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A TREATISE ON CODE PLEADING AND PRACTICE

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1900 FORMS

ADAPTED TO PRACTICE IN

CALIFORNIA, ALASKA, ARIZONA, IDAHO,
MONTANA, NEVADA, NEW MEXICO, NORTH
DAKOTA, OKLAHOMA, OREGON, SOUTH
DAKOTA, UTAH, WASHINGTON, AND
OTHER CODE STATES

BY

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OF THE CALIFORNIA BAR

IN FOUR VOLUMES

VOL. I.

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PREFACE.

If there is one branch of general law of more importance to the trial lawyer than another, it is undoubtedly that dealing with pleading and practice—with the production and disposition of issues between contending parties in court. Under the “code system” of procedure, no matter what the subject of the litigation may be, or what may be the branch of substantive law which will determine the controversy, the issue must be reached and finally disposed of by the application of certain more or less well-defined and uniform rules, laid down in the first instance by statute and finally interpreted and construed by the courts.

In the preparation of this work, it has been the aim of the author to set forth these rules as given by the legislatures of the code states, particularly those of the Pacific slope, and to show the application thereof by the courts. With this object in view, statutes have been carefully compared and the latest decisions have been examined and harmonized.

More than nineteen hundred *forms*, the great majority of which have been judicially approved, are suggested for use under appropriate heads.

For the convenience of the practitioner, each particular subject treated is embraced in a single chapter. In this chapter there will be found a statement of the rules of pleading and practice applicable to the subject, much of the substantive law of the subject, and all of the forms suggested for use in the proceeding involved. It is believed that this arrangement of the work will commend itself to the profession.

Judicial or statutory authority has been cited for every statement made. In a work of this scope, however, it would be impracticable, and even undesirable, to include all decisions pertinent to a given point, and no attempt has been made to do so. Merely cumulative

authorities have been omitted, and cases have been multiplied only where they are of considerable illustrative value.

The author desires to acknowledge here his indebtedness to Mr. U. Grant Hayden of the California Bar for valuable assistance rendered in noting statutory revisions made and cases decided since the preparation of the manuscript, and in making the index to the work, which it is believed the profession will find to be of unusual excellence.

WILLIAM A. SUTHERLAND.

Fresno, Cal., January, 1910.

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SUTHERLAND'S
PLEADING, PRACTICE,
AND FORMS

PLEADINGS PRACTICE, AND FORMS.

CHAPTER I.

INTRODUCTORY.

RIGHTS AND REMEDIES.

§ 1. **Rights.**—Every person has certain rights which the state is bound to protect. These rights may be said to be comprehended in the familiar expression, "Life, liberty, and property." The right to life has been held to be the right to the body in all its completeness, without dismemberment.¹ Liberty means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term embraces the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any lawful calling, and, for that purpose, to enter into all contracts that may be proper and necessary to carry these purposes to a successful conclusion. The term also includes the right to acquire property.²

Besides certain political rights to which citizens are entitled under the express laws of the several states, every person has, subject to the qualifications and restrictions provided by law, the right to protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.³

The protection of property extends to the acquisition, possession, and enjoyment of it in any way consistent with the rights of others and the just demands of the state,⁴ and any act whereby an owner is deprived of the benefit of his property, by withhold-

¹ *Bertholf v. O'Reilly*, 74 N. Y. 509,
30 Am. Rep. 323.

² Cal. Civ. Code, § 43.

⁴ *Bertholf v. O'Reilly*, 74 N. Y.

³ *Sutherland's Notes on U. S.* 509, 30 Am. Rep. 323.
Const., p. 647.

ing, deteriorating, or destroying it, is an injury, for which he is entitled to redress.

For a wrong with respect to any of these rights, there is a remedy against the wrongdoer; the person injured has a remedy by due course of law. Due course of law requires that the party or parties entitled to the remedy shall apply for it to a competent court, in an action or proceeding against the proper parties in the form and manner prescribed.⁵ And if there be an admitted wrong, the courts will look far to apply the remedy.⁶

§ 2. Remedies.—While, under the code system of procedure, all distinctions between *forms* of action to secure redress for wrongs are abolished, in all or nearly all of the code states there has been a division of judicial *remedies* into—1. Actions; 2. Special proceedings; 3. Provisional remedies. In California the division has been made into actions and special proceedings;⁷ but provisional remedies are recognized and enforced as incidents to actions.

§ 3. Actions.—Broadly speaking, an action is any proceeding in a court of justice in which a person pursues his remedy to recover a right or claim; any proceeding in which a right is litigated between parties and the decision of a court is sought. It is clear that these definitions are sufficiently comprehensive to cover any conceivable proceeding before a court. But the scope of the term is narrowed by the definition in the codes, which make the division of judicial remedies above mentioned. For the purposes of this division, an action is defined to be “an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.”⁸

To come within the meaning of the term “action” as thus used, the proceeding must be an *ordinary* proceeding. All other than ordinary proceedings are declared to be *special* proceedings.⁹

§ 4. Of the division of actions.—Actions are of two kinds: civil and criminal. Of the two classes, we are concerned only with civil actions.

⁵ Estee's Pl. & Pr., § 1.

⁶ De Lima v. Bidwell, 182 U. S. 176, 21 Sup. Ct. 743, 45 L. Ed. 1041.

⁷ Cal. Code Civ. Proc., § 21.

⁸ Cal. Code Civ. Proc., § 22; N. Y. Code Civ. Proc., § 2.

⁹ Cal. Code Civ. Proc., § 23; N. Y. Code Civ. Proc., § 4.

A civil action arises out of an obligation or an injury. The obligation giving rise to the action may itself result from contract or operation of law. An injury may be to person or to property.

In this connection it is to be observed that there is a distinction between the term "action" and the *suit* in which the action is enforced. "The action springs from the obligation, and hence the *cause of action* is simply the obligation. . . . The obligation may be either *ex contractu* or *ex delicto*. . . . The cause of action is to be distinguished, also, from the remedy, which is simply the means by which the obligation or the corresponding action is effectuated."¹⁰ Under the Oregon code, the term "civil actions" includes actions at law and suits in equity, and all other judicial controversies in which rights of property are involved, and is employed in contradistinction to "criminal actions."¹¹ In Colorado, proceedings for the violation of town or city ordinances are civil actions.¹²

While *habeas corpus* cannot be said to be an action under the narrow code definition of "action," it is to be noted that in a general division of proceedings into civil and criminal, *habeas corpus* should be classed as a civil proceeding, although instituted to secure freedom from custody under a criminal proceeding.¹³

§ 5. **Special proceedings.**—The code definition of a special proceeding as any remedy other than an action is not so vague as may at first appear. As was said by the New York supreme court, "An action is defined to be an *ordinary* proceeding, and this definition can hardly be said to embrace a proceeding which is purely statutory and new, and which is conducted in no respect according to the ordinary forms of the common law; the whole proceeding is peculiar, and is unknown to our courts, except by statutory provision."¹⁴ The distinction is even more clearly brought out in a Montana case, where the court says: "A civil action is an action wherein an issue is presented for trial, formed by the averments

¹⁰ Frost v. Witter, 132 Cal. 426, 84 Am. St. Rep. 53, 64 Pac. 705.

¹¹ In re Fenstermacher v. State, 19 Or. 504, 25 Pac. 142.

¹² Walton v. Cañon City, 13 Colo. App. 77, 56 Pac. 671; City of Durango v. Reinsberg, 16 Colo. 327, 26 Pac. 820.

¹³ Ex parte Tom Tong, 108 U. S. 560, 2 Sup. Ct. 871, 27 L. Ed. 826; In re Borrego, 8 N. Mex. 657, 46 Pac. 211. In the California code, *habeas corpus* is placed under the general head of "Special Proceedings of a Criminal Nature." See Pen. Code, § 1473.

¹⁴ Hallahan v. Herbert, 57 N. Y. 414.

of the complaint and the denials of the answer, or the replication to new matter, and the trial takes place by the introduction of legal evidence to support the allegations of the pleadings. . . . But an action, the issues to which are made up in a summary way, without pleadings, without formal issue, without any definite means of knowing what is to be tried, cannot be dignified by the name of a civil action."¹⁵

Besides this distinction, it has been pointed out that, under the practice of some states, civil actions must be commenced by the service of a summons, and that this would seem necessarily to imply that no proceeding not so commenced can properly be deemed a civil action.¹⁶ This reasoning would seem at first to apply as well where the law provides that a civil action shall be commenced by filing an initial instrument denominated a complaint.¹⁷ But, while it may be true, in general, that where a code makes the division of judicial remedies we have been considering, a subsequent statute which provides that civil actions are commenced by filing a complaint would seem to contemplate actions as distinguished from special proceedings, such a test cannot be applied with certainty. In most cases special proceedings are instituted by the filing of a writing not properly a complaint; but a proceeding to take property by eminent domain, which has been held to be a special proceeding,¹⁸ must be commenced by filing a complaint and issuing a summons thereon.¹⁹

Special proceedings, being purely statutory, must conform strictly to the requirements of the statutes authorizing them, or they will fail, and the courts, in exercising jurisdiction in such cases, are limited to the terms and conditions expressed.²⁰ These special proceedings, the nature of the remedy in each case, and the right thereto, will be treated at length in another part of the present work.

§ 6. **Provisional remedies.**—Provisional remedies are applied, pending litigation, for the purpose of securing the judgment or preserving the *status quo*, and in some cases after judgment, for the purpose of preserving or disposing of the subject-matter.

¹⁵ *Deer Lodge County v. Kohrs*, 2 Mont. 66.

¹⁶ *Hyatt v. Seeley*, 11 N. Y. 54.

¹⁷ Cal. Code Civ. Proc., § 405; Or. B. & C. Codes, § 51.

¹⁸ *Santa Rosa v. Fountain Water Co.*, 138 Cal. 580, 71 Pac. 1123, 1136.

¹⁹ Cal. Code Civ. Proc., § 1243.

²⁰ *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 283; *Smith v. Westfield*, 88 Cal. 379, 26 Pac. 206.

Proceedings before judgment or decree, in courts exercising equity powers, to provide for the safety and preservation of property in the possession of an adverse party, or to preserve it during the pendency of an appeal, by the appointment of a receiver or other like officer, and also restraining orders or injunctions, have always existed, independently of statute, as incidents to actions. These proceedings, so far as they are now defined or regulated by statute, as well as others created by statute, are commonly known as "provisional remedies," under the code practice, whether technically so designated or not.²¹

It is not our purpose to treat of these provisional remedies in detail in this place. The most familiar examples of these remedies are arrest and bail, attachment, injunction, receivers, and replevin, or claim and delivery. All of these, as well as others less commonly known, will be considered elsewhere.

²¹ See Estee's Pl. & Pr., § 26.

CHAPTER II.

PARTIES TO CIVIL ACTIONS.

§ 7. Who are parties.—To every civil action there are, necessarily, two or more parties: the person who seeks to establish a right in himself, known as the plaintiff, and the person upon whom the corresponding duty or liability is sought to be imposed, known as the defendant. In suits in equity, these parties are frequently designated as complainant and respondent, respectively. In appellate courts, the parties are known as appellant and appellee, or respondent, and in courts of error, as plaintiff in error and defendant in error.

The term “parties,” when used in connection with the subject-matter of the issue, is understood to include all who are directly interested, and who, therefore, have a right to make a defense, control the proceedings, or appeal from the judgment. Persons not having these rights are regarded as strangers to the action.¹ The general rules as to parties to civil actions are established, of course, for the convenient administration of justice, and are subject to exceptions; they are more or less a matter of discretion in the court, and ought to be restricted to parties whose interests are involved in the issue and to be affected by the decree.

A person cannot be both plaintiff and defendant in the same action. He cannot have a cause of action against himself as debtor or tort-feasor, in whatever different capacities he may act.²

§ 8. Of formal and necessary parties.—Parties to actions are either formal parties, proper but not necessary, or those who are necessary parties, if within the jurisdiction of the court, or those whose interests are so bound up with the interests of other parties before the court that it cannot proceed without them. These latter are commonly known as indispensable parties.

Necessary parties are those who have an interest in the controversy, and who ought to be made parties to the action so that the court may act according to the rule which requires it to hear

¹ Estee's Pl. & Pr., § 124.

² Byrne v. Byrne, 94 Cal. 579, 29 Pac. 1115, 30 Pac. 196.

and finally determine on the whole controversy and do complete justice by adjusting all the rights involved in it. As to such persons not made parties, the court may be able to make a decree, in the event of their absence from its jurisdiction; but in no such case can they be concluded as to their interest in the subject-matter.³ Indispensable parties, on the other hand, are those persons who have such an interest in the controversy that no final decree can be made without either affecting that interest or leaving the controversy in such a condition that the final determination may be wholly inconsistent with equity and good conscience. It is improper to adjudge exclusive possession to real estate in a plaintiff who claims title by virtue of a trust, if the trustee is not made a party defendant.⁴

A complaint against partners, and one of them individually, is not a misjoinder, all the parties to the joint purchase being necessary parties.⁵ All the defendants in a joint action for damages are necessary, though one of them may be indemnified against loss by the others.⁶ Those having interests in common with plaintiff should be joined, unless they refuse, when they should be made parties defendant.⁷ The court may direct that other parties in interest be made parties.⁸

§ 9. Parties to code actions.—What has just been said of formal, necessary, and indispensable parties is of universal application. In general, these rules govern in actions at common law, as well as under the code systems of procedure. Whatever variations or modifications have been made by the codes will be noticed under the appropriate headings.

In an action at law under the old system, the plaintiff must be a person in whom is vested the whole legal right or title; and if there are more than one, they must all be equally entitled to the recovery; that is, the right must dwell in them all as a unit, and the judgment must be in their favor equally; the defendants must be equally subject to the common liability, and judgment must be rendered against them all in a body. The necessity of joining all

³ *Myers v. Dorr*, 13 Blatchf. 28; Fed. Cas. No. 9988.

⁴ *City of Globe v. Slack* (Ariz.), 95 Pac. 126.

⁵ *Redwood City Salt Co. v. Whitney*, 153 Cal. 421, 95 Pac. 885.

⁶ *Choctaw, O. & G. R. Co. v. Hamilton* (Okla.), 95 Pac. 972.

⁷ *Littleton v. Burgess*, 16 Wyo. 58, 91 Pac. 832, 16 L. E. A. (N. S.), 49.

⁸ *Hough v. Porter* (Or.), 95 Pac. 732; Or. B. & C. Codes, §§ 41, 394.

as plaintiffs, in whom was vested the whole legal title, was imperative. In certain cases the plaintiff was privileged to elect whether he would sue all who were liable; but whenever judgment passed between two or more defendants, it was necessarily joint.⁹

In suits in equity the courts were governed by two general rules: 1. That the suit should be prosecuted by the party beneficially interested, instead of by the party who had the apparent legal right, and that he might join with him all others interested in the subject-matter and in the relief demanded; 2. That all persons whose presence was necessary to a complete determination and settlement of the questions involved should be parties plaintiff or defendant, so that all their rights and interests, of whatever nature or extent, might be determined and adjusted by the court.

But courts of equity, not being restrained by the technicalities that governed the actions of courts of law, could look beyond the nominal parties to a suit to discover the real parties in interest. And the general rule requiring all parties in interest to be before the court was subject to modification, in the discretion of the court, according to circumstances, for the promotion of justice; and the fact that some of the parties in interest could not be reached by process did not preclude a decree as between parties whose rights could be completely adjusted.

These equitable doctrines have been adopted substantially by the codes of procedure of the several states, notwithstanding slight differences in minor details;¹⁰ and a court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights.¹¹

§ 10. **Cause of action necessary.**—Elsewhere we have noticed the distinction between the remedy for the redress of a wrong, or the enforcement of a right, and the cause of action.¹² In every suit there must be a cause of action; an obligation on the part of one person to accord to another certain rights or to recompense him for a wrong done to him. The right of the plaintiff and the obligation, duty, or wrong of the defendant combined constitute the cause of action.¹³ Thus when a contract, express or implied, is violated, or one is wrongfully injured in his person or property, a cause of action at once arises.

⁹ Estee's Pl. & Pr., § 125.

¹² Ante, § 3.

¹⁰ Pomeroy's Remedies and Remedial Rights, §§ 196-200.

¹³ Veeder v. Baker, 83 N. Y. 156, 160.

¹¹ Cal. Code Civ. Proc., § 389.

The action itself springs from the obligation;¹⁴ it is the right or power to enforce the obligation, and we cannot conceive of a cause of action apart from the person who has the right to maintain the action.¹⁵ The obligation thus constituting the cause of action may be *ex contractu* or *ex delicto*; and again, the latter may be either for compensation or damages, or for restitution, yet in either case the action is to enforce an obligation, and there can be an action for no other purpose.¹⁶

¹⁴ *Frost v. Witter*, 132 Cal. 426, 84 Am. St. Rep. 53, 64 Pac. 705.

¹⁵ In this connection, Mr. Pomeroy says: "Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff and a corresponding primary duty devolving on the defendant which consisted in a breach of such primary right or duty; a reme-

dial right in favor of the plaintiff and a remedial duty resting upon the defendant, springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements." *Remedies and Remedial Rights*, § 453.

¹⁶ See *Austin's Jurisprudence*, § 527.

CHAPTER III.

REAL PARTY IN INTEREST.

§ 11. **Code provisions.**—Under the codes of all the Pacific Coast states a defendant has the right to have an action against him prosecuted in the name of the real party in interest. In Montana, Nevada, Oregon, North Dakota, South Dakota, and Washington it is provided that such a statute shall not be deemed to authorize the assignment of a cause of action not arising out of contract. The purpose of the statute is readily discernible, but the right thus secured is limited to its purpose. It is to save a defendant against whom a judgment may be obtained from further harassment or vexation at the hands of other claimants to the same demand; to prevent a claimant from making a simulated transfer, and thus defeating any just counterclaim or set-off which the defendant would have to the demand if pressed by the real owner.¹ Where, however, the plaintiff shows such a title that a judgment upon it satisfied by the defendant will protect him from future annoyance or loss, and where, as against the party suing, the defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object; so far as he is interested, the action is being prosecuted by the real party in interest.²

§ 12. **Who is the real party in interest.**—In actions upon contract under the old practice, the right of action vests in and the suit must be brought in the name of the person in whom the legal interest is vested or whose legal interest has been injuriously affected; and the legal interest is deemed to be vested in him to whom the promise was made and from whom the consideration passed. Thus, where no other person has acquired an interest in the matter in dispute only the parties to the contract sued upon should be made parties to the suit.³

¹ *Daneri v. Gazzola*, 139 Cal. 416, 73 Pac. 179.

² *Giselman v. Starr*, 106 Cal. 651, 40 Pac. 8.

³ *Estee's Pl. & Pr.*, § 131.

It very frequently happens, however, that the party in whom the legal interest is vested is not the real party in interest. Whatever may be the rule under the old system, the "real party in interest" is the party who would be benefited or injured by the judgment or the "party entitled to the avails of the suit."⁴ "Interest," within the meaning of this rule, means material interest, an interest in issue and to be affected by the decree, as distinguished from mere interest in the question involved, or mere incidental interest.⁵ So a person who is not a party to a contract and for whose benefit it was not expressly made cannot maintain an action thereon, notwithstanding the contract, if performed by the parties to it, would incidentally inure to his benefit.⁶ But, on the other hand, a county interested in the payment of taxes may sue on a bond to secure such payment, although the bond runs to the territory.⁷

The rule that the court may look beyond the record to ascertain who are real parties in interest not of record, applies only to a person who voluntarily undertakes, in whole or in part, the prosecution or defense of an action between other parties in protection of his own interest or in pursuance of some obligation which he has incurred, and does not apply to one who, whatever his interest, has not in any way aided or intermeddled in the action prior to the filing of a complaint for intervention, except by procuring a dismissal from the plaintiff for the protection of his own interest.⁸

§ 13. Assignee as real party in interest.—As already stated, the object of the requirement we are considering is to prevent the defeat of just counterclaims or set-offs. In the case of an assignment of a thing in action, this protection is secured to a defendant by code provisions to the effect that the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment. The exception is made of negotiable notes or bills of exchange, transferred in good faith and upon good consideration, before maturity.⁹

⁴ Hoagland v. Van Etten, 22 Neb. 681, 35 N. W. 869; Kinsella v. Sharp, 47 Neb. 664, 66 N. W. 634.

⁵ Story v. Livingston, 13 Pet. 359, 10 L. Ed. 200; Smith v. Ford, 48 Wis. 145, 2 N. W. 150, 4 N. W. 462.

⁶ Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100.

⁷ Curry v. Gila County, 6 Ariz. 48, 53 Pac. 4, construing Rev. Stats. Ariz., par. 680.

⁸ McDonald v. Cutter, 120 Cal. 44, 52 Pac. 120.

⁹ Cal. Code Civ. Proc., § 368; Or. B. & C. Codes, § 28.

An assignee is then, under this rule, the real party in interest, and may maintain a suit in his own name. His right in this respect is not dependent in the least on the inability of his assignor to maintain an action upon the claim assigned. Thus an assignee of a written instrument for the payment of money to a partnership by its firm name, though fictitious, may sue thereon in his own name regardless of the right of the partnership to sue.¹⁰ If the assignment of a claim is merely for security, it nevertheless passes title to the assignee; and the defense that the assignor was the real party in interest cannot be maintained;¹¹ and if the legal title to anything in action is vested in the assignee, the right to sue cannot be affected in any way by collateral agreements between him and his assignor as to disposition of the proceeds;¹² accordingly an assignment for collection vests the legal title in the assignee regardless of the fact that the assignee paid no consideration for the assignment, and the assignee may sue thereon in his own name.¹³ So, also, the fact that the assignee of a claim merely gave his due bills therefor does not deprive him of his right to sue.¹⁴

§ 14. Promises for the benefit of third persons.—The codes provide that an executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. And it is expressly provided that a person with whom, or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of the rule so stated.

It is to be noted that the language used by the several legislatures in this connection is permissive, while that employed in laying down the rule with reference to the bringing of suits in the name of the real party in interest is imperative. Commenting on this circumstance, writers on code pleading maintain that suits may be brought by the real party in interest notwithstanding the exception, which they argue merely *permits* suits to be instituted by the representative or trustee with-

¹⁰ *Quan Wye v. Chin Lin Hee*, 123 Cal. 185, 55 Pac. 783.

¹¹ *Estate of Cummins*, 143 Cal. 525, 77 Pac. 479.

¹² *Grant v. Heverin*, 77 Cal. 263, 18 Pac. 647; 19 Pac. 493.

¹³ *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Tuller v. Arnold*, 98 Cal. 522, 33 Pac. 445.

¹⁴ *Glendale Fruit Co. v. Hirst*, 6 Ariz. 428, 59 Pac. 103.

out joining the party beneficially interested—the real party in interest.¹⁵ This contention is supported by the prevailing rule that one for whose benefit a promise is made may sue alone on the promise as the real party in interest.¹⁶ In *Wiggins v. McDonald* (18 Cal. 126), where the defendant was indebted to the Empire Mining Company, which was indebted to the plaintiff, and it was agreed by all parties that the defendant should pay to the plaintiff the amount of this indebtedness, the supreme court of California said: “If the rights of the plaintiff were to be determined by the rules of the common law it might be a question whether the action could be entertained in its present form; but there is no doubt that the transaction amounted to an equitable assignment of the debt. . . . We have but one form of action for the enforcement of private rights, and, with certain exceptions, the statute requires that every action shall be prosecuted in the name of the real party in interest. Cases of assignment are not included in these exceptions, and in the form of remedy no distinction exists between legal and equitable rights.”

In those jurisdictions where this rule maintains it is uniformly held that where a contract, either oral or written, and not under seal, is entered into by two persons for the sole benefit of a third, the latter may sue thereon in his own name, although the contract may not be directly to or with him and the consideration therefor did not move to or from him. It has been held in a California case that if a contract be for the benefit of a third person, even though he be not cognizant of it when it is made, if adopted by him is deemed to have been made to him, and he may sue thereon, though the whole consideration moved from the promisee to the original promisor; and it is no objection to the action that the original promisee might also sue on the promise.¹⁷ In some jurisdictions it is held that if a contract is under seal it cannot be sued upon by the person for whose benefit it is made if he is not a party

¹⁵ Pomeroy's Remedies, § 138; Bates on Code Pl., § 5.

¹⁶ *Wiggins v. McDonald*, 18 Cal. 126; *Malone v. Crescent City etc. Transp. Co.*, 77 Cal. 38, 18 Pac. 858; *Curry v. Gila Co.*, 6 Ariz. 48, 53 Pac.

4; *Miliani v. Tognini*, 19 Nev. 135, 7 Pac. 280; *Thompson v. Cheesman*, 15 Utah, 49, 48 Pac. 479; *Todd v. Weber*, 95 N. Y. 195, 47 Am. Rep. 29.

¹⁷ *Malone v. Crescent City etc. Transp. Co.*, 77 Cal. 38, 18 Pac. 858.

to the deed, but the suit must be brought in the name of the person with whom the contract is made.¹⁸

New York was the first state to adopt the rule that a third party may maintain an action upon a promise made for his benefit, and it is from New York that most of the states derive their authorities sustaining the doctrine.¹⁹ In Colorado, the person for whose benefit a contract has been entered into may not only sue upon it himself, but may plead it by way of set-off.²⁰

§ 15. Principal and agent.—Agency has been frequently recognized as the basis of the rule considered under the last head.²¹ Whether there is any force in this contention or not, it is a universal rule that if a contract be made by one of the parties as the agent of another person, the latter may treat it as his own contract, and may sue thereon in his own name, and prove by parol evidence that he is entitled to do so, although there is nothing on the face of the writing to connect him with it.²² Of course, where a contract affirms that a party is contracting on his own behalf as principal, or excludes in terms the idea of his acting as agent, no other person can be substituted as principal for the purpose of a suit on the contract.

Where the fact of the agency is known and the contract is made in the agent's name he may sue thereon without joining his principal.²³ In those cases where actions may be maintained by undisclosed principals, a right of action appears, in the first instance, to exist in favor either of the principal or of the agent in whose name the contract was made, and where an

¹⁸ *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855; *Willard v. Wood*, 135 U. S. 313, 10 Sup. Ct. 83, 34 L. Ed. 210; *Moore v. Hense*, 64 Ill. 162.

¹⁹ *Schermerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am. Dec. 304; *Lawrence v. Fox*, 20 N. Y. 268; *Buchanan v. Tilden*, 158 N. Y. 109, 70 Am. St. Rep. 454, 52 N. E. 724, 44 L. R. A. 170; *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Bishop v. Stewart*, 13 Nev. 25; *Miliani v. Tognini*, 19 Nev. 133, 7 Pac. 279; *Brower Lumber Co. v. Miller*, 28 Or. 565, 52 Am. St. Rep.

807, 43 Pac. 659; *Montgomery v. Rief*, 15 Utah, 495, 50 Pac. 623.

²⁰ *Lehow v. Simonton*, 3 Colo. 346; *Green v. Morrison*, 5 Colo. 18.

²¹ In *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508, 22 N. E. 756, 6 L. R. A. 610, Judge Finch declared that the idea of agency in such cases was a legal fiction, having no warrant in the facts.

²² *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Parker v. Cochrane*, 11 Colo. 363, 18 Pac. 209; *Nicoll v. Burke*, 78 N. Y. 580.

²³ *Winters v. Rush*, 34 Cal. 136; *West v. Crawford*, 80 Cal. 31, 21 Pac. 1123.

agent contracts directly as principal, he may sue in his own name whether the other party knew of the agency or not.²⁴ If, however, an undisclosed principal undertakes to treat as his own a contract made with his agent and in the latter's name, he must generally accept the contract subject to the same defenses which might have been asserted in an action brought by the agent prior to the disclosing of the fact of agency.²⁵ Such a holding is necessary to meet the reason for the rule requiring actions to be brought in the name of the real party in interest.

²⁴ *Tustin Fruit Assoc. v. Earl Fruit Co.* (Cal.), 53 Pac. 693.

Am. Dec. 618. This subject is treated at length in a monographic note in

²⁵ *Ruiz v. Norton*, 4 Cal. 355, 60

55 Am. St. Rep., pp. 916-923.

CHAPTER IV.

PARTIES PLAINTIFF—ACTIONS EX CONTRACTU.

§ 16. **Creation of interest.**—As pointed out in the last preceding chapter, the plaintiff in an action must have a real interest in the subject-matter of the suit, and a party suing cannot recover if it is shown that he has not such an interest. In actions *ex contractu* the relation to the contract necessary to enable a person to sue upon it may arise in any one of several ways: 1. By the contract itself, as where the party asserting the right to sue is a party to the original contract; 2. By transfer or assignment of an original party's rights; 3. By operation of law, as in the case of executors or administrators of a deceased party to, or assignee of, a contract, or as in the case of persons constituted by law the personal representatives of parties otherwise proper plaintiffs; 4. By aid of the law, as in the case of attachment or garnishment of debts due or property in possession.¹ As pointed out by Mr. Estee, attachment is a special proceeding, in most states, in aid of an action pending or for the enforcement of a judgment rendered. To be exact, it should perhaps be called a provisional remedy. "While in some states, as in Michigan, although a suit must first be commenced against the principal defendant before a writ of garnishment can be obtained against one indebted to him, yet the affidavit for the writ and the answer of the garnishee form an issue between them, and the case is docketed and tried as an independent suit, and a judgment is rendered therein for or against the garnishee, as in other actions, but as the garnishee of the principal debtor."²

§ 17. **Persons who may join as plaintiffs.**—The codes of the several states which have adopted the code procedure contain a provision similar to the one in the California code, to the effect that "all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs,

¹ Estee's PL. & Pr., § 133.

² Id.

except when otherwise provided.”³ What these exceptions are will be considered elsewhere. The rule thus stated is substantially a re-enactment of the rule prevailing under the former equity practice. The codes do not pretend to enumerate the cases in which the joinder of persons as plaintiff may be optional, but it seems to have been intended that the rules of pleading prevailing in equity should govern, and that persons who could not formerly have joined in equity cannot join under the code practice.⁴ When, however, parties show “an interest in the subject of the action, and in obtaining the relief demanded,” it is immaterial in what proportions they may be severally concerned.⁵ Several plaintiffs may properly join in one action where their rights are identical in nature and kind and only differ in extent and quantity. A person in his individual capacity as distributee of one half of a mortgage may be joined as plaintiff with himself as executor, representing the undistributed half of the mortgage in an action to foreclose.⁶

§ 18. Persons who must join as plaintiffs.—The question as to nonjoinder of parties is one of the principal grounds of demurrer and is a question very frequently adjudicated. It is accordingly one of the most important questions in the law relating to parties. What has been said in chapter III with reference to the institution of actions by the real party in interest always applies where the inquiry is as to who must join as plaintiffs in a particular case. As a starting-point in such an inquiry we have the rule that actions must be prosecuted in the name of the real party in interest. As a corollary to this rule, where there are several parties interested in obtaining relief the code states have adopted the further rule that “of the parties to the action those who are united in interest must be joined as plaintiffs or defendants.”⁷

The reason for this rule is obvious. In the first place it prevents a multiplicity of suits, and in the second place “a defendant who has made but one contract or incurred a single liability has the right to require that the whole case be disposed of in one action.”⁸ In such a case the plaintiff or plaintiffs must represent the entire cause of action, and the plaintiff or plaintiffs thus representing the entire cause of action must

³ Cal. Code Civ. Proc., § 378.

⁴ Goodnight v. Goor, 30 Ind. 418.

⁵ Lyon v. Bertram, 20 How. 149, construing California code provision.

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⁶ Casey v. Gibbons, 136 Cal. 368, 68 Pac. 1032.

⁷ Cal. Code Civ. Proc., § 382.

⁸ Estee's Pl. & Pr., § 134.

be the "real parties in interest." In other words, a single cause of action cannot be divided. There may be a contract made with two or more persons of such a nature that the interests of these persons would be severable and the parties be entitled to sue separately. Such a case is presented by a contract whereby a mother, in consideration of a deed from her three sons of certain land owned by them all as tenants in common, agrees to pay "each one fourth of all moneys received" above a certain sum.⁹ So, also, where two join in a power of attorney authorizing a third person to collect their respective shares in an estate.¹⁰ And where a payment, although joint, is made from individual funds, all the persons making the payment need not join in a suit for reimbursement.¹¹ Where, however, there is a unity of interest between several persons constituting one party to a contract, so long as that unity of interest continues, all must join in a suit for its enforcement or breach. Making a plaintiff in equity, one who could have been made a defendant, is not a fatal misjoinder.¹²

§ 19. Severable interests.—Obviously the rule we are considering cannot operate where the interests under a contract are severable. In such a case the cause of action is not single and the reason for the rule ceases. The legal interests of the plaintiffs are several, and the right of action follows the interest. So where a contract contains distinct obligations to perform different things for different obligees, each has his distinct right of action without joining his co-obligees.¹³ Such a case is presented where joint owners of goods consign them to a factor and inform him that each owns a moiety, and each gives him separate and different instructions.¹⁴

Interests of several obligees under a contract, although not of themselves severable, may nevertheless be severed by agreement between all of the parties to the original contract, the obligor consenting to pay each of the original joint obligees his

⁹ *Vandermulen v. Vandermulen*, 108 N. Y. 195, 15 N. E. 383.

¹⁰ *Best v. Sinz*, 73 Wis. 243, 41 N. W. 169.

¹¹ *Doremus v. Seldon*, 19 Johns. 213; *Smith v. Hicks*, 1 Wend. 202.

¹² *California Farm etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593.

¹³ *Irish v. Wright*, 12 Rob. 563; *Curry v. Kansas etc. Ry. Co.*, 58 Kan. 6, 48 Pac. 579; *Richey v. Branson*, 33 Mo. App. 418; *Vandermulen v. Vandermulen*, 108 N. Y. 195, 15 N. E. 383; *Best v. Sinz*, 73 Wis. 243, 41 N. W. 169.

¹⁴ *Hall v. Leigh*, 8 Cranch, 50, 3 L. Ed. 484.

several share. This gives to each obligee a separate cause of action to recover his share, but these separate actions would be upon the new agreement and not the original promise. In no case, however, can joint obligees, by agreement among themselves, render the obligor liable to separate actions without his consent.

It would seem that a debtor might, by his own act, work a severance of the joint interests of his obligees, as where he settled with one for his part of the claim. Such has been the holding in a number of cases.¹⁵ In an early California case,¹⁶ such a state of facts was presented, and the court held that if the plaintiff relied upon the original contract between himself, his co-obligee, and the defendant, he could not sue without joining his co-obligee, notwithstanding the defendant had performed as to the latter and canceled the contract as to him. It is difficult to perceive, however, the reasoning by which this decision was reached. The opinion of the court is short and unsatisfactory. It would seem that an obligor by entirely satisfying one obligee should be estopped to set up his nonjoinder, in a suit by the other. He certainly cannot be injured by the nonjoinder, for he cannot be subjected to further liability in a suit by the satisfied obligee.

§ 20. Exceptions to the general rule.—Of course, the codes contain the proviso that “if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.” But beyond this there are certain exceptions to the general rule.

¹⁵ *Beach v. Hotchkiss*, 2 Conn. 697; *Holland v. Weld*, 4 Me. 255; *Austin v. Walsh*, 2 Mass. 401; *Baker v. Jewell*, 6 Mass. 460, 4 Am. Dec. 162.

¹⁶ *McGilvery v. Moorhead*, 3 Cal. 267.

CHAPTER V.

PARTIES PLAINTIFF—ACTIONS EX DELICTO.

§ 21. In general.—Actions in form ex delicto are for injuries to the absolute or relative rights of persons, or to personal or real property. The proper party plaintiff in such action is the one who has suffered the injury, he being the real party in interest. This was the rule at common law, and it has remained substantially unchanged by the code. The principal changes made by the code, and by statute in other states, in respect to this class of actions, are those relating to the death or injury to the person of adults or minors, caused by the wrongful act or neglect of another, and those relating to seduction. The code has also made several important changes in regard to parties plaintiff in this class of actions by permitting assignments of certain causes of actions sounding in tort.¹

§ 22. For injuries to real property.—An injury to real property is primarily an injury to the possession, for which the party in possession, unless he hold for another as servant or agent, should bring the action. Where, however, the injury is of a permanent character, and one affecting the inheritance, the remainderman or reversioner may maintain an action, either for trespass on the case, or to enjoin the further continuance of the wrongful act.² Thus the equitable owner, in possession, may maintain an action for damage to the freehold.³ Or he may sue for trespass.⁴ One holding under a homestead claim may sue for the wrongful turning of water upon the land.⁵ On the same principle, the owner, redeeming from a sale under execu-

¹ See, post, "Assignees and Devisees."

² 1 Chit. Pl. 62, 63; Van Deusen v. Young, 29 Barb. 9; Lamport v. Abbott, 12 How. Pr. 340; Ulrich v. McCabe, 1 Hilt. 251; Cowand v. Meyers, 99 N. C. 198, 6 S. E. 82; Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270; University v. Tucker, 31 W. Va. 621, 8 S. E. 410.

³ Rood v. New York etc. R. R. Co., 18 Barb. 80.

⁴ Honsee v. Hammond, 39 Barb. 89; Safford v. Hynds, 39 Barb. 625; Pierce v. Hall, 41 Barb. 142; Sparks v. Leavy, 19 Abb. Pr. 364.

⁵ Wendel v. Spokane Co., 27 Wash. 121, 91 Am. St. Rep. 825, 67 Pac. 576.

tion, may sue for waste intermediate between the sale and his redemption.⁶ So, also, an action can be maintained by the mortgagee of real estate to recover damages for wrongful and fraudulent injuries done to the mortgaged property, by which the security of the mortgage has been impaired.⁷ But several parties cannot, in a joint action, recover damage for the use and occupation of two or more tracts of land which they own in severalty.⁸

§ 23. For injuries to personal property.—In actions for injuries to personal property, or for its conversion, the proper party plaintiff is generally the one having the right to the immediate possession, although in proper cases the general owner, whose reversionary interest has been injured, may sue.⁹ If there are two or more joint owners of the property injured, they should all join.¹⁰

§ 24. In ejectment.—At the common law, tenants in common could not join in an action of ejectment under a joint demise to the normal plaintiff, although the rule was different as to the joinder of joint tenants and coparceners.¹¹ Under the codes which provide that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs," such joinder is permitted.¹² Except in California, Missouri, and Nevada, a joinder of tenants in common less than all is not permitted. They must all sue, or each one separately.¹³ In the states named, however, a joinder of

⁶ Thomas v. Crofut, 14 N. Y. 474.

⁷ Robinson v. Russell, 24 Cal. 472.

⁸ Tennant v. Pfister, 51 Cal. 511.

⁹ 1 Chit. Pl. 61; Paddon v. Williams, 2 Abb. Pr. (N. S.) 88; Triseony v. Orr, 49 Cal. 612; Harrison v. Marshall, 4 E. D. Smith, 271; Wiggins v. McDonald, 18 Cal. 126; Summers v. Farish, 10 Cal. 347, affirmed in Prader v. Purkett, 13 Cal. 591; Browner v. Davis, 15 Cal. 11; McGinn v. Worden, 3 E. D. Smith, 355; Hall v. Robinson, 2 Comst. 293; Kellogg v. Church, 3 Code Rep. N. Y. 53; Cass v. New York etc. R. R. Co., 1 E. D. Smith, 522; Robinson v. Weeks, 1 Code Rep. (N. S.) N. Y. 311; Van Hassel v. Borden, 1 Hilt. 128; Wheel-

er v. Lawson, 103 N. Y. 40, 8 N. E. 360; Laing v. Nelson, 41 Minn. 521, 43 N. W. 476; Kemp v. Seely, 47 Wis. 687, 3 N. W. 830.

¹⁰ Dubois v. Glaub, 52 Pa. St. 238; D'Wolf v. Harris, 4 Mason, 515, Fed. Cas. No. 4221.

¹¹ 1 Chit. Pl. 65.

¹² Woolfork v. Ashby, 2 Metc. (Ky.) 288.

¹³ Cruger v. McLaury, 41 N. Y., 219; Hasbrouck v. Bunce, 62 Cal. 479. One of several tenants in common may maintain ejectment for the recovery of possession of the entire premises. Weese v. Barker, 7 Colo. 178, 2 Pac. 919; Yancy v. Greenlee, 90 N. C. 317.

less than all is permitted,¹⁴ and they may sue regarding subject-matter affecting the common estate.¹⁵ Actions of ejectment must be prosecuted in the name of the real party in interest,¹⁶ and the person having the legal title to the land, and not the one having the equitable title, is such party.¹⁷ And to entitle him to sue he must be out of possession.¹⁸

In California, the heir may maintain ejectment when there is no administration.¹⁹ The rule that each of several heirs may sue in ejectment for payment of rent without joining the others, applies to the case of tenants in common of an incorporeal hereditament of rents charged in fee, and no reversion; the rents are apportioned in either case.²⁰ Husband and wife may sue jointly as tenants in common of community property.²¹ But in case of a homestead declared upon the separate property of the wife, it is not necessary to have the husband join in the action.²² The grantee may bring an action to recover lands conveyed while in adverse possession, in the name of the grantor.²³ Lessees in the actual possession of land from which they are ousted by an intruder, without title or color of right, may maintain ejectment.²⁴ And it may be maintained by the vendor of land against a vendee in possession under a contract of purchase, who refuses to comply with the terms and conditions of the contract.²⁵ A deed conveying title to the members of a firm enables one partner to maintain ejectment against an intruder.²⁶

§ 25. For injuries to the person.—Injuries to the person, although inflicted by the same act and by the same defendants,

¹⁴ Wag. Stat. 558, § 3; Cal. Code Civ. Proc., § 384; Comp. Laws Nev. 1873, § 1077; *Morenhaut v. Wilson*, 52 Cal. 269.

¹⁵ *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428.

¹⁶ *Ritchie v. Dorland*, 6 Cal. 33.

¹⁷ *Emeric v. Penniman*, 26 Cal. 122; *O'Connell v. Dougherty*, 32 Cal. 462; *Green v. Jordan*, 83 Ala. 220, 3 Am. St. Rep. 711, 3 South. 513.

¹⁸ *Taylor v. Crane*, 15 How. Pr. 358.

¹⁹ *Updegraff v. Trask*, 18 Cal. 458; *Estate of Woodworth*, 31 Cal. 604; *Soto v. Kroder*, 19 Cal. 87.

²⁰ *Cruger v. McClaughry*, 51 Barb. 642.

²¹ *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433.

²² *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908.

²³ *Lowber v. Kelly*, 9 Bosw. 494.

²⁴ *Kirsch v. Brigard*, 63 Cal. 319.

²⁵ *Hicks v. Lovell*, 64 Cal. 14; 49 Am. Rep. 679, 27 Pac. 942; *Moyer v. Garrett*, 96 Pa. St. 376; *Wallace v. Maples*, 79 Cal. 433, 21 Pac. 860; *Coates v. Cleaves*, 92 Cal. 427, 28 Pac. 580; *Connolly v. Hingley*, 82 Cal. 642, 23 Pac. 273.

²⁶ *Smith v. Smith*, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186; *Miller v. Kern Co.*, 137 Cal. 516, 70 Pac. 549.

generally are several, and each person injured should sue alone. This rule is not universal, as the wrongful act may injure two or more persons in their joint relation, in which case they may join. Thus in action for libel or slander against a partnership the partners may join.²⁷

§ 26. **Trustees.**—The statute providing that a trustee, though not the real party in interest, may sue in his own name, is permissive and not at all compulsory.²⁸ And the owner of premises may bring suit in his own name on a contractor's bond, to recover payment for materials, on part of the parties furnishing such materials.²⁹

§ 27. **Injuries to married woman.**—At common law, for injuries to a married woman, the right of action was in the husband, although in certain cases the wife must join. As stated by Chitty, the rule was substantially this: "If the cause of action survive to the wife, she must be joined as plaintiff; as where the injury was before marriage; or, if it was inflicted after marriage, and it be of such a nature as to bring personal suffering to the wife, or if it injures her personally; as a battery, false imprisonment, or slander by words actionable *per se*."³⁰ And the same rule prevailed in regard to injuries to the wife's property. If the cause of action survived to her, she should join, otherwise not.³¹ The code has made sweeping changes in regard to the common-law rules concerning the joinder of husband and wife. In California, the code provides that "when a married woman is a party, her husband must be joined with her, except—1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone; the wife may sue in her own name to recover the homestead, without joining her husband,³² but the complaint must show that a valid declaration of home-

²⁷ 1 Chit. Pl. 64; Forster v. Lawson, 11 Moore, 360; Cook v. Batchelor, 3 Bos. & P. 150; Maitland v. Goldney, 2 East, 426. See, also, note to Corryton v. Lithebye, 2 Wm. Saund. 361.

²⁸ Hecker v. Cook, 20 Colo. App. 282, 78 Pac. 311; Mills Annot. Code, § 5.

²⁹ United States v. McCann, 40 Or. 13, 66 Pac. 274; B. & C. Codes, §§ 27, 29; United States v. Rundle, 27 Wash. 7, 67 Pac. 395; Bal. Codes, §§ 4824-5.

³⁰ 1 Chit. Pl. 73, and note 3; Bliss on Code Pl., § 27.

³¹ 1 Chit. Pl. 75.

³² Mauldin v. Cox, 67 Cal. 387, 7 Pac. 804.

stead covers the land;³³ 2. When the action is between herself and her husband she may sue or be sued alone; 3. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone.”³⁴ Similar statutes have been passed in all the code states. Such statutes differ somewhat in their details, but their general results are substantially the same.³⁵ In Iowa, a married woman may in all cases sue and be sued, without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment shall be enforced by or against her as if she were a single woman.³⁶ Section 30 of the Oregon code is the same as section 370 of the California code, except that the third subdivision is omitted, and the clause “and in no case need she prosecute or defend by a guardian or next friend,” is added. The Ohio code (§ 28) is as follows: “Where a married woman is a party, her husband must be joined with her, except that where the action concerns her separate property, or is between herself and husband, she may sue or be sued alone; and in every such case her separate property shall be liable for any judgment rendered therein against her to the same extent as would the property of her husband were the judgment rendered against him; but in no case shall she be required to prosecute or defend by her next friend.” Formerly section 114 of the New York code was the same as the above section of the Ohio code, omitting the clause in regard to the liability of her separate property; but the new code, passed June 2, 1876, has the following provision (§ 450): “In an action or special proceeding, a married woman appears, prosecutes, or defends, alone or joined with other parties, as if she was single.” Minnesota, Kansas, and Nebraska have provisions similar to those of New York and Iowa. In construing these provisions of the code, it has been held that in actions for injuries to the wife’s person or character, she must join with her husband,³⁷ and this joinder of the husband as party

³³ Tappendorff v. Moranda, 134 Cal. 419, 66 Pac. 491.

³⁴ Cal. Code Civ. Proc., § 370; Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

³⁵ Comp. Laws Nev., § 1070; Rev. Codes Idaho, § 7.

³⁶ Code of Iowa, § 2562.

³⁷ Pomeroy’s Remedies, § 237. And see *McFadden v. Santa Ana etc. Ry.*

Co., 87 Cal. 465, 25 Pac. 681, 11 L. R. A. 252; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. 223; *Neale v. Depot Ry. Co.*, 94 Cal. 425, 29 Pac. 954; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56; *Hawkins v. Front Ry. Co.*, 3 Wash. 592; 28 Am. St. Rep. 72, 28 Pac. 1021, 16 L. R. A. 808.

plaintiff may be made during the progress of the trial, with permission of the court;³⁸ while, for injuries to her separate estate, whether the same arise from deceit, trespass, or conversion, she may sue alone, or her husband may be joined with her, as the provision authorizing her to sue alone has generally been held permissive, except in those states which absolutely require the action to be prosecuted by the wife alone.³⁹ But in case of foreclosure of mortgage upon personal property of the wife the husband must be made a party defendant.⁴⁰ So, also, if the cause of action arises from contract the wife may sue alone, if it concerns her separate estate, or her husband may join with her in such action.

There is no statutory limitation as to the kind of actions that may be maintained by the wife when they concern her separate property, or are against her husband. Thus, a married woman may sue alone on a promissory note forming a part of her separate estate,⁴¹ although such note was given to her by her husband before marriage, and he is the party sought to be held liable in the action.⁴² Nor is it necessary, under this section, for the wife to sue by a *prochein ami*.⁴³ In New York, a married woman, it seems, cannot sue her husband for assault and battery,⁴⁴ nor for libel or slander;⁴⁵ nor in eject-

³⁸ Davis v. City of Seattle, 37 Wash. 223, 79 Pac. 784.

³⁹ Palmer v. Davis, 28 N. Y., 242; Newbery v. Garland, 31 Barb. 121; Ackley v. Tarbox, 31 N. Y. 564; Van Maren v. Johnson, 15 Cal. 308; Kays v. Phelan, 19 Cal. 128; Calderwood v. Pyser, 31 Cal. 333; Corcoran v. Doll, 32 Cal. 90; Spargur v. Heard, 90 Cal. 221, 27 Pac. 198. In Calderwood v. Pyser, supra, it was held, "that an action which concerned the separate property of the wife, and in which the husband and wife joined, did not abate in consequence of a divorce; the parties survived the divorce, and the cause of action survived. The husband was joined, not because he owned the property, but because of his relation to the other plaintiff. His relation ceased by the divorce, but the right of action continued in the wife, where it was before. But supposing the interest in the action terminated

as to the husband upon the entry of the judgment for divorce, there was still the same cause of action in favor of the wife, the real party in interest, which she was entitled to prosecute in her own name, without joining a person whom she afterwards married, and the most that could be said was that there was a misjoinder of parties plaintiff from that time forward; and that objection, not having been taken either by demurrer or answer, was waived."

⁴⁰ Henley v. Wilson, 137 Cal. 273, 92 Am. St. Rep. 160, 70 Pac. 21, 58 L. R. A. 941.

⁴¹ Corcoran v. Doll, 32 Cal. 82; Smart v. Comstock, 24 Barb. 411.

⁴² Wilson v. Wilson, 36 Cal. 447; 95 Am. Dec. 194.

⁴³ Kashaw v. Kashaw, 3 Cal. 312.

⁴⁴ Longendyke v. Longendyke, 44 Barb. 366.

⁴⁵ Freethy v. Freethy, 42 Barb. 641.

ment.⁴⁶ But she may sue him for alimony, without bringing an action for divorce.⁴⁷ In California, the possession of either of the spouses as to the community property is the possession of the other, and neither can sue the other for the conversion thereof.⁴⁸ The provision of the section authorizing the wife to be sued alone when living separate and apart from her husband, has no application to a mere temporary absence of the wife from her husband. There must have been an abandonment on the part of the husband or wife, or a separation which was intended to be final.⁴⁹ In some jurisdictions a married woman can maintain an action alone for an injury to her person, and the husband is not a necessary party to such action.⁵⁰ A married woman may maintain an action in her own name without joining her husband to recover possession of the homestead property.⁵¹ And she may sue alone to recover money loaned by her which is her separate property.⁵² So, if a wife deserts her husband, but before the expiration of the statutory period required to make the desertion a cause of divorce, offers in good faith to return and resume the performance of her marital duties, and he refuses to receive her, such refusal amounts to desertion on his part, and she can in California sue alone to recover damages for personal injuries.⁵³ The husband is held to be the proper plaintiff in an action to recover the proceeds of his wife's labor, in the absence of an agreement between them making such proceeds her separate property,⁵⁴ but he cannot sue alone to recover for injury to her person, she being a necessary party.⁵⁵

⁴⁶ Gould v. Gould, 29 How. Pr. 441. But it is now held she may sue her husband in ejectment to recover the possession of her separate real estate. Wood v. Wood, 83 N. Y. 575; also, Crater v. Crater, 118 Ind. 521, 10 Am. St. Rep. 161, 21 N. E. 290; Gibson v. Herriott, 55 Ark. 85, 96, 29 Am. St. Rep. 17, 17 S. W. 589.

⁴⁷ Galland v. Galland, 38 Cal. 265.

⁴⁸ Schuler v. Savings etc. Soc., 64 Cal. 397, 1 Pac. 479.

⁴⁹ Tobin v. Galvin, 49 Cal. 36; Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847.

⁵⁰ Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; City of Portland v. Taylor, 125 Ind. 522,

25 N. E. 459; Westlake v. Westlake, 34 Ohio St. 621; 32 Am. Rep. 397. So in Kansas. Mehrhoff v. Mehrhoff, 26 Fed. 13. Under the Alabama statutes (Code, § 2347), the wife must sue alone for all injuries to her person. Barker v. Anniston Ry. Co., 92 Ala. 314, 8 South. 466.

⁵¹ Mauldin v. Cox, 67 Cal. 387, 7 Pac. 804.

⁵² Evans v. De Lay, 81 Cal. 103, 22 Pac. 408.

⁵³ Andrews v. Runyon, 65 Cal. 629, 4 Pac. 669.

⁵⁴ Moseley v. Heney, 66 Cal. 478, 6 Pac. 134.

⁵⁵ McKune v. Santa Clara V. M. & L. Co., 110 Cal. 480, 42 Pac. 980.

§ 28. **Sole traders.**—A married woman may, upon proper proceedings had, become a sole trader, and as such may sue and be sued alone, without being joined with her husband, in reference to all property used by her in her business, or property and profits acquired therefrom.⁵⁶ Upon her first engaging in such trade it is presumed to be with funds of the community.⁵⁷ The property acquired by her is separate, but is not to be classified with the separate property described in the act defining rights of husband and wife as to separate and community property.⁵⁸

§ 29. **For injuries to minor child or servant.**—Both at the common law and under the code, the master may recover damages for injuries to his servant or minor child. The gist of the cause of action is the loss of the service of the servant or child. Under the code it is provided that a "father, or in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child, and a guardian for the death or injury of his ward, when such death or injury is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person."⁵⁹ Where the mother is divorced on the grounds of extreme cruelty, consisting in driving her and infant off at point of a pistol, and showing that the father had not contributed to their support since divorce, it is a desertion within the meaning of this section, and the mother may maintain action for death of the infant.⁶⁰ Under this section the minor may sue by his guardian and recover for the injuries he has sustained; or the parent may sue and recover for the damages sustained by him. If the minor sue, he cannot recover for the special damages sustained by the parent; and the parent may bring and sustain his action for such special damages, notwithstanding the recovery by the child. If the child do not sue, the parent cannot, in the same action, recover his

⁵⁶ Cal. Code Civ. Proc., §§ 1812-1819; Idaho Rev. Codes, §§ 3884-3888; Mont. Rev. Codes, §§ 7376-7377; Nev. Comp. Laws, §§ 545-549.

⁵⁷ *Bashore v. Parker*, 146 Cal. 525, 80 Pac. 707.

⁵⁸ *Camden v. Mullen*, 29 Cal. 564.

⁵⁹ Cal. Code Civ. Proc., § 376. See *Munro v. Dredging Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

⁶⁰ *Delatour v. Mackay*, 139 Cal. 621, 73 Pac. 454.

special damages, and also the damages which the child might recover, if he brought suit by his guardian, the action, when brought by the parent, being one of that class which is permitted to be brought without joining the person for whose benefit it is brought, and unless the action, when brought by the parent, is to be regarded as for the benefit of the minor, there would seem to be no obstacle in recovering in an action brought by the child. In actions for injuries resulting in death, the measure of damages is left to the sound discretion of the jury. Under the Colorado statute (Gen. Laws, 1877, p. 343), if the deceased be a minor, the father and mother may join in the suit and each shall have an equal interest in the judgment. But the joining of the father and mother is permissive, not imperative, and either may sue alone.⁶¹ Under the California statute (Code Civ. Proc., § 377), an action for an injury resulting in death can be brought by either the heirs or the personal representative, but separate actions cannot be brought or maintained by both, and a former recovery by an executor may be pleaded and proved in bar to an action subsequently brought by the heirs of one killed through the negligence of the defendant.⁶²

§ 30. **For seduction.**—The codes have made great changes in some of the states in the rules of the common law in regard to the liabilities for seduction. Section 374 of the California code provides that “an unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary and exemplary, as are assessed in her favor.”⁶³ Section 375 provides that “a father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.” Neither of these sections imposes any restrictions upon the right to maintain the action. The unmarried female, whatever her age, whether living with her father or guardian, or not, may maintain the action. Nor does the right of the

⁶¹ *Pierce v. Conners*, 20 Colo. 178, 46 Am. St. Rep. 279, 37 Pac. 721.

⁶² *Hartigan v. Southern Pacific Ry. Co.*, 86 Cal. 142, 24 Pac. 851.

⁶³ As to the meaning of the word “seduction” as used in this section of the code, see *Marshall v. Taylor*, 98 Cal. 55, 35 Am. St. Rep. 144, 32 Pac. 867.

father or guardian depend upon the question whether the female is living with or in the service of the father or guardian. Some questions as to the measure of damages, and the right to maintain several actions for the same seduction, arise which are not free from difficulties. If the female who has been seduced be at the time a minor, and living with her father, the loss of service accrues to him. Can she recover for that? May she maintain the action and recover all other damages, and her father maintain a separate action and recover for the loss of services? If so, can he recover anything more unless he has incurred expenses directly caused by the seduction? In some states each one may recover both actual and exemplary damages.⁶⁴ If the seduction occurs after she has attained her majority, can the father maintain any action therefor? If he can, does the recovery go for his benefit, or only for the daughter's? Would a recovery by him bar an action brought by the daughter? Or a recovery by the daughter bar an action brought by the father? Section 3339 of the Civil Code declares, "the damages for seduction rest in the sound discretion of the jury." Section 49 of the Civil Code provides, "the rights of personal relation forbid: 3. The seduction of a wife, daughter, orphan sister, or servant." The rule in relation to actions for torts is, that "the person who sustains an injury is the person to bring an action for the injury against the wrongdoer."

Under the Penal Code of California seduction is a felony. At common law no action could be sustained for damages in cases where the wrong amounted to a felony. These provisions of the Code of Civil Procedure, however, give the right to maintain the action, but whether the common-law rule that an action based upon a tort cannot be maintained by any one who has not suffered legal damages is changed by these provisions, is not free from difficulty.

The seducer may be a married man,⁶⁵ and a married woman may be seduced, but she cannot recover under section 374.⁶⁶

It is true that formerly the woman who was seduced could not maintain the action, having (on the ground of *volenti non fit injuria*) suffered no legal wrong; and the person who can bring an action is the parent or master, who sues, in theory at

⁶⁴ *Stevenson v. Belknap*, 6 Iowa, 97, 35 Am. St. Rep. 144, 32 Pac. 867.
71 Am. Dec. 392

⁶⁶ *Rea v. Tucker*, 51 Ill. 110, 99 Am.

⁶⁵ *Marshall v. Taylor*, 98 Cal. 55, Dec. 539.

least, for the wrong to him, viz. the loss of service. The action, therefore, could be brought by any one who stood in the relation of master to the woman seduced, whether he were merely the master, or the parent, brother, or other near relative of the woman. Nor was it any objection that the woman was of age at the time of the seduction; and it has been held, in a case where she lived with her father and acted as his servant, no objection to the action that she was a married woman.⁶⁷ But service of some sort was held to be absolutely essential. Where, therefore, the daughter was living independently, and supporting herself and the family, neither the parent nor any one else could maintain an action for her seduction.⁶⁸

Under section 375 of the California code, it is plain that the "service," which was formerly essential, is dispensed with as a foundation of the right of the parent to sue; and we may, therefore, conclude that the parent has the right now, independently of any loss of services, to recover to the same extent as formerly. If this be true, it would follow that a recovery by the parent would be a bar to an action brought by the daughter; and that a recovery by the daughter would be a bar to an action brought by the parent for more than special damages (if any were sustained) which from their nature could not have been included in the former recovery. Section 34 of the Oregon code is identical with section 375 of the California code, but section 35 of the Oregon code restricts the right of an unmarried female to sue for her own seduction to those over twenty-one years of age; and further provides that the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in section 34, shall be a bar to an action by such unmarried

⁶⁷ Harper v. Luffkin, 7 B. & C. 387. Under the Iowa code (§ 2556), no action can be maintained by a parent for the seduction of an adult child. Dodd v. Focht, 72 Iowa, 579, 34 N. W. 425.

⁶⁸ Manly v. Field, 29 L. J., 79 C. P., 7 Com. B. (N. S.) 96. It has been held that a father may recover for the loss of service of his infant daughter caused by her being gotten with an illegitimate child, although she was not at the time actually in his service, provided he still retained the legal right to reclaim such ser-

vice; Lavery v. Crooke, 52 Wis. 612; 38 Am. Rep. 768, 9 N. W. 599. See Lawyer v. Fritcher, 130 N. Y. 239, 27 Am. St. Rep. 521, 29 N. E. 267, 14 L. R. A. 700; Simpson v. Grayson, 54 Ark. 404, 26 Am. St. Rep. 52, 16 S. W. 4. So an imbecile daughter over the age of twenty-one years is to be regarded as a minor, for the loss of whose services by reason of seduction the father may recover, so long as she remains at his home or under his control. Hahn v. Cooper, 84 Wis. 629, 54 N. W. 1022.

female. Under section 450 of the New York Code of Civil Procedure, a wife may maintain an action in her own name and for her own benefit, without joining her husband as a party, against one who has enticed him from her, alienated his affection, and deprived her of his society.⁶⁹

⁶⁹ Bennett v. Bennett, 116 N. Y. So in Ohio: Westlake v. Westlake, 34 584, 23 N. E. 17, 6 L. R. A. 553. Ohio St. 621, 32 Am. Rep. 397.

CHAPTER VI.

PARTIES DEFENDANT.

§ 31. At common law, all persons who were jointly liable on the same contract or obligation must be joined in an action thereon. In determining whether such liability was joint, the rule was that "several persons contracting together with the same party for one and the same act shall be regarded as jointly, and not individually or separately, liable, in the absence of any express words to show that a distinct as well as entire liability was intended to fasten on the promisors."¹ This common-law rule has been changed in most if not in all of the states which have adopted codes of procedure. In California, the Civil Code provides that "when all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."² If a new defendant joined does not object, and the original defendants objecting show no injury to them, such new defendants may properly be added.³

In regard to the joinder of such parties the code provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant,⁴ and "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have joined as plaintiff cannot be obtained, he may be made a defendant;"⁵ and persons severally liable upon the same obligation or instrument,

¹ Chit. Pl. 41.

² Civ. Code, § 1659.

³ *Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045.

⁴ Cal. Code Civ. Proc., § 379; 1 Van Santv. Pl. Eq. Pr. 74; N. Y. Code, 1877, § 447; 1 Van Santv. Pl. Eq. Pr. 119; Nash's Ohio Pl., § 36; Laws of

Iowa, § 2762; Or., B. & C. Codes, § 40; Idaho, Rev. Codes, § 13; Nev., § 13; Ariz., § 13.

⁵ Cal. Code Civ. Proc., § 382. Similar provisions are found in the codes of other states. When each of the defendants is alleged to have been in some way connected with the trans-

including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff." But a necessary party defendant cannot be added after judgment without good showing of cause why he had not been made a party prior to the trial.⁶

§ 32. **Annuling patent to land.**—In an action to set aside a patent to land, the patentee is a necessary party defendant. His rights cannot be determined or impaired in any side suit between third parties.⁷

§ 33. **Actions against assessors.**—In Massachusetts, assessors are jointly, as well as severally, liable for illegally assessing and collecting a tax.⁸

§ 34. **For breach of contract.**—All persons materially interested in the subject-matter of the suit should be made parties, either plaintiff or defendant.⁹ But in an action for damages for breach of contract, only the parties to the contract should be joined as defendants.¹⁰ One merely making himself party to a contract, which is filed as a stipulation in an action, and embodied in orders made therein, does not make himself a party to the action.¹¹ And in a suit to enforce a covenant not to carry on a certain trade, the original covenantor is not a proper party if he has parted with all interest and is not in fault.¹² It is held in Massachusetts that heirs are jointly chargeable as assigns on a covenant of their ancestor which runs with the land that descends to them.¹³ So with guardians severally appointed for different heirs.¹⁴ In New York, persons severally liable should not be joined in the same action as defendants.¹⁵

action complained of, and complete justice cannot be done in the absence of either of them, there is no improper joinder of parties. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

⁶ *Peck v. Peck*, 33 Colo. 421, 80 Pac. 1063.

⁷ *Boggs v. Merced Mining Co.*, 14 Cal. 279; approved in *Yount v. Howell*, 14 Cal. 469; *Pioche v. Paul*, 22 Cal. 111.

⁸ *Withington v. Eveleth*, 7 Pick. 106.

⁹ *Burton v. Lies*, 21 Cal. 87; affirmed in *Carpentier v. Williamson*, 25 Cal. 161; *Wilson v. Castro*, 31 Cal. 420.

¹⁰ *Barber v. Cazalis*, 30 Cal. 92.

¹¹ *Elliott v. Superior Court*, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109.

¹² *Clements v. Welles*, L. R., 1 Eq. 200.

¹³ *Morse v. Aldrich*, 1 Mete. 544.

¹⁴ *Donahue v. Emery*, 9 Mete. 63.

¹⁵ *Le Roy v. Shaw*, 2 Duer, 626; *Phalen v. Dingee*, 4 E. D. Smith, 379; *Spencer v. Wheelock*, 11 N. Y. Leg. Obs. 329.

§ 35. **Unnecessary parties.**—Defendants who afterwards become unnecessary parties may be eliminated by motion to dismiss as to them.¹⁶ Failure to substitute the true name of a defendant will not warrant a reversal of the cause, notwithstanding section 474 of the Code of Civil Procedure.¹⁷

§ 36. **Objection to nonjoinder.**—The objection that there is a nonjoinder of parties defendant should be raised by demurrer or answer, and cannot be raised by an objection to the introduction of testimony.¹⁸ Nor can objection to the parties plaintiff be raised by demurrer to the evidence.¹⁹

§ 37. **Waiver of defects in parties defendant.**—Nonjoinder of all the heirs of a deceased in an action for damages on account of death of deceased must be raised before the cause comes on for trial, or it is deemed to be waived.²⁰

Defendants' failure to raise by demurrer the failure of plaintiff to join her husband with her in action for injury to her prior to her marriage, is a waiver of such nonjoinder.²¹ A general demurrer admits the sufficiency of the parties, but the defect can afterwards be raised by answer.²² But this rule does not apply in case of the omission of an indispensable party.²³

Filing an answer after having his demurrer to the defect of parties in plaintiffs' complaint overruled, is not a waiver of such defect, if they are necessary parties.²⁴ If the defect of parties is disclosed for the first time during trial, it can be raised by amending the answer, or possibly by motion, but not after verdict rendered.²⁵ But if the defect is known to de-

¹⁶ *California Farm etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593.

¹⁷ *Blackburn v. Bucksport*, 7 Cal. App. 649, 95 Pac. 668.

¹⁸ *Dickerson v. City of Spokane*, 26 Wash. 292, 66 Pac. 381.

¹⁹ *Groenmiller v. Kaub*, 67 Kan. 844, 73 Pac. 100.

²⁰ Cal. Code Civ. Proc., § 434; *Salman v. Rathjens*, 153 Cal. 290, 92 Pac. 733.

²¹ *Kippen v. Ollasson*, 136 Cal. 640, 69 Pac. 293; *Reclamation Dist. v. van Loben Sels*, 145 Cal. 181, 78 Pac. 638.

²² *Florence v. Helms*, 136 Cal. 613, 69 Pac. 429; *Town of Susanville v. Long*, 144 Cal. 362, 77 Pac. 987; *Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 Pac. 431; *Johnson v. Bott*, 18 Colo. App. 469, 72 Pac. 612; *Grisson v. Hofins*, 39 Wash. 51, 80 Pac. 1002.

²³ *Peck v. Peck*, 33 Colo. 421, 80 Pac. 1063; *Farmers' High Line etc. Co. v. White*, 32 Colo. 114, 75 Pac. 415.

²⁴ *Farmers' High Line etc. Co. v. White*, 32 Colo. 114, 75 Pac. 415.

²⁵ *Young v. Stickney*, 46 Or. 101, 79 Pac. 345.

fendant at time of making answer and is not set out therein, it is waived.²⁶

§ 38. Actions against executors and administrators.—In California, the executor and administrator of a decedent is entitled to the possession of the entire estate of the deceased, both real and personal. The code provides that “actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.”²⁷ The administrator of an estate is a necessary defendant in case of a claim made to property of the estate upon a contract made by the deceased in his lifetime.²⁸ But if suit is brought by one heir against the other heirs on such a contract the administrator is not a necessary party.²⁹ “Any person, or his personal representatives, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.”³⁰ And “in actions for or against executors or administrators it is not necessary to join those as parties to whom letters were issued, but who have not qualified.”³¹ The code also contains minute provisions requiring a creditor of a deceased to present his claim against the estate to the executor or administrator of the deceased for allowance before he can maintain an action thereon. In construing these provisions of the code, it has been repeatedly held that the general right to sue an executor or administrator was taken away by statute, except in cases where the creditor’s claim has been properly presented and rejected.³² If an executor has come into possession of the trust fund or its substitute, so that the same can be identified, he can be held

²⁶ *Criswell v. Board Everett School Dist.*, 34 Wash. 420, 75 Pac. 984.

²⁷ Cal. Code Civ. Proc., § 1582.

²⁸ *In re Healy’s Estate* (Cal.), 66 Pac. 175; Cal. Code Civ. Proc., §§ 1597-1599, 1664.

²⁹ *Healy’s Estate*, 137 Cal. 474, 70 Pac. 455.

³⁰ Cal. Code Civ. Proc., § 1584.

³¹ *Id.*, § 1587.

³² *Ellisen v. Halleck*, 6 Cal. 393; *Hentsch v. Porter*, 10 Cal. 559; *Eustace v. Jahns*, 38 Cal. 3.

to account and charged as trustee, upon the same terms as his testator held the trust, and the relation of trustee and *cestui que trust* is added to that of executor.³³ In suit for specific performance of testator's contract for sale of lands, the executor of deceased should join as plaintiff.³⁴ In an action for specific performance against heirs on their ancestor's contract, where damages are demanded in the alternative, the executors or administrators should be made parties, or no judgment can be taken for such damages.³⁵ In Nevada, a joint action cannot be maintained against the survivor and the administrator of a deceased maker of a promissory note;³⁶ and the same would seem to be the rule in California. The reason assigned for this rule is that the judgment against the survivor would have to be *de bonis propriis*, and against the executor or administrator *de bonis testatoris*.³⁷

It is a general rule of law that no action will lie against an executor or administrator to which his testator or intestate was not liable.³⁸ The estate, represented by a person upon whom the duty of keeping the premises in repair is cast, is no more liable for his neglect of that personal duty than it would be for a fine which might be imposed upon him by a criminal court for an assault and battery committed by him while in possession of such estate.³⁹ In actions for the foreclosure of a mortgage, against the estate of a deceased mortgagor, his heirs are not necessary parties,⁴⁰ but in partition they are, and if the executors of a deceased plaintiff have been made parties instead of the heirs, the error may be cured by a subsequent amendment.⁴¹

§ 39. Foreclosure of mortgages and mechanics' liens.—In actions to foreclose mortgages, all parties who own or have an

³³ Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; Fox v. Tay, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897.

³⁴ Adams v. Green, 34 Barb. 176. See Cal. Code Civ. Proc., § 1582.

³⁵ Massie's Heirs v. Donaldson, 8 Ohio, 377.

³⁶ Maples v. Geller, 1 Nev. 233.

³⁷ Bank of Stockton v. Howland, 42 Cal. 129; Mattison v. Childs, 5 Colo. 78.

³⁸ 2 Williams on Executors, p. 1478; Eustace v. Jahns, 38 Cal. 3.

³⁹ Crayton v. Munger, 9 Tex. 286; Able v. Chandler, 12 Tex. 92, 62 Am. Dec. 518; Eustace v. Jahns, 38 Cal. 3.

⁴⁰ Bayly v. Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486. An action instituted by a party on one side for individual rights, against herself as administratrix of her husband's estate, is irregular, and should not be upheld. Norton v. Walsh, 94 Cal. 564, 29 Pac. 1109.

⁴¹ Adams v. Hopkins (Cal.), 69 Pac. 228.

estate in the land to be sold under the decree, and those who, either originally or by assignment, are liable on the mortgage debt, are necessary parties. It is proper, however, to join as defendants all persons materially interested in the subject-matter of the controversy.⁴² Thus the owner of the equity of redemption is a necessary party to a foreclosure suit.⁴³ And the same is true of the grantee of the mortgagor.⁴⁴ But where the payment of the mortgage debt is assumed by the grantee, as between himself and the mortgagor, although the grantee is a necessary party, the grantor is not.⁴⁵ In New York and other states, the wife of the mortgagor, or of the subsequent grantee, is a necessary party, in order to cut off her equity of redemption,⁴⁶ and also in case the property is community property, or if it is a homestead.⁴⁷ The wife is a necessary party defendant in an action to foreclose a mortgage on the homestead executed by the husband.⁴⁸ A subsequent lienor may apply to be made a party in intervention in the former suit, and if he does not he cannot be made a party defendant, or at all.⁴⁹ An assignee in bankruptcy of the mortgagor is a necessary party,

⁴² *Luning v. Brady*, 10 Cal. 265; *Montgomery v. Tutt*, 11 Cal. 307; *Tyler v. Yreka Water Co.*, 14 Cal. 212; *De Leon v. Higuera*, 15 Cal. 483; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *McDermott v. Burke*, 16 Cal. 580; *Burton v. Lies*, 21 Cal. 87; *Horn v. Jones*, 28 Cal. 194; *Anthony v. Nye*, 30 Cal. 401; *Carpenter v. Brenham*, 40 Cal. 221; *Brainard v. Cooper*, 10 N. Y. 356; *Peck v. Mal-lams*, 10 N. Y. 509; *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. Pr. 33; *Case v. Price*, 17 How. Pr. 348, 9 Abb. Pr. 111.

⁴³ *Reed v. Marble*, 10 Paige, 409; *Dexter v. Arnold*, 1 Sumn. 109, Fed. Cas. No. 3857; *Gordon v. Lewis*, 2 Sumn. 143, Fed. Cas. No. 5613; *Gris-wold v. Fowler*, 6 Abb. Pr. 120; *New York Life Ins. etc. Co. v. Bailey*, 3 Edw. Ch. 417; *Crooke v. O'Higgins*, 14 How. Pr. 154. See *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316; *Case v. Price*, 9 Abb. Pr. 113; *Landon v. Towns-hend*, 112 N. Y. 93; 8 Am. St. Rep. 712, 19 N. E. 424; *Watts v. Julian*, 122 Ind. 124, 23 N. E. 698; *Carpenter*

v. Ingalls, 3 S. Dak. 49, 44 Am. St. Rep. 753, 51 N. W. 948.

⁴⁴ *Skinner v. Buck*, 29 Cal. 253; *Heyman v. Lowell*, 23 Cal. 106; *Mor-row v. Morrow*, 48 Tex. 304.

⁴⁵ *Drury v. Clark*, 16 How. Pr. 424; *Van Nest v. Latson*, 19 Barb. 604; *Stebbins v. Hall*, 29 Barb. 524; *Mc-Arthur v. Franklin*, 15 Ohio St. 485.

⁴⁶ *Denton v. Nanny*, 8 Barb. 618; *Dexter v. Arnold*, 1 Sumn. 109, Fed. Cas. No. 3857; *Gordon v. Lewis*, 2 Sumn. 143, Fed. Cas. No. 5613; *Wheeler v. Morris*, 2 Bosw. 524; *Vartie v. Underwood*, 18 Barb. 561; *Mills v. Van Voorhies*, 20 N. Y. 412; *Bly-denburgh v. Northrop*, 13 How. Pr. 289; *Brownson v. Gifford*, 8 How. Pr. 389; *Pinckney v. Wallace*, 1 Abb. Pr. 82; *Lewis v. Smith*, 11 Barb. 152; *Union Bank v. Bell*, 14 Ohio St. 200.

⁴⁷ *N. W. Bridge Co. v. Tacoma Ship Building Co.*, 36 Wash. 333, 78 Pac. 996.

⁴⁸ *Mabury v. Ruiz*, 58 Cal. 11.

⁴⁹ *Bal. Codes*, Wash., § 5910; *La-vanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117.

and if not joined may sue to redeem.⁵⁰ But an assignment in bankruptcy pending suit does not make the assignee a necessary party.⁵¹

If a mortgage is assigned as a security, the assignor is a necessary party;⁵² likewise the assignor of a mortgage who guarantees its payment;⁵³ but otherwise if there is no express covenant to pay, though it forms part of the purchase money.⁵⁴

In a foreclosure of mortgage given by trustees the *cestuis que trust* are necessary parties.⁵⁵ When an action is brought to foreclose a mortgage securing the payment of a promissory note, the maker and indorser of the note may be joined as defendants.⁵⁶ A writ of entry to foreclose a mortgage may be maintained against a tenant in possession.⁵⁷ Where infants having an equitable vested remainder in fee, liable to be defeated by their dying in the lifetime of the equitable tenant for life, were not made parties, they are not bound by the decree.⁵⁸ And where there are several future and contingent interests, the person who has the first vested estate of inheritance and all other persons having prior rights or interests in the premises must be made parties; though every person having a future or contingent interest is not a necessary party.⁵⁹ In such suit, where the defendant dies after the commencement of suit, the administrator becomes a necessary party in a petition for decree of sale of mortgaged premises, if it is sought to have a judgment over against the estate for any deficiency.⁶⁰

In general, all incumbrancers prior and subsequent are proper parties defendant, and should be joined if it is desired to secure a judgment binding them.⁶¹ But an incumbrancer who becomes

⁵⁰ Winslow v. Clark, 47 N. Y. 261.

⁵¹ Cleveland v. Boerum, 24 N. Y. 613; Daly v. Burchell, 13 Abb. Pr. (N. S.) 264.

⁵² Kittle v. Van Dyck, 1 Sandf. Ch. 76.

⁵³ Bristol v. Morgan, 3 Edw. Ch. 142.

⁵⁴ Lockwood v. Benedict, 3 Edw. Ch. 472.

⁵⁵ Piatt v. Oliver, 2 McLean, 267, Fed. Cas. No. 11115; Woolner v. Wilson, 5 Ill. App. 439.

⁵⁶ Eastman v. Turman, 24 Cal. 382.

⁵⁷ Fales v. Gibbs, 5 Mason, C. C. 462, Fed. Cas. No. 4621.

⁵⁸ Williamson v. Field, 2 Sandf. Ch. 533.

⁵⁹ Nodine v. Greenfield, 7 Paige, 544, 34 Am. Dec. 363.

⁶⁰ Belloc v. Rogers, 9 Cal. 123. See Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140.

⁶¹ Finley v. Bank of United States, 11 Wheat. 304, 6 L. Ed. 480; Matcalm v. Smith, 6 McLean, 416, Fed. Cas. No. 9272; Ensworth v. Lambert, 4 Johns. Ch. 605; Haines v. Beach, 3 Johns. Ch. 461.

such pending suit is not entitled to redeem, and, therefore, need not be made a party.⁶²

But in California, no person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered and the proceedings therein had are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.⁶³ Suits for the foreclosure of a mechanic's lien are in many respects analogous to those in ordinary foreclosure. All parties necessary to enable the court to do complete justice may be joined.⁶⁴ In a suit to foreclose a lien by a materialman or subcontractor, the contractor or original promisor, against whom a debt must be established as the foundation of a decree, is an indispensable party.⁶⁵

Ordinarily, in an action to foreclose a mortgage, it is not necessary to make prior mortgagees or incumbrancers parties;⁶⁶ but all subsequent lienors by judgment must be made parties.⁶⁷ It is held in some of the states that the heirs of a deceased mortgagor are necessary parties in a suit to foreclose the mortgage.⁶⁸ But in California the heirs are not necessary parties in an action against an administrator to foreclose a mortgage.⁶⁹ The surviving partner is a proper party to an action to foreclose a mortgage made by a deceased partner of his individual property to secure the firm indebtedness, but is not a necessary or indispensable party thereto.⁷⁰

⁶² Cook v. Mancius, 5 Johns. Ch. 89; Loomis v. Stuyvesant, 10 Paige, 490; People's Bank v. Hamilton Mfg. Co., 10 Paige, 481. See Bishop of Winchester v. Paine, 11 Ves. 194.

⁶³ Code Civ. Proc., § 726.

⁶⁴ Sullivan v. Decker, 1 E. D. Smith, 699; Lowber v. Childs, 2 E. D. Smith 577; Foster v. Skidmore, 1 E. D. Smith 719; Kaylor v. O'Connor, 1 E. D. Smith 672.

⁶⁵ Davis v. Mouat Lumber Co., 2 Colo. App. 381, 31 Pac. 187; Estey v. Hallack etc. Lumber Co., 4 Colo. App. 165, 34 Pac. 1113; Sayre-Newton Lumber Co. v. Park, 4 Colo. App. 482, 36 Pac. 445.

⁶⁶ White v. Holman, 32 Ark. 753; Evans v. McLucas, 12 S. C. 56; Hague v. Jackson, 71 Tex. 761, 12 S. W. 63; Crawford v. Munford, 29 Ill. App. 445.

⁶⁷ De Lashmuth v. Sellwood, 10 Or. 319.

⁶⁸ Pillow v. Sentella, 39 Ark. 61; Hill v. Townley, 45 Minn. 167, 47 N. W. 653; Trapier v. Waldo, 16 S. C. 276; Renshaw v. Taylor, 7 Or. 315.

⁶⁹ Bayly v. Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486.

⁷⁰ London etc. Bank v. Smith, 101 Cal. 415, 35 Pac. 1027.

§ 40. **Action for fraud.**—In an action to obtain relief from a judgment fraudulently procured, the attorney at law charged with being a party to the fraud should be joined with the client.⁷¹ So partners may be jointly sued for fraudulently recommending an insolvent person as worthy of credit.⁷² Or for deceit in a sale, if both knowingly make false representations, though only one was interested in the expected fruits of the fraud.⁷³ So in an action to set aside a conveyance as made without consideration and in fraud of creditors, the fraudulent grantor is a necessary party defendant.⁷⁴

A fraudulent grantor is a proper party defendant in an action to subject to a lien of a judgment the property alleged to have been fraudulently conveyed, but he is not a necessary party.⁷⁵ So in an action by a purchaser at an execution sale, to set aside a conveyance alleged to have been made by the judgment debtor in fraud of creditors and purchasers, and to recover possession of the property, the assignee in insolvency of the judgment debtor is a proper party defendant.⁷⁶

§ 41. **In ejectment.**—The general rule is that ejectment can be maintained only against the real party in possession although he is not personally on the premises, but may be in possession through servants and employees.⁷⁷ A mere party, in charge for others, is not an occupant.⁷⁸ A railroad company that has simply laid rails on a public highway is not an occupant.⁷⁹ But if the landlord be joined with the tenant as defendant in an action of ejectment, judgment, if for the plaintiff, must be against both.⁸⁰ Complaint in ejectment against several who are in possession, alleging that one holds by virtue of tenancy from the others, sufficiently joins them all as defendants.⁸¹

⁷¹ *Crane v. Hirschfelder*, 17 Cal. 467.

⁷² *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141.

⁷³ *Stiles v. White*, 11 Metc. 356, 45 Am. Dec. 214.

⁷⁴ *Gaylords v. Kelshaw*, 1 Wall. 81, 17 L. Ed. 612.

⁷⁵ *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.

⁷⁶ *Pfister v. Dasey*, 65 Cal. 403, 4 Pac. 393.

⁷⁷ *Polack v. Mansfield*, 44 Cal. 36, 13 Am. Rep. 151. See, also, *Valentine v. Mahoney*, 37 Cal. 389, where the question is discussed as to the applicability of section 13 of the Practice Act (Code Civ. Proc., § 379, first clause) to the action of ejectment.

⁷⁸ *Hawkins v. Reichert*, 28 Cal. 534; *People v. Ambrecht*, 11 Abb. Pr. 97.

⁷⁹ *Redfield v. Utica & Syracuse R. Co.*, 25 Barb. 54.

⁸⁰ Code Civ. Proc., § 379.

⁸¹ *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 762.

In ejectment against mining claims, it is not necessary to include as defendants those holding other undivided interests.⁸² But a landlord may come in and defend in an action in ejectment, where summons is served on a tenant, by a proper showing, even after a default is taken. The statute should in such cases be construed so as to dispose of actions of this character as nearly on their merits as possible, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided.⁸³ A landlord may defend in the name of the tenant, but not in his own name.⁸⁴ Persons renting different apartments in the same house may be joined as defendants.⁸⁵ And the same is true of parties claiming title, accompanied by acts of ownership, to unoccupied premises.⁸⁶ And any number may be made defendants, subject to their right to answer separately.⁸⁷ A mere employee of a defendant in ejectment, who is permitted to reside upon the premises when suit is commenced, and who claims no rights in the land as tenant or otherwise, is not a necessary party defendant.⁸⁸ And where the defendant in ejectment has possession and a life estate in the property, his heirs cannot be made parties defendant with him.⁸⁹

§ 42. Married woman.—In California, where a married woman is a party, her husband must be joined with her, except—
1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone; 2. When the action is between herself and her husband, she may sue or be sued alone; 3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement

⁸² *Waring v. Crow*, 11 Cal. 366.

⁸³ *Roland v. Kreyenhagen*, 18 Cal. 455. See, also, *Reed v. Calderwood*, 22 Cal. 465; *Barrett v. Graham*, 19 Cal. 632; affirmed in *Bailey v. Taaffe*, 29 Cal. 424.

⁸⁴ *Dimick v. Deringer*, 32 Cal. 488. See, also, *Valentine v. Mahoney*, 37 Cal. 393; *Hussman v. Wilke*, 50 Cal. 250; *Garner v. Marshall*, 9 Cal. 270.

⁸⁵ *Pearce v. Colden*, 8 Barb. 522.

⁸⁶ *Garner v. Marshall*, 9 Cal. 268; *Taylor v. Crane*, 15 How. Pr. 358; *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

⁸⁷ *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597; *Ritchie v. Dorland*, 6 Cal. 33; *Ellis v. Jeans*, 7 Cal. 417; *Curtis v. Sutter*, 15 Cal. 264; *Morton v. Folger*, 15 Cal. 276; *Leese v. Clark*, 28 Cal. 35; *Fosgate v. Herkimer etc. Hyd. Co.*, 12 Barb. 352; *Andrews v. Carlile*, 20 Colo. 370, 38 Pac. 465; *Walker v. Read*, 59 Tex. 187.

⁸⁸ *Shaw v. Hill*, 83 Mich. 322, 21 Am. St. Rep. 607, 47 N. W. 247.

⁸⁹ *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282.

in writing entered into between them, she may sue or be sued alone.⁹⁰ It is proper to allow plaintiff, a married woman, to add the name of her husband as a party plaintiff during the progress of the trial.⁹¹ If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.⁹² In actions brought under subdivision 2 of this section, the test is simply to ascertain if the suit is between her and her husband; and this being found in the affirmative, the necessity of introducing other parties cannot affect her right.⁹³ In actions brought under subdivision 3, a temporary absence does not come within the meaning of the act. There must have been an abandonment on the part of the husband or wife, or a separation which was intended to be final.⁹⁴ The wife can appear in and defend an action separately from her husband; she therefore possesses, as defendant, all the rights of a *feme sole*, and is able to make as binding admissions in writing as other parties.⁹⁵ The statute confers only a privilege which in many instances it may be important for the wife to assert for the protection of her interests, and in the exercise of which the fullest liberty should be accorded to her.⁹⁶ Where there is a statute giving the wife an inchoate right of dower, she must be joined as a defendant in an action in partition.⁹⁷

For any fraud or deceit practiced by the defendant, whether the injury were wrought through the form of a contract or not, affecting the common property, the remedy is by the husband alone.⁹⁸ The husband of a married woman is properly joined with her as a party defendant in an action upon a partnership obligation contracted by the wife and third persons as partners previous to the marriage and while she was a *feme sole*.⁹⁹ The wife is an improper party to a suit brought to recover money loaned to her to complete the amount of purchase money for a lot of ground, the deed of which was executed to her, but which

⁹⁰ Code Civ. Proc., § 370.

⁹¹ Davis v. City of Seattle, 37 Wash. 223, 79 Pac. 784.

⁹² Code Civ. Proc., § 371; Laws of Iowa, § 2774; Idaho, Rev. Codes, § 8; Nev., Comp. Laws, § 29; Ohio, § 29; N. Y. Code, 1877, § 450. As to what is separate property, see Cal. Civ. Code, §§ 162, 163.

⁹³ Kashaw v. Kashaw, 3 Cal. 321.

⁹⁴ Tobin v. Galvin, 49 Cal. 36, 37.

⁹⁵ Alderson v. Bell, 9 Cal. 321.

⁹⁶ Van Maren v. Johnson, 15 Cal. 311.

⁹⁷ Hurley v. O'Neill, 31 Mont. 595, 79 Pac. 242.

⁹⁸ Barrett v. Tewksbury, 18 Cal. 336.

⁹⁹ Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78.

became common property, and which purchase was afterwards ratified by the husband. There could be no personal judgment against the wife.¹⁰⁰ In California, the wife may appear in and defend an action separately from her husband.¹⁰¹ Where the defense of the wife is a special one, she can defend for her own right as well when sued jointly as if the trial was separate.¹⁰² To enable her to defend in her own right, she must possess as defendant the rights of a *feme sole*.¹⁰³ In an action pertaining to her property as sole trader under the act of 1852, the husband need not be joined.¹⁰⁴

The husband is properly joined with the wife in an action upon an obligation contracted by the wife previous to marriage.¹⁰⁵ In a suit to foreclose a mortgage, and set aside a fraudulent conveyance of property by the husband to the wife, the wife was properly joined with the husband as a defendant.¹⁰⁶ And in a foreclosure of a husband's mortgage for the purchase money of the wife's separate estate, both must be joined.¹⁰⁷ So, also, where the wife executes a mortgage with her husband,¹⁰⁸ or if the mortgage was given by the husband upon community property.¹⁰⁹ So, in partition suits, the wife must be joined with her husband as defendant.¹¹⁰ In forcible entry and detainer, also, the husband is properly joined in the action.¹¹¹ So, also, where the homestead is involved, the wife must be joined as

¹⁰⁰ Althof v. Conheim, 38 Cal. 230, 99 Am. Dec. 363.

¹⁰¹ Alderson v. Bell, 9 Cal. 315; approved in Leonard v. Townsend, 26 Cal. 435.

¹⁰² Deuprez v. Deuprez, 5 Cal. 387.

¹⁰³ Alderson v. Bell, 9 Cal. 315; Leonard v. Townsend, 26 Cal. 435. In South Dakota, when a married woman is a party the same rules apply as if she were single. Code Civ. Proc., § 77.

¹⁰⁴ Guttman v. Scannell, 7 Cal. 455. For other authorities, see Dunderdale v. Grymes, 16 How. Pr. 195; Rouillier v. Wernicki, 3 E. D. Smith 310; Avogadro v. Bull, 4 E. D. Smith 385; Freeman v. Orser, 5 Duer, 477. And she must be sued alone. McKune v. McGarvey, 6 Cal. 497; approved in Guttman v. Scannell, 7 Cal. 455, and Camden v. Mullen, 29 Cal. 564.

¹⁰⁵ Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78.

¹⁰⁶ Kohnner v. Ashenauer, 17 Cal. 579.

¹⁰⁷ Mills v. Van Voorhies, 20 N. Y. 412, 10 Abb. Pr. 152; Rusher v. Morris, 9 How. Pr. 266.

¹⁰⁸ Oats v. Shuey, 25 Wash. 597, 66 Pac. 58; Anthony v. Nye, 30 Cal. 401; Conde v. Shepard, 4 How. Pr. 75; Conde v. Nelson, 2 Code Rep. (N. Y.), 58. See Fitzgerald v. Fernandez, 71 Cal. 504, 12 Pac. 562.

¹⁰⁹ N. W. Bridge Co. v. Tacoma Ship Bldg. Co., 36 Wash. 333, 73 Pac. 996.

¹¹⁰ De Uprey v. De Uprey, 27 Cal. 329, 87 Am. Dec. 81; Ripple v. Gilborn, 8 How. Pr. 460; Tanner v. Niles, 1 Barb. 563.

¹¹¹ See Howard v. Valentine, 20 Cal. 282.

defendant in certain cases.¹¹² For the torts of the wife, committed out of the presence of the husband, the latter must be joined.¹¹³

§ 43. **Actions by or against infants.**—When an infant is a party, he must appear either by his general guardian or by a guardian appointed by the court in which the action is prosecuted, or by a judge thereof. A guardian may be appointed in any case, when it is deemed by the court in which the action is prosecuted, or by a judge thereof, expedient to represent the infant in the action, notwithstanding he may have a general guardian, and may have appeared by him.¹¹⁴ The appearance of a general guardian is sufficient to give the court jurisdiction of the persons of infant defendants, and the fact that no guardian *ad litem* was appointed for them is immaterial.¹¹⁵ When the infant is defendant, a guardian will be appointed upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.¹¹⁶ Where infant defendants have no separate or special defense, no separate or special answer need be filed in their behalf, but joinder in a common answer with the other defendant is sufficient.¹¹⁷

§ 44. **For infringement of patent.**—In selling an article which infringes upon a patent, the agent may be joined with the manufacturer as a party defendant in an action against them as trespassers.¹¹⁸

¹¹² Sargent v. Wilson, 5 Cal. 504; approved in Moss v. Warner, 10 Cal. 297; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Marks v. Marsh, 9 Cal. 96; Horn v. Volcano Water Co., 13 Cal. 70; 73 Am. Dec. 569; Anthony v. Nye, 30 Cal. 401.

¹¹³ Anderson v. Hill, 53 Barb. 238; Peak v. Lemon, 1 Lans. 295; Tait v. Culbertson, 57 Barb. 9; Kowing v. Manley, 57 Barb. 479, 49 N. Y. 192, 10 Am. Rep. 346; Brazil v. Moran, 8 Minn. 236, 83 Am. Dec. 772; Ball v. Bennett, 21 Ind. 427, 83 Am. Dec. 356; Turner v. Hitchcock, 20 Iowa, 310; Musselman v. Galligher, 32 Iowa,

383; McElfresh v. Kirkendall, 36 Iowa, 224; Luse v. Oaks, 36 Iowa, 562; Curd v. Dodds, 6 Bush, 681; Coolidge v. Parris, 8 Ohio St. 594.

¹¹⁴ Cal. Code Civ. Proc., § 372.

¹¹⁵ Richardson v. Loupe, 80 Cal. 499, 22 Pac. 227; Western Lumber Co. v. Phillips, 94 Cal. 54, 29 Pac. 328.

¹¹⁶ Cal. Code Civ. Proc., § 373; N. Y. Code Civ. Proc., § 470; B. & C. Codes, Or., § 33.

¹¹⁷ Western Lumber Co. v. Phillips, 94 Cal. 54, 29 Pac. 328.

¹¹⁸ Buck v. Cobb, 9 Law Rep. 545. See Bryce v. Dorr, 3 McLean, 582, Fed. Cas. No. 2070.

§ 45. **Mandamus.**—A writ of *mandamus* is properly directed to the mayor and city council to compel a tax levy.¹¹⁹ And in proceedings to compel issuance of a county warrant, the joinder of the county commissioners as parties, on the theory that the county would be ultimately affected by the result, is not improper.¹²⁰ But in *mandamus* to compel the restoration of a record to its former meaning, by which plaintiff was appointed to a position instead of a third party, such third party need not be made a party defendant, though such change would affect him more than any other.¹²¹

§ 46. **Water and watercourses.**—In suit by the consumers of the water of a ditch against the corporation owning the ditch to restrain it from compelling them to prorate with the stockholders of the corporation, all the consumers, similarly situated, should be made either plaintiffs or upon their refusal, defendants. For the corporation cannot represent the stockholders in such a suit.¹²² Persons using water for irrigation purposes from a creek branch are not necessary parties in suit to restrain enlargement of the head of the branch and consequent diversion of an undue amount of water.¹²³

§ 47. **Injunction.**—In an action to enjoin the issuance of bonds by fund commissioners, it is necessary that some of the parties to whom bonds are to be issued should be parties defendant.¹²⁴ In a bill of peace to restrain vexatious litigation, although some of the parties be mere accommodation grantees, they have a right to be heard at law in their own defense.¹²⁵ Where one of the defendants in a joint judgment sues to have the judgment perpetually enjoined, his co-defendants should be made parties to the action.¹²⁶

§ 48. **Injuries caused by negligence.**—In an action to recover for damage done to the property of the plaintiff by reason of the breaking away of a dam built by contractors, when the employers exercise no supervision, give no directions, furnish

¹¹⁹ Territory v. City of Socorro, 12 N. Mex. 177, 76 Pac. 283.

¹²⁰ American Bridge Co. v. Wheeler, 35 Wash. 40, 76 Pac. 534.

¹²¹ City of Denver v. People, 17 Colo. App. 190, 68 Pac. 114.

¹²² Farmers' High Line Canal etc. Co. v. White, 32 Colo. 114, 75 Pac. 415.

¹²³ Sander v. Wilson, 34 Wash. 659, 76 Pac. 280.

¹²⁴ Hutchinson v. Burr, 12 Cal. 103; affirmed in Patterson v. Yuba Co., 12 Cal. 105.

¹²⁵ Knowles v. Inches, 12 Cal. 212.

¹²⁶ Gates v. Lane, 44 Cal. 392.

no materials, and have not accepted the work, the contractors alone are liable.¹²⁷ After the acceptance of the work, the owner is also liable for damage resulting from faulty construction.¹²⁸ Common carriers, for loss of goods, may be sued jointly or severally.¹²⁹ And in a damage suit against a railroad for injury to a passenger, incurred while the road was in the hands of a receiver, the purchaser who takes the road subject to all liabilities incurred during the receivership is a proper defendant.¹³⁰

§ 49. Action for legacy charged on land.—Purchasers of land in unequal portions, charged with the payment of a legacy, must be joined in an action for the legacy.¹³¹

§ 50. Actions against partners.—In California, partners may be sued by their common name, whether it comprises the names of the persons associated or not.¹³² In such case the statute provides that the judgment may run against the joint and individual property of the partner served, and against the joint property of the partner not served. The constitutionality of the statute, so far as it attempts to impose a liability upon the person or property of the partner not served, has been more than doubted.¹³³ But a party can only be bound on a note executed in a firm name, who is actually a member of the firm executing the same, or has held himself out as a member so as to give the firm credit on his responsibility. So it would seem, dormant partners not disclosed need not be joined as defendants.¹³⁴ All partners are liable for fraudulent representations

¹²⁷ *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Du Pratt v. Lick*, 38 Cal. 691; *O'Hale v. Sacramento*, 48 Cal. 212; *Wabash etc. Railroad Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296; *Hughes v. Cincinnati etc. Ry. Co.*, 39 Ohio St. 461. See *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504, 23 N. E. 384, 7 L. R. A. 128.

¹²⁸ *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Fanjoy v. Seales*, 29 Cal. 249.

¹²⁹ *McIntosh v. Ensign*, 28 N. Y. 169; *Merrick v. Gordon*, 20 N. Y. 93.

¹³⁰ *Denver & R. G. v. Gunning*, 33 Colo. 280, 80 Pac. 727.

¹³¹ *Swasey v. Little*, 7 Pick. 296.

¹³² Cal. Code Civ. Proc., § 388; *Welch v. Kirkpatrick*, 30 Cal. 202, 89 Am. Dec. 85.

¹³³ *Tay v. Hawley*, 39 Cal. 93; *Davidson v. Knox*, 67 Cal. 143; *Booth v. Gamble-Robinson Co.*, 139 Cal. 175, 72 Pac. 908.

¹³⁴ *North v. Bloss*, 30 N. Y. 374; *Wood v. O'Kelley*, 8 Cush. 406; *Lord v. Baldwin*, 6 Pick. 352. See, also, *New York Dry Dock Co. v. Treadwell*, 19 Wend. 525; *Clarkson v. Carter*, 3 Cow. 84; *Clark v. Miller*, 47 Barb. 38; *Mitchell v. Doll*, 2 Har. & G. 159; *Hurlbut v. Post*, 1 Bosw. 28. See *Pitkin v. Benfer*, 50 Kan. 108, 34 Am. St. Rep. 110, 31 Pac. 695; *Hahlo v. Mayer*, 102 Mo. 93, 22 Am. St. Rep. 753, 13 S. W. 804, 15 S. W. 750.

of one made in the course of partnership business.¹³⁵ So a partner is liable to third persons for injuries occasioned by negligence, if committed in the course of the partnership business.¹³⁶ In suit to take an account and dissolve a mining partnership, all those owning interests are necessary parties defendant.¹³⁷ A partner may be sued at law by his copartner or one who has been such, where the balance has been ascertained by the act of all the partners, and agreed to as constituting such balance.¹³⁸

§ 51. Actions against principal and agent.—A principal though himself innocent, is liable for fraud or misconduct of the agent acting within the scope of his authority,¹³⁹ but not in matters beyond that scope.¹⁴⁰ But where the agent makes a contract on behalf of his principal in excess of his authority, he is liable thereon under an implied warranty of authority, even though he makes no false representations concerning his authority.¹⁴¹ And where the principal is known, he alone is liable.¹⁴² But an agent may render himself personally liable by not disclosing the name of his principal,¹⁴³ though that does not release the principal in the absence of fraud.¹⁴⁴ If on the face of an instrument not under seal, executed by an agent with competent authority, by signing his own name simply, it appears that the agent executed it in behalf of the principal, the principal and not the agent is bound.¹⁴⁵ Where a party makes a

¹³⁵ *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380.

¹³⁶ *Cotter v. Bettner*, 1 Bosw. 490; *Whittaker v. Collins*, 34 Minn. 299, 57 Am. Rep. 55, 25 N. W. 632; *Hess v. Lowry*, 122 Ind. 225, 17 Am. St. Rep. 355, 23 N. E. 150, 7 L. R. A. 90.

¹³⁷ *Settembre v. Putnam*, 30 Cal. 490.

¹³⁸ *Ross v. Cornell*, 45 Cal. 133; *Hoff v. Rogers*, 67 Miss. 208, 19 Am. St. Rep. 301, 7 South. 358; *Newby v. Harrell*, 99 N. C. 149, 6 Am. St. Rep. 503, 5 S. E. 284. As to partnerships, general and special, the powers and authority of partners, their mutual obligations and liability, etc., see Cal. Civ. Code, §§ 2424-2520.

¹³⁹ *Dwinelle v. Henriquez*, 1 Cal. 392; *Adams v. Cole*, 1 Daly, 147; *Hunter v. Hudson River Iron etc. Co.*, 20 Barb. 493; *Thomas v. Winchester*,

6 N. Y. 397, 57 Am. Dec. 455; *Smith v. Reynolds*, 8 Hun, 128; *Du Sonchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459; *Reynolds v. Witte*, 13 S. C. 5, 36 Am. Rep. 678.

¹⁴⁰ *New York Life Ins. etc. Co. v. Beebe*, 7 N. Y. 364. See, also, *Mechanics' Bank v. New York etc. R. R. Co.*, 13 N. Y. 599, 4 Duer, 570; *Marsh v. South Carolina R. R. Co.*, 56 Ga. 274.

¹⁴¹ *Anderson v. Adams*, 43 Or. 621, 74 Pac. 215.

¹⁴² *Conro v. Fort Henry Iron Co.*, 12 Barb. 27.

¹⁴³ *Nason v. Cockroft*, 3 Duer, 366; *Cabre v. Sturges*, 1 Hilt. 160; *Blake-man v. Mackay*, 1 Hilt. 266.

¹⁴⁴ *Jones v. Western Mfg. Co.*, 32 Wash. 375, 73 Pac. 359.

¹⁴⁵ *Haskell v. Cornish*, 13 Cal. 45; affirmed in *Shaver v. Ocean Mining*

purchase from an innocent agent, who afterwards parts with the money of his principal, and the purchase avails the purchaser nothing, no legal right of complaint will lie against the agent.¹⁴⁶ The principal and agent are jointly liable for an injury caused by negligence of the agent.¹⁴⁷

§ 52. **Actions for trespass.**—Generally a trespass committed by several persons acting together creates a several liability; but if the trespass is joint, all the trespassers may be joined.¹⁴⁸ A justice of the peace who issues an execution commanding the arrest of the judgment debtor, and the attorney who procures the execution to be issued, in a case in which both know that the law prohibits an arrest in such action, are jointly liable to the debtor in trespass.¹⁴⁹ Trespass lies against a municipal corporation.¹⁵⁰

§ 53. **Actions against trustees.**—In an action to carry out a trust-deed, or against a trustee, for breach of trust, all the *cestuis que trust* are necessary parties,¹⁵¹ but not in an action to set aside a trust-deed.¹⁵² A party not a trustee may be joined or not, at the option of the plaintiff.¹⁵³ In an action by one of several *cestuis que trust* to declare and enforce an implied trust, all who claim to be entitled to a portion of the trust estate are proper parties defendant.¹⁵⁴ Generally, where there is more than one *cestui que trust* and one is joined, all should be joined as

Co., 21 Cal. 45; Hall v. Crandall, 29 Cal. 571, 89 Am. Dec. 64; Love v. Sierra Nevada L. W. & M. Co., 32 Cal. 654.

¹⁴⁶ Engels v. Heatly, 5 Cal. 136.

¹⁴⁷ Phelps v. Wait, 30 N. Y. 78. See Malone v. Morton, 84 Mo. 436; Berghoff v. McDonald, 87 Ind. 549; Martin v. Benoist, 20 Mo. App. 262; Cal. Civ. Code, § 2338; and generally in relation to agency, see tit. 9, Cal. Civ. Code.

¹⁴⁸ Sumner v. Tileston, 4 Pick. 308; Creed v. Hartman, 29 N. Y. 591, 86 Am. Dec. 341; Kasson v. People, 44 Barb. 347; Woodbridge v. Cannor, 49 Me. 353, 77 Am. Dec. 263. That they may be sued jointly, see King v. Orser, 4 Duer, 431; Waterbury v. Westervelt, 9 N. Y. 598; Herring v.

Hoppock, 3 Duer, 20; Marsh v. Backus, 16 Barb. 488.

¹⁴⁹ Sullivan v. Jones, 2 Gray, 570.

¹⁵⁰ Allen v. City of Decatur, 23 Ill. 332, 76 Am. Dec. 692; Frederick v. Lansdale Borough, 156 Pa. St. 613, 27 Atl. 563.

¹⁵¹ Colgrove v. Tallmadge, 6 Bosw. 289; Bishop v. Houghton, 1 E. D. Smith, 566; Bank of British N. A. v. Suydam, 6 How. Pr. 379; Johnson v. Snyder, 8 How. Pr. 498.

¹⁵² Russell v. Lasher, 4 Barb. 232; Wheeler v. Wheedon, 9 How. Pr. 293; Scudder v. Voorhis, 5 Sandf. 271. See, also, Wallace v. Eaton, 5 How. Pr. 99.

¹⁵³ Bateman v. Margerison, 6 Hare, 499.

¹⁵⁴ Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; West v. Randall, 2

parties.¹⁵⁵ But a *cestui que trust* who has transferred his interest need not be joined.¹⁵⁶ But when such share is ascertained, each claimant may sue alone;¹⁵⁷ or for breach of trust.¹⁵⁸ Persons holding funds, and who have always dealt with them as if they were trust-funds, are liable for losses occasioned by improper investments, though they did not in fact know who the *cestui que trust* were.¹⁵⁹ So where A. was indebted to plaintiff, and conveyed his property to B., to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B., who had accepted it, and B. subsequently conveyed a portion of the property to A., without consideration, it was held that A. was a proper and necessary party to the action.¹⁶⁰

§ 54. Persons severally liable on same obligation or instrument.—Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same and separate instruments, may all or any of them be included in the same action at the option of the plaintiff.¹⁶¹ This section applies only to written obligations.¹⁶² It applies to bonds, as well as bills of exchange and promissory notes,¹⁶³ and to cases of joint and several contracts.¹⁶⁴ In Oregon, the sureties on an execution bond cannot be sued until after default in the probate court.¹⁶⁵

Persons jointly and severally liable may be sued together or separately, at the option of the plaintiff.¹⁶⁶ But in actions on

Mason, 181, Fed. Cas. No. 17424; *Armstrong v. Lear*, 8 Pet. 52, 8 L. Ed. 863; *General Mutual Ins. Co. v. Benson*, 5 Duer, 168.

¹⁵⁵ *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 305; *Railway Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438.

¹⁵⁶ *Eldredge v. Putnam*, 46 Wis. 205, 50 N. W. 595.

¹⁵⁷ *Smith v. Snow*, 3 Madd. 10.

¹⁵⁸ *Perry v. Knott*, 5 Beav. 293.

¹⁵⁹ *Ex parte Norris*, L. R., 4 Ch. 280.

¹⁶⁰ *Lucas v. Payne*, 7 Cal. 92; *Shaver v. Brainard*, 29 Barb. 25.

¹⁶¹ Cal. Code Civ. Proc., § 383. See *London etc. Bank v. Smith*, 101 Cal. 415, 35 Pac. 1027; *Powell v. Powell*, 48 Cal. 235; *Wibaux v. Life Stock Co.*, 9 Mont. 154, 22 Pac. 492.

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¹⁶² *Spencer v. Wheelock*, 11 N. Y. Leg. Obs. 329; *Tibbits v. Percy*, 24 Barb. 39.

¹⁶³ *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758; *People v. Love*, 25 Cal. 530; *Brainard v. Jones*, 11 How. Pr. 569. As to when the holders of bonds issued by a county should be made parties defendant in suit against the county, see *Hutchinson v. Burr*, 12 Cal. 103; *Patterson v. Supervisors of Yuba County*, 12 Cal. 106.

¹⁶⁴ *Humphreys v. Crane*, 5 Cal. 173; *Stearns v. Aguirre*, 6 Cal. 176.

¹⁶⁵ *Hamlin v. Kennedy*, 2 Or. 91; *Laws of Or.*, 1866, p. 55.

¹⁶⁶ *Enys v. Donnithorne*, 2 Burr. 1190; *Eccleston v. Clipsham*, 1 Saund. 153; *Alfred v. Watkins*, 1 Code Rep. 343; *Kelsey v. Bradbury*, 21 Barb.

joint and several obligations, an administrator cannot be joined with the survivor, because against one the judgment would be *de bonis testatoris*, and against the other *de bonis propriis*.¹⁶⁷ To create a several liability, express words are necessary.¹⁶⁸ In New York, it seems the plaintiff may sue one or all of the obligors of a joint and several bond; but in strictness of law, he cannot sue an intermediate number.¹⁶⁹ The practice is, however, different in California, where one or all of any intermediate number may be made defendants, at the option of the plaintiff.¹⁷⁰ So, also, in cases of a promissory note, and mortgage to secure the same.¹⁷¹ Although the several parties to a bill or note may be sued in one action, yet their being so sued does not make them jointly liable,¹⁷² or joint debtors.¹⁷³ The common-law rule, that where defendants are sued on a joint contract, recovery must be had against all or none is modified by the code.¹⁷⁴ But one of two joint debtors, not served with process, is not a proper party defendant in an action upon the judgment against the party on whom service of process was made.¹⁷⁵ So, where joint debtors reside in different states, they may be sued separately.¹⁷⁶ It seems that different parties, liable for the same sum, but under different contracts, cannot be joined in the same action.¹⁷⁷ So held in New York, as to a guaranty written under a promissory note.¹⁷⁸ And that the guarantor cannot be sued in the same

531; *Parker v. Jackson*, 16 Barb. 33; *Brainard v. Jones*, 11 How. Pr. 569; *De Ridder v. Schermerhorn*, 10 Barb. 638; *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413; *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, 28 Pac. 795; *Lux v. McLeod*, 19 Colo. 465, 36 Pac. 246.

¹⁶⁷ *May v. Hanson*, 6 Cal. 642.

¹⁶⁸ *Brady v. Reynolds*, 13 Cal. 31.

¹⁶⁹ *Leroy v. Shaw*, 2 Duer, 626; *Carman v. Plass*, 23 N. Y. 286; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46, 7 L. Ed. 47; *Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973; *Brainard v. Jones*, 11 How. Pr. 569; *Loomis v. Brown*, 16 Barb. 325; *Phalen v. Dingee*, 4 E. D. Smith 379; *Allen v. Fosgate*, 11 How. Pr. 218.

¹⁷⁰ *Lewis v. Clarkin*, 18 Cal. 400. See, also, *People v. Love*, 25 Cal. 520; *Code Civ. Proc.*, § 383.

¹⁷¹ *Eastman v. Turman*, 24 Cal. 379.

¹⁷² *Alfred v. Watkins*, 1 Code Rep. (N. S.) 343.

¹⁷³ *Kelsey v. Bradbury*, 21 Barb. 531; *Farmers' Bank v. Blair*, 44 Barb. 642.

¹⁷⁴ *Cal. Code Civ. Proc.*, § 989; *People v. Frisbee*, 18 Cal. 402; *Lewis v. Clarkin*, 18 Cal. 399.

¹⁷⁵ *Tay v. Hawley*, 39 Cal. 93.

¹⁷⁶ *Brown v. Birdsall*, 29 Barb. 549.

¹⁷⁷ *Allen v. Fosgate*, 11 How. Pr. 218; *Glen Cove Mut. Ins. Co. v. Harrold*, 20 Barb. 298; *De Ridder v. Schermerhorn*, 10 Barb. 638. See, also, *Brown v. Curtiss*, 2 N. Y. 225; *Barker v. Cassidy*, 16 Barb. 177; *White v. Low*, 7 Barb. 204.

¹⁷⁸ *Brewster v. Silence*, 8 N. Y. 207; affirming *S. C.*, 11 Barb. 144; *Kelsey v. Bradbury*, 21 Barb. 531;

action with the maker.¹⁷⁹ It was there held, also, that the liability of a purchaser and his guarantor is several.¹⁸⁰ So, also, of a lessee and his surety.¹⁸¹

§ 55. On judgment.—And in case of verdict against two defendants in an action *ex delicto*, the court may set aside the action and dismiss as to one and render judgment against the other, each defendant being severally liable for the whole damage.¹⁸²

If two different mining and reduction works pollute the waters of a creek each one is liable for the damage it does, and not for what the other does, regardless of the difficulty in determining the amount.¹⁸³

§ 56. Joinder of parties not bound.—Where a mining company and its manager are both sued as principal for damages for breach of contract, the company has no ground to complain because the manager, who is not bound, is made a party to the suit, if in fact the company is bound by the contract.¹⁸⁴

§ 57. Joinder of corporation.—In an action by a stockholder seeking relief against directors who are improperly diverting the funds of the corporation, it is not necessary to join as parties directors whose acts are not complained of, but it is necessary that the corporation should be joined, as the action, though in the name of the plaintiff, is in reality in behalf of the corporation;¹⁸⁵ nor need it make all of the alleged wrongdoers defendants.¹⁸⁶ In recovery from stockholders upon a judgment previously obtained against the corporation, it is an equitable proceeding, and all the stockholders within the jurisdiction must be made parties, to the end that all the debts of the corporation may be adjudged and assessments made sufficient to satisfy such

Alfred v. Watkins, 1 Code Rep. (N. S.) 343; Draper v. Snow, 20 N. Y. 331; 75 Am. Dec. 408; Church v. Brown, 29 Barb. 486.

¹⁷⁹ Allen v. Fosgate, 11 How. Pr. 218.

¹⁸⁰ Leroy v. Shaw, 2 Duer, 526; Spencer v. Wheelock, 11 Leg. Obs. 329. But see Cal. Code Civ. Proc., § 383, and Civ. Code, title "Negotiable Instruments."

¹⁸¹ Phalen v. Dingee, 4 E. D. Smith 379.

¹⁸² Birkel v. Chandler, 26 Wash. 241, 66 Pac. 406.

¹⁸³ Watson v. Colusa-Parrott Min. Co., 31 Mont. 513, 79 Pac. 14.

¹⁸⁴ Ruffatti v. Societe Lexington Min. Co., 10 Utah, 386, 37 Pac. 591.

¹⁸⁵ Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

¹⁸⁶ Morrison v. Blue Star Nav. Co., 26 Wash. 541, 67 Pac. 244.

debts.¹⁸⁷ In an action by a number of stockholders against the officers of a corporation for an accounting, the corporation is a necessary party plaintiff, since any judgment against defendants must be in favor of the corporation, and a judgment cannot be rendered in favor of one not a party to the action.¹⁸⁸

An unauthorized levy of an assessment and threat to sell stock for delinquency therein is sufficient cause for action against the directors, but if attempt is made to have corporate notes executed by the directors to and in favor of a bank set aside for fraud, the bank itself is a necessary party.¹⁸⁹

¹⁸⁷ Waller v. Hamer, 65 Kan. 168,
69 Pac. 185.

¹⁸⁹ McConnell v. Comb. Min. & Mill.
Co., 31 Mont. 563, 79 Pac. 243.

¹⁸⁸ Peck v. Peck, 33 Colo. 421, 80
Pac. 1063.

CHAPTER VII.

SUBSTITUTION OF PARTIES AND PLEADINGS.

§ 58. In general.—An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of any disability of a party, the court on motion may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.¹ It has been the uniform practice in California to permit the substitution to be made, on the suggestion of the death of the former party and satisfactory proof, on an *ex parte* motion, of the appointment and qualification of the administrator.² In ejectment, if plaintiff parts with the title pending the action, it may be continued in his name unless the grantee applies to be substituted.³ In an action of replevin, where the defendant pleaded title and right of possession to the property, the court properly allowed the action upon the defendant's death to be continued by his personal representative.⁴ And if one purchases from the lessor of a defendant in ejectment, the purchaser is entitled to continue the defense either in the name of the tenant, or to be substituted in his place.⁵ In ejectment, the cause of action survives on the death of a party.⁶

¹ Cal. Code Civ. Proc., § 385; Alaska Codes, pt. 4, c. 3, §§ 3, 7; Ariz. Civ. Code, pars. 1296-1313; Idaho Rev. Codes, § 4108; Mont. Rev. Codes, §§ 6494, 6495; Nev. Comp. Laws, § 3111; N. Mex. Comp. Laws, § 2685; Or. B. & C. Codes, §§ 38-41; Utah Rev. Stats., §§ 2920-1; Wash. Bal. Codes, § 4837; Wyo. Rev. Stats., § 3465.

² Taylor v. Western Pacific R. R. Co., 45 Cal. 337. See, also, Johnson v. Superior Court, 60 Cal. 578; Strong v. Eldridge, 8 Wash. 595, 36 Pac. 696;

Campbell v. West, 93 Cal. 653, 29 Pac. 219.

³ Camarillo v. Fenlon, 49 Cal. 202; Barstow v. Newman, 34 Cal. 90; Moss v. Shear, 30 Cal. 467. See Smith v. Harrington, 3 Wyo. 503, 27 Pac. 803. Substitution of execution creditor as defendant in replevin. France v. First Nat. Bank, 3 Wyo. 187, 18 Pac. 748.

⁴ O'Neill v. Murry, 6 Dak. 107, 50 N. W. 619.

⁵ Mastick v. Thorp, 29 Cal. 446.

⁶ Barrett v. Birge, 50 Cal. 655.

Where all the parties are before the court, in an action that should be prosecuted by the heirs of a decedent, it is proper to permit them to be substituted to prosecute such action, in lieu of the administrator, who has no right to maintain it.⁷

§ 59. **Bankruptcy.**—The bankruptcy of a party against whom a judgment has been rendered, though adjudicated before appeal taken, will not prevent the prosecution of the appeal in his name. The appeal may be prosecuted either in the name of the bankrupt or of his assignee.⁸

§ 60. **Transfer of interest.**—The California statute authorizing the substitution of parties upon transfer of interests, is permissive and appeals to the discretion of the court.⁹ That clause of section 121 of the New York code, which provides that in case of “any other” transfer of interest the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action, contemplates a transfer other than by death—contemplates an existing, pending action, and the substitution of one person in the place of another.¹⁰ Under the Oklahoma statute (Stats. 1893, § 3912) authorizing the continuance of an action in the name of the real party in interest, the court may order the substitution of a person to whom the interests of an original party have been transferred.¹¹ After the issues in a cause are all made up, a person claiming to be assignee of a cause of action may be substituted as plaintiff, and if so substituted, need not file a supplemental complaint; he takes the place of the original plaintiff, who ceases to be a party to the suit.¹² It is otherwise, however, under the Washington statutes.¹³ Where a person claiming to be assignee of a cause of action is substituted as plaintiff, and the cause proceeds and a judgment is rendered in his name, it is too late to

⁷ *Farrell v. Puthoff*, 13 Okla. 159, 74 Pac. 96.

⁸ *O'Neil v. Dougherty*, 46 Cal. 575. Substitution of receiver for defendant. See *Jackson v. Dines*, 13 Colo. 90, 21 Pac. 918.

⁹ Code Civ. Proc., § 385; *Fay v. Steubenrauch*, 138 Cal. 656, 72 Pac. 156.

¹⁰ *Kissam v. Hamilton*, 20 How. Pr.

369. But see Cal. Code Civ. Proc., § 385.

¹¹ *Anderson v. Ferguson*, 12 Okla. 307, 71 Pac. 225.

¹² *Virgin v. Brubaker*, 4 Nev. 31; *Warren v. Robison*, 25 Utah, 205, 70 Pac. 989.

¹³ §§ 4824, 4837; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 612, 68 Pac. 389.

object in the appellate court that he did not file a supplemental complaint showing his interest.¹⁴

In the practice, where the names of the parties to an action have to be changed, it is usually done by suggestion or stipulation only; for in the case of the death of one of the parties, or marriage of one of them, the labor of drawing up formal affidavits and petitions is by our practice generally dispensed with.¹⁵

§ 61. **Death, effect of.**—If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on real estate, but must be paid in due course of administration.¹⁶ In such case, however, it is error to move for new trial or to take appeal, without suggesting the death and bringing in the representative of the deceased, of which such representative must be notified.¹⁷ If such representative is substituted on motion of the adverse party but no notice is given to him, and he does not appear, and the deceased is named in the judgment, the executor is not affected by it, and the judgment as to him is a nullity.¹⁸ The death of the wife without issue after suit brought by herself and husband for the homestead defeats a recovery by the husband, though the right to recover existed at the commencement of the suit.¹⁹

§ 62. **Partition.**—In a suit in chancery for partition, one of the defendants died after the bill had been taken as confessed as against him. The suit was prosecuted to judgment without bringing in his heirs (who were not parties to the suit), and after sale under the judgment and delivery of the master's deed, an order was made reviving the suit against his heirs, who thereafter made application to the court in relation to the disposition of the proceeds; it was held that the heirs were not bound by the decree. By the death of their ancestor the action became defective, and the title which he had at the time of his death could not be

¹⁴ *Virgin v. Brubaker*, 4 Nev. 31; Substitution of transferees of interest. See *Smith v. Harrington*, 3 Wyo. 505, 27 Pac. 803; *Malone v. Big Flat etc. Mining Co.*, 93 Cal. 384, 28 Pac. 1063.

¹⁵ But see Cal. Code Civ. Proc., §§ 370, 385.

¹⁶ Cal. Code Civ. Proc., § 669.

¹⁷ *Judson v. Love*, 35 Cal. 463; *Shartzer v. Love*, 40 Cal. 93.

¹⁸ *McCreery v. Everding*, 44 Cal. 284; *Symes v. Charpiot*, 17 Colo. App. 463, 69 Pac. 312.

¹⁹ *Gee v. Moore*, 14 Cal. 472.

affected without bringing in those who succeeded to his interests.²⁰

§ 63. **Practice.**—The death of a party *pendente lite* should be made known by suggestion of that fact to the court, and the action continued by order of the court against the representative of the party deceased, of which he must be duly notified before he can be affected by further proceedings in the action. Where, in an action by J. against L. and others, L. died after verdict rendered for defendants, and thereafter J. moved for a new trial, without suggestion made of the death of L., or substitution of his successor in interest, and appealed from the judgment rendered on the verdict and an order denying a new trial, it is held that all said proceedings, except the rendition of judgment upon said verdict, were void, and that the appeal as to L. should be dismissed. Where a party litigant dies after a verdict, the authority of the attorney to act for him is thereby determined, and he can neither give nor receive notice of motion for new trial or appeal.²¹

§ 64. **Order conclusive.**—An order of revivor in the name of A. "as executor" of a deceased plaintiff, standing in full force at the time of the trial, is conclusive to show that the action has been properly revived, and that A. can recover all that the testator might have recovered.²²

§ 65. **Substitution of parties—Matters of practice, etc.**—Application for substitution must be made without unreasonable delay.²³ Where, after the commencement of an action, the plaintiff has become insane, it is error to substitute his guardian as sole plaintiff, but the suit should be prosecuted in the name of the plaintiff, as an insane person, by his guardian.²⁴ An erroneous order, making such substitution, should not be given effect as a dismissal of the action as to the incompetent plaintiff.²⁵ Where, pending an action, there is a transfer of interest which is set up

²⁰ *Randall v. Mumford*, 18 Ves. 424; *Story's Eq. Pl.*, §§ 329, 331, 354, 369; *Hind's Ch. Pr.* 46; *Kelly v. Hooper*, 3 Yerg. 395; *Garr v. Gomez*, 9 Wend. 649; *Mandeville v. Riggs*, 2 Pet. 482, 487, 7 L. Ed. 493.

²¹ *Judson v. Love*, 35 Cal. 463; *Symes v. Charpiot*, 17 Colo. App. 463, 69 Pac. 312.

²² *Underhill v. Crawford*, 29 Barb. 664, s. c., 18 How. Pr. 112.

²³ *Switzer v. Eadie*, 71 Kan. 859, 80 Pac. 961.

²⁴ *Justice v. Ott*, 87 Cal. 530, 25 Pac. 691; *O'Shea v. Wilkinson*, 95 Cal. 454, 30 Pac. 588.

²⁵ *Dixon v. Cardozo*, 106 Cal. 506, 39 Pac. 857.

by a supplemental complaint, a judgment in favor of the transferee will be reversed if there be no order of the court substituting him as in the action.²⁶ If a party to an action die after the rendition of judgment, and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminates, and any subsequent action of the attorney, before substitution, will not bind the representatives of the deceased, or any other party in interest.²⁷ Where the court has acquired no jurisdiction of the administrator of an estate, or of the subject-matter of the litigation, it has no power to substitute another party to the action, and a motion for that purpose will be overruled.²⁸

In case this order is made without notice, as it often is in practice, the form should be varied accordingly, and the executor notified of its entry; which is generally done by serving a copy of the order on him. The correct practice is to enter an order of substitution of a party in the minutes as a distinct order made before judgment.²⁹

§ 66. Substituting true name.—When plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and that defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly.³⁰ But a failure to substitute the true name of a defendant will not warrant a reversal of the cause.³¹

§ 67. Substitution of papers.—If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.³² There can be no judgment without pleadings on file, original or substituted.³³

§ 68. Lost pleading.—If a pleading be lost, it can only be supplied by motion based on affidavits showing what the lost pleading contained; and a service of personal notice of motion on the opposite party must be sufficiently explicit in form to

²⁶ *Lowell v. Parkinson*, 4 Utah, 64, 6 Pac. 58. Compare *Thomas v. Morris*, 8 Utah, 284, 31 Pac. 446.

²⁷ *Coffin v. Edgington*, 2 Idaho, 595, 23 Pac. 80.

²⁸ *McCormick Harvesting Co. v. Snedigar*, 3 S. Dak. 625, 54 N. W. 814.

²⁹ *Cockrill v. Clyma*, 98 Cal. 123, 32 Pac. 888.

³⁰ Cal. Code Civ. Proc., § 474.

³¹ *Blackburn v. Bucksport*, 7 Cal. App. 649, 95 Pac. 668.

³² Cal. Code Civ. Proc., § 1045.

³³ *Grimison v. Russell*, 11 Neb. 469, 9 N. W. 647.

enable him to controvert the affidavits submitted.³⁴ Substitution of pleadings or papers in a case is always within the discretion of the court; and no notice of the motion to apply for it need be given when the notice of it can be of no use.³⁵

FORMS IN SUBSTITUTIONS.

§ 69. Petition by receiver to be substituted as a party to a pending action.

Form No. 1.

[TITLE.]

To the . . . court of . . . county:

The petition of R. C. respectfully alleges:

1. That by an order duly made and entered in an action pending in the above-entitled . . . court, on the . . . day of . . . , 19.., wherein A. B. is plaintiff, and C. D. defendant, your petitioner was appointed receiver of [state what he was appointed receiver of and his duties generally] which trust he accepted, duly qualified under and is now engaged in the duties thereof.

2. That the action above entitled was pending at the date of such appointment, and is at issue, and the object of the same is [here state the object of the action in general terms].

3. That it is necessary for the proper protection of the interests committed to your petitioner as such receiver that he be substituted for C. D. in said action to defend the same.

Your petitioner, therefore, prays that he be substituted in the place of C. D. as defendant in the above entitled action, to defend the same.

[DATE.]

R. C.

[Add verification as in case of a pleading.]

§ 70. Notice of motion to substitute officer's successor.

Form No. 2.

[TITLE.]

Please take notice that on the affidavit of A. B., of which a copy is herewith served, the undersigned will move the court, at a special term thereof, to be held at . . . , on the . . . day of . . . , 19.., at . . . o'clock in the forenoon, or as soon thereafter as counsel can be heard, to substitute W. X., supervisor of the town

³⁴ People v. Cazalis, 27 Cal. 522.

³⁵ Benedict v. Cozzens, 4 Cal. 381.

of . . . [or other official designation], in the place of Y. Z., as plaintiff [or defendant] in this action; or for such other relief as may be just.

[DATE.]

[SIGNATURE.]

§ 71. Affidavit therefor.

Form No. 3.

M. N., being duly sworn, says that he is the attorney of the plaintiff [or defendant] in this action; that on the . . . day of . . . last, W. X., of . . . , was duly elected [or appointed] to the office of . . . of the [town of . . . , in the] county of . . . , in place of the defendant Y. Z.; and that on the . . . day of . . . last, the said W. X. entered upon the duties of said office, and still holds the same.

[JURAT.]

[SIGNATURE.]

§ 72. Order thereon.

Form No. 4.

[TITLE.]

[At a special term, etc.]

On reading and filing the affidavit of M. N. [and proof of due service of notice], and on motion of M. N., after hearing O. P. [or no one appearing] in opposition;

Ordered, that W. X., of . . . , [designating official character], be substituted as the [defendant] herein, in place of Y. Z., (and he is hereby required to appear and answer within . . . days after service of a copy of this order).

§ 73. Affidavit for substitution by assignee of plaintiff.

[TITLE.]

Form No. 5.

[VENUE.]

E. F., being duly sworn, deposes and says:

I. That on or about the . . . day of . . . , 19.., one A. B. commenced an action in this court against one C. D. for [here state the cause of action]; that issue was joined therein by the service and filing of the defendant's answer on the . . . day of . . . , 19..; that said cause is upon the calendar of this court awaiting trial.

II. That on the . . . day of . . . , 19.., and while said action was still pending, said A. B., plaintiff in said action, duly assigned

and transferred the [promissory note] in the complaint mentioned, for a valuable consideration, to affiant, who is now the owner and holder thereof [or sold and conveyed to affiant all his right, title, and interest in and to the real property in controversy in this action, and that affiant is now the owner thereof].

Wherefore affiant prays that he may be substituted as plaintiff in said action in place of said A. B., and that said action may be continued in his name, and that he may have such other relief as may be just.

[JURAT.]

[SIGNATURE.]

§ 74. Affidavit by husband after marriage of female plaintiff to continue cause in joint names of husband and wife.

Form No. 6.

[TITLE.]

[VENUE.]

I. [As in form 5.]

II. That pending said action, and on the . . . day of . . . , 19.., the said A. B. was married to this affiant E. F., who thereby became, and now is, a necessary party plaintiff herein, as he is advised and believes.

Wherefore affiant prays the order of this court that said action may be continued by said A. B. and this affiant jointly as plaintiffs, against C. D., and that they may have leave to amend the complaint as they may be advised, and such other relief as may be just.

[JURAT.]

[SIGNATURE.]

§ 75. Order by consent substituting administrator as plaintiff, without prejudice to proceedings.

Form No. 7.

[TITLE.]

On reading and filing the affidavit of E. F., showing the death of A. B., the plaintiff in the above-entitled action, and the granting of letters of administration to P. Q., by the probate court of the county of . . . , and on motion of E. F., the plaintiff's attorney, the defendant's attorney consenting thereto:

It is ordered that this action be and the same is hereby revived and continued in the name of the said P. Q., administrator of the estate of A. B., deceased, as plaintiff; and that the said adminis-

trator be and he is hereby substituted as plaintiff in the place and stead of the said A. B., deceased, and that such revivor and continuance be without prejudice to any of the proceedings already had in this action.

[DATE.]

[SIGNATURE.]

§ 76. Affidavit by defendant to have plaintiff's executor substituted.

Form No. 8.

[TITLE.]

[VENUE.]

S. T., being duly sworn, deposes and says, I am the defendant in the above-entitled action:

I. That on or about the . . . day of . . . , 19.., the above-named A. B. commenced an action in this court against this affiant, for [state cause of the action and condition, as in form 5, and if defendant has asked affirmative relief in his answer, set it forth].

II. That affiant is informed and believes that A. B., the above-named plaintiff, died on or about the . . . day of . . . , 19.. last having first made and published his last will and testament in due form of law, by which, among other things, he appointed P. Q. his executor; that said will has been duly admitted to probate in the probate court of the county of . . . , and letters testamentary issued to the said P. Q., on the . . . day of . . . , A. D. 19.., and he has duly qualified and entered upon his duties as such executor, but to the best of affiant's information and belief, has hitherto failed to make any application to have the above-entitled action continued by him as plaintiff.

Wherefore affiant prays that the above-entitled action may be continued in the name of said executor, or that the complaint herein be dismissed, or for such other order as may be just.

[JURAT.]

[SIGNATURE.]

§ 77. Notice of motion on behalf of defendant for substitution of plaintiff's executor.

Form No. 9.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit, a copy of which is herewith served, and the papers on file in this cause, the under-

signed will move the court, at the courtroom thereof, at . . . , on the . . . day of . . . , 19.., at the hour of . . . , in the forenoon, or as soon thereafter as counsel can be heard, for an order directing the above-entitled action to be continued by P. Q., as executor of the last will and testament of [or administrator of the estate of] C. D., plaintiff above named, deceased, in place of said deceased plaintiff.

[DATE.]

[SIGNATURE.]

§ 78. Order of substitution.

Form No. 10.

[TITLE.]

On reading and filing the affidavit of J. R., dated the . . . day of . . . , 19.., and the pleadings in this action, and proof of due service of notice of this motion, and on motion of S. T., counsel for defendant, and after hearing G. H., of counsel for said P. Q., executor of A. B., the deceased plaintiff:

It is ordered, etc.

[DATE.]

[SIGNATURE.]

§ 79. Novation, by substitution of new creditor.

Form No. 11.

[TITLE.]

That on the . . . day of . . . , 19.., at . . . , at the request of the plaintiff, he made his promissory note [or his bond, under seal] to one M. N. for . . . dollars, in discharge of the indebtedness stated in the complaint.

§ 80. The same, in case of a promise to apply indebtedness upon a mortgage by the plaintiff.

Form No. 12.

[TITLE.]

I. That before the delivery by the plaintiff to the defendants of the goods in the complaint mentioned, the said goods, or part thereof, were mortgaged by the plaintiff to one M. N., who, by virtue of said mortgage, had a lien and control over the said goods, and the said plaintiff was unable to deliver them to the defendants; and in order that he might deliver said goods to the defendants, freed and discharged from said mortgage, and all claim and lien of the said M. N., it was then and there

agreed by and between the defendants and the plaintiff and the said M. N., that in consideration that he, the said M. N., should and did, at the request of said plaintiff, release the said goods of and from all his lien and claim thereof, to the end that the same might be delivered by the plaintiff to the defendants, free of said mortgage and lien; that the defendants should, before payment for said goods, deduct and retain out of any moneys that should be or become due from them, enough to be applied to satisfy and discharge, so far as the same would extend, any sum which at the time of such payment should be due from plaintiff to M. N. on said mortgage.

II. That the said M. N., relying on such agreement, and in consideration thereof, did, after the making of said agreement, and before the delivery of said goods to the defendants, and at the request of said plaintiff, release and discharge the said goods from the said mortgage and his claim or lien thereon.

III. That afterwards, upon an accounting between the parties, there was found due from the plaintiff to the said M. N., a sum exceeding the amount due from the defendants; namely, the sum of . . . dollars, and interest thereon from the . . . day of . . . 19.., and of which the defendants then and there had notice.

IV. That the defendants thereupon paid to the said M. N. [or, at the request of said M. N., held and retained to and for his use and benefit] the said sum due from the defendants in payment and satisfaction, so far as the same would extend, of the said then existing indebtedness of the plaintiff to the said M. N., and which the said M. N. was then and there ready and willing should be applied, and it was applied, in satisfaction and discharge, so far as the same would extend, of the said then indebtedness of the said plaintiff to said M. N., in pursuance of the said agreement.

§ 81. Order for revivor and continuance.

Form No. 13.

[TITLE.]

On reading and filing the petition of C. D., dated the . . . day of . . . , 19.., and the pleadings in this action [and the proposed supplemental complaint herein, and proof of due service of notice of this motion], and on motion of Q. R., counsel for said C. D., assignee [or receiver, or executor, or administrator, or heir] of the plaintiff, deceased, and after hearing O. P., of counsel for the defendant [or no one appearing], in opposition:

Ordered, that the above-entitled action be continued in the names of C. D. and E. F., as executors of A. B., plaintiff above named, [or that the complaint herein be dismissed so far as the interests of C. D. and E. F., executors of A. B., plaintiff above named, are concerned; and that the defendant have leave to enter judgment against said C. D. and E. F., as executors, for the costs of the action, with . . . dollars, costs of this motion].

§ 82. Affidavit for supplying the place of a lost pleading.

Form No. 14.

[TITLE.]

[VENUE.]

I. On the . . . day of . . . , 19.., a complaint was filed in the above-named court, in this action, of which the following is a true copy.

II. That the said original complaint has been lost or mislaid, and that after search made by the clerk of the said court, the same cannot be found.

III. That this affiant does not know where the said original complaint now is.

CHAPTER VIII.

GENERAL RULES OF PLEADINGS.

§ 83. **Pleadings defined.**—The definition of pleadings in the several codes is substantially as follows:

The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

The codes are practically uniform in their statements as to the pleadings allowed on the part of the plaintiff and defendant, the only difference being that in some states a reply to the answer is required in some cases.

Under the codes the only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer.

Those allowed on the part of the defendant are:

1. The demurrer to the complaint;
2. The answer.

This code definition is merely a statutory declaration of the common-law definition admirably given by Chitty as “the statement in a logical and legal form of the facts which constitute the plaintiff’s cause of action or the defendant’s ground of defense: it is the formal mode of alleging that, upon the record, which would be the support of the action or the defense of the party in evidence.”¹

Blackstone (bk. III, chap. 20) defines pleadings as the “mutual altercations between the plaintiff and defendant.” In other words, whenever there is submitted to a court for adjudication a proposition of fact or of law which is affirmed by one party and denied by the other, no matter how the issue is made, whether orally or in writing, whether formally or informally, the affirmation by one party and the denial by the other constitute pleadings; such affirmation being in substance and effect a declaration or complaint and such denial a plea or answer.²

¹ Chit. Pl. 235.

² Tarbox v. Adams County Supervisors, 34 Wis. 558.

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§ 84. **Object of pleadings.**—As may be inferred from what has just been said the object of pleadings is the production of a material issue between the parties,—that is, a material matter of law or fact affirmed upon the one side and denied upon the other, and which is the matter disputed between the parties and to be tried and determined by the court or jury.³ In other words, the pleadings are but the forms intended as the basis of the proof to be submitted at the trial of the issue.

The foregoing is substantially a definition of the term “issue,” both under the codes and at common law. “Issues arise upon the pleadings where a fact or conclusion of law is maintained by the one party, and is controverted by the other.”⁴ They are of two kinds—of law, and of fact. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof. An issue of fact arises,— 1. Upon a material allegation in the complaint controverted by the answer; 2. Upon new matters in the answer, except an issue of fact is joined thereon.⁵ The statement of new matter in the answer, in avoidance, or constituting a defense or counterclaim, must on the trial be deemed controverted by the other party.⁶ Such a pleading as an “additional answer” is unknown to the code system of pleading; but where the plaintiff, without questioning it by motion or otherwise in the first instance, joins issue thereon, it makes one of the issues in the case.⁷ The codes of some few of the states require a replication by the plaintiff to new matter set up in the answer; but the rule above stated prevails generally.

§ 85. **Construction of pleadings.**—The California code⁸ provides that “the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined are those prescribed by this code.” But this does not mean that the rules of the common law and the decisions of the courts thereunder are to be disregarded when the sufficiency of a pleading is in question. The codes can do no more, and pretend to do no more, than to state general rules to be followed in construing pleadings. These rules are not exclusive of other rules, and courts should still resort to the common-law rules and the decisions construing them.

³ Estee's Pl. & Pr., § 178.

⁴ Cal. Code Civ. Proc., § 588.

⁵ Cal. Code Civ. Proc., §§ 588-590.

⁶ Cal. Code Civ. Proc., § 462.

⁷ Greig v. Clement, 20 Colo. 167, 37 Pac. 960.

⁸ Cal. Code Civ. Proc., § 421.

The familiar common-law rule, that a pleading is to be construed most strongly against the pleader, has been somewhat relaxed by the codes. The California Code of Civil Procedure provides that in the construction of a pleading for the purpose of determining its effect its allegations must be liberally construed with a view to substantial justice between the parties.⁹ Similar provisions are to be found in the codes of other states.¹⁰ And pleadings are to be construed with greater liberality when the parties go to trial on an issue of fact than when the sufficiency of the pleadings is tested by demurrer,¹¹ or on motion.¹² "Substantial justice," in this connection, means substantial justice to be ascertained and determined by fixed rules and positive statutes.¹³

It will be noticed that this rule of construction is given for the purpose of "determining the effect" of a pleading. It does not entirely abrogate the common-law rule of strict construction. That allegations should be liberally construed does not mean that the omission of substantial averments should be disregarded.¹⁴ In the absence of a special demurrer, if a complaint, or any allegation of a complaint, is capable of different constructions, that which the plaintiff gives it, or which the court finds necessary to support the action, will be given.¹⁵ But the failure to aver material facts, in a verified complaint especially, must be construed as implying that they do not exist, and therefore could not be averred;¹⁶ the law will not assume anything in favor of a party which has not been averred by him.¹⁷

Where the language of a pleading is ambiguous, after giving to it a reasonable intendment, it should be resolved against the pleader.¹⁸ This is especially true on appeal from a judgment rendered after refusal to amend; where a general and special demurrer to a complaint has been sustained, and the plaintiff has

⁹ Cal. Code Civ. Proc., § 452.

¹⁰ Or. B. & C. Codes, § 85; N. Y. Code Civ. Proc., § 159; Idaho Rev. Codes, § 4207; Nev. 1 Comp. Laws § 1133; Wash. Bal. Codes, § 94.

¹¹ White v. Spencer, 14 N. Y. 247; St. John v. Northrup, 23 Barb. 26; Stutsman County v. Mansfield, 5 Dak. 78, 37 N. W. 304.

¹² Wall v. Buffalo Water Works, 18 N. Y. 119.

¹³ Stevens v. Ross, 1 Cal. 95.

¹⁴ Callahan v. Laughran, 102 Cal. 476, 36 Pac. 835; Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 Pac. 395; Spear v. Downing, 34 Barb. 523; Estee's Pl. & Pr., § 199.

¹⁵ Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186.

¹⁶ Callahan v. Laughran, 102 Cal. 476, 36 Pac. 835.

¹⁷ Cruger v. Hudson River R. R. Co., 12 N. Y. 201.

¹⁸ J. Thompson & Sons Mfg. Co. v. Perkins, 97 Iowa, 607, 66 N. W. 874.

refused to amend, all ambiguities and uncertainties must be construed against him.¹⁹ A pleading which contains allegations both affirming and denying a particular fact carries falsehood on its face, and the court is justified in accepting as true the allegation most disadvantageous to the pleader.²⁰ After verdict, however, when there has been no motion to make pleadings more definite and certain, they will be liberally construed to sustain the judgment.²¹

§ 86. **Construction of verified pleadings.**—The general rules for the construction of pleadings apply, of course, as well to verified as unverified pleadings, the only possible difference being that in a case where a pleader undertakes to support his allegation of facts by his solemn oath the old rule of strict construction might be applied more closely. It must always be assumed that a pleader has stated his claim as strongly as he can safely do so, and the failure to aver material facts in a verified complaint must be construed as implying that they do not exist, and therefore could not be averred in a complaint under oath.²²

Where an expression is capable of different meanings, that meaning should be taken which will support the allegation, rather than the one which would defeat it.²³ And when a word has two meanings in law, differing in degree merely, it will be understood in its larger sense, unless it appears to be used in its narrower sense.²⁴ In no case where the rule of strict construction is urged will it be applied if the result would be to make the pleading absurd.²⁵

A verified pleading must be construed so as to make all its parts harmonize, if possible.²⁶ The whole pleading must be construed together; and it is not proper to take an isolated sentence, separate it from its context, and give effect to it as an independent averment, unless upon the whole pleading it appears to have been

¹⁹ McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69.

²⁰ Lasch v. Pickett, 36 Kan. 216, 12 Pac. 822.

²¹ Fisk v. Henarie, 13 Or. 156, 9 Pac. 322; Johnson v. Leonhard, 1 Wash. 564, 20 Pac. 591.

²² Callahan v. Laughran, 102 Cal. 476, 36 Pac. 835.

²³ 1 Chit. Pl. 237; Vernon v. Keyes, 4 Taunt. 492; Gage v. Acton, 1 Polk. 325; The King v. Stephens, 5 East, 244; Pender v. Dicken, 27 Miss. 252.

²⁴ Miller v. Miller, 33 Cal. 353.

²⁵ Marshall v. Shafter, 32 Cal. 176.

²⁶ Ryle v. Harrington, 14 How. Pr. 59, 4 Abb. Pr. 421.

so intended.²⁷ It has even been held that the plaintiff's complaint and reply should be read together, when not repugnant, to determine his intent.²⁸ The demand for judgment and the summons may be consulted in case of doubt,²⁹ and even the caption of a petition may be resorted to.³⁰

General averments in a pleading must give way to specific averments.³¹ An averment of a legal conclusion at variance with an admitted fact will be disregarded.³² So, where an action is brought on a written contract, which is set out in the complaint, such writing will control any allegation purporting to state the legal effect of the contract.³³

²⁷ *Farish v. Coon*, 40 Cal. 33; *Bates v. Babcock*, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745.

²⁸ *Lavery v. Arnold*, 36 Or. 84, 58 Pac. 524, 57 Pac. 906.

²⁹ *Rodgers v. Rodgers*, 11 Barb. 595; *Sellar v. Sage*, 12 How. Pr. 531; *Chambers v. Lewis*, 2 Hilt. 591.

³⁰ *McCloskey v. Strickland*, 7 Iowa, 259.

³¹ *Moyer v. Fort Wayne etc. Ry. Co.*, 132 Ind. 88, 31 N. E. 567; *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343; *Spargus v. Romine*, 38 Neb. 736, 57 N. W. 523.

³² *Jones v. Phoenix Bank*, 8 N. Y. 235; *Robinson v. Stewart*, 10 N. Y. 189.

³³ *Patrick v. Colorado Smelting Co.*, 20 Colo. 263, 38 Pac. 236.

CHAPTER IX.

FORMS OF ACTIONS.

§ 87. **Forms of action abolished.**—Under the code system of procedure there is but one form of civil action. By this is meant that the formal distinctions between the different common-law actions, such as *assumpsit*, *debt*, *covenant*, *trespass*, etc., and also between actions at law and in equity, are swept away.¹ Under the old practice it was necessary to decide what form of action must be resorted to in order to obtain the relief justified by the facts, and it was necessary to state this form of action in the writ and to adhere to it in the declaration. Accordingly, the pleader was required to determine before he had the writ issued what his form of action should be. In many cases this was no easy matter, and the consequences of mistake were often serious. The suitor was also required to determine whether he should resort to a court of law or a court of equity.² Now, however, these formal distinctions are done away with, and the pleader is required only to state the facts which constitute his cause of action. He need not give his pleading any particular name if it state sufficient facts.³

The old rule was “form, and not substance”; the code rule is “substance, and not form.” Whatever may be said by opponents of the code system of procedure, it is certain that a suitor no longer goes into court with the fear that he may possibly have given his form of action the wrong name, and dreading the consequences that such a misnomer may entail. As was said by the supreme court of California, “Under the Code of Practice, we have but one system of rules respecting pleadings, which governs all cases both at law and in equity. These rules are clearly laid down in the Practice Act; and although in construing that act we resort to former adjudications, and the old and well-established principles of pleadings at common law, yet the former distinctions between common law and equity pleadings no longer exist.”⁴

¹ *Miller v. Van Tassel*, 24 Cal. 459;
Tanderup v. Hansen, 5 S. Dak. 164,
58 N. W. 578.

² See *Estee's Pl. & Pr.*, § 179.

³ *Mastin v. Bartholomew*, 41 Colo.
328, 92 Pac. 682.

⁴ *Bowen v. Aubrey*, 22 Cal. 570;
Cordier v. Schloss, 12 Cal. 143; *Payne*

Legal and equitable remedies may now be sought in the same action, where they relate to the same subject-matter. The nature of a cause of action is to be determined rather from the object and purpose of the suit than from the character of the evidence which is necessary to sustain it.⁵ It was the intention of the legislature to adopt a "uniform and complete system," whereby the old and cumbersome forms of pleading would be dispensed with.⁶ And it has been held that although an action is an equitable one, yet where there is nothing to give a court of equity jurisdiction thereof, the court may permit it to be tried as an action at law, if the defendant is not thereby prevented from having a fair trial.⁷ It is error, however, to compel the trial of a cause as an action at law where both the complaint and answer invoke the equity powers of the court.⁸

It was the object of the codes to make the procedure uniform in all ordinary cases in law and equity. But while the system of pleading thus introduced contemplates plainness of averment and a clear and logical statement of the matters relied upon, it would be a mistake to conclude that an absolute departure from the common-law forms was intended. The codes abolish the distinctions between the forms of action, but not the substantial rules of pleading of the common law.⁹

Nor should it be inferred from what has been said that the abolishment of the distinction between the forms of a bill in chancery and the common-law declaration has obliterated the essential and inherent distinctions between law and equity as two separate sciences.¹⁰ "What was an action at law before the code, is still an action founded on legal principles; and what was a bill in equity before the code, is still a civil action founded on principles of equity."¹¹ Such has been the holding in decisions under

v. Treadwell, 16 Cal. 243; Rowe v. Blake, 99 Cal. 167, 37 Am. St. Rep. 45, 33 Pac. 864; and see Wadsworth v. Union Pacific Ry. Co., 18 Colo. 600, 36 Am. St. Rep. 309, 33 Pac. 515, 23 L. R. A. 812.

⁵ Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820.

⁶ Humiston v. Smith, 21 Cal. 134.

⁷ Surber v. Kittinger, 6 Wash. 240, 33 Pac. 507. See, also, Kleeb v. Bard, 7 Wash. 41, 34 Pac. 138.

⁸ Distler v. Dabney, 7 Wash. 431, 35 Pac. 138, 1119.

⁹ Sampson v. Shaeffer, 3 Cal. 196; Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 466; Stirling v. Garritee, 18 Md. 468; Knowles v. Gee, 8 Barb. 300, 4 How. Pr. 317; Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

¹⁰ Dewitt v. Hays, 2 Cal. 464, 56 Am. Dec. 352; Smith v. Rowe, 4 Cal. 6; Wiggins v. McDonald, 18 Cal. 127.,

¹¹ Estee's Pl. & Pr., § 179; Hurlbutt v. N. W. Spaulding Saw Co., 93 Cal. 55, 28 Pac. 795; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac.

the New York code.¹² Under the Oregon code proceedings in equity are still kept distinct from actions at law.¹³

§ 88. **Mode of stating facts—Logical order.**—It is a fundamental rule of pleading that logical order should be observed in the statement of facts.¹⁴ By “logical order” is meant “natural order.”¹⁵ This necessity for logical order is well stated by Mr. Chief Justice Field in *Green v. Palmer*:¹⁶ “To avoid repetition, as well as to obtain conciseness, logical order is necessary. There are persons who are incapable of making a logical statement of anything; and such persons will be bad pleaders under the code. But a man of education, as every lawyer is supposed to be, ought to have no difficulty in setting forth any occurrence in its logical, which is its natural, order. And if he does this, and sets forth only the facts on which his case hinges, and uses no more words than are necessary, we shall have brevity and substance, and hear no more of long pleadings, unnecessary recitals, or immaterial averments.”

Ordinarily facts may, at the option of the pleader, be pleaded as they actually exist or according to their legal effect. When pleaded according to the legal effect, and the opposite party is uninformed as to the proof he is required to meet at the trial, as a general rule, his remedy is by a demand for a bill of particulars or a motion to make it more definite and certain.¹⁷ The pleading of facts according to their legal effect is conducive to brevity and conciseness, which is one of the code requirements.¹⁸ The facts required to be stated under the codes are substantially such facts as were required to be stated in pleadings at common law,—that is, issuable facts or facts essential to the cause of action or defense. It is neither necessary nor desirable to state facts or circumstances which merely go to establish these ultimate facts.¹⁹ So where the issuable fact is that a resolution was passed by a board of super-

965; *Aiken v. Aiken*, 12 Or. 203, 6 Pac. 682; *Weber v. Rothchild*, 15 Or. 385, 3 Am. St. Rep. 162, 15 Pac. 650.

¹² *Howard v. Tiffany*, 3 Sandf. 695; 1 Van Santv. Pl. 41.

¹³ Or. B. & C. Codes, § 390; *Ming Yue v. Coos Bay R. Co.*, 24 Or. 393, 33 Pac. 641.

¹⁴ 1 Chit. Pl. 231; *Gould's Pl.* 4; 2 Till. & Shear. 8.

¹⁵ *Green v. Palmer*, 15 Cal. 417, 76 Am. Dec. 492.

¹⁶ 15 Cal., at p. 417, 76 Am. Dec. 492.

¹⁷ *New York News Pub. Co. v. National Steamship Co.*, 148 N. Y. 39, 42 N. E. 514.

¹⁸ Cal. Code Civ. Proc., § 426.

¹⁹ *Bowen v. Aubrey*, 22 Cal. 566; *Knowles v. Gee*, 8 Barb. 300, 4 How. Pr. 317.

visors, the facts or acts which led up to the passage of the resolution are probative and need not be alleged.²⁰

Statements of conclusions of law as bad pleading will be found discussed elsewhere;²¹ but it may not be amiss to observe here that although there is a wide distinction between the statement of facts according to their legal effect and the statement of legal conclusions,²² it is a very common occurrence for pleaders to spoil their pleadings by unwittingly stating conclusions of law in the effort to state facts according to their legal effect. It is unnecessary, however, to go to the other extreme to avoid this error, for, as was said in a California case, "Facts are not to be, or at least need not be, separated entirely from the law by the pleader; nor could they be without great and most damaging prolixity. In this as well as in most things, theory and practice are compelled to meet each other halfway for the sake of attainable good. The last analysis between the fact and the law is usually made by the judge at the trial."²³

§ 89. Allegation of facts by direct averment.—Another common-law rule that still obtains under the code practice is that requiring that facts be alleged by direct averment. In other words, they must be stated positively and not argumentatively, inferentially, or by way of recital,²⁴ nor hypothetically.²⁵ The office of an answer is to state the ultimate facts, and not the evidence of those facts.²⁶ The lack of direct and positive averments of a fact cannot be supplied by intendment or implication; and where the fact is stated only argumentatively, or by way of recital or inference, it is insufficient.²⁷ This is a fundamental rule of our code pleading, and whenever it is violated a complaint is demurrable for not stating facts sufficient to constitute a cause of action.²⁸

²⁰ *Miles v. McDermott*, 31 Cal. 270. See, also, *McCaughy v. Schuette*, 117 Cal. 224, 59 Am. St. Rep. 177, 46 Pac. 666, 48 Pac. 1088.

²¹ Chap. X, post, "Allegations."

²² Mr. Estee says: "The one is still a fact, while the other is not." Pl. & Pr., § 195.

²³ *Nudd v. Thompson*, 34 Cal. 47.

²⁴ 1 Chit. Pl. 231, 319; Steph. Pl. 387; Gould's Pl. 55; *Ahrens v. Adler*, 33 Cal. 608; *Byington v. Saline*

County Commrs., 37 Kan. 654, 16 Pac. 105; *Gallagher v. Dunlap*, 2 Nev. 326.

²⁵ *Ilfeld v. Ziegler*, 40 Colo. 401, 91 Pac. 825.

²⁶ *Rio Grande etc. Ry. Co. v. Colorado Fuel etc. Co.*, 41 Colo. 3, 91 Pac. 1114.

²⁷ *People v. Jones*, 123 Cal. 299, 55 Pac. 992.

²⁸ *McCaughy v. Shuette*, 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176.

Averments in a complaint of the facts constituting a deraignment of title are but averments of evidence,²⁹ and in an action of ejectment would be stricken out.³⁰ So, where a complaint alleged an agreement by the defendant to execute a deed which the plaintiff agreed to accept in full payment of a note executed by the plaintiff; the execution and delivery of the deed and the cancellation of the note; and the refusal of the defendant to deliver possession, the court held that in the absence of averment of seisin, or ownership, or possession, or right of possession to the premises, the complaint was insufficient.³¹

§ 90. **Certainty and clearness of allegations.**—A party has the right to be apprised by his adversary's pleading of the precise facts upon which the latter bases his right of action, and to have them so fully pleaded that there may be no question as to whether the merits are to involve a disputed question of fact or to depend solely on a question of law.³² The matter pleaded must be clearly and distinctly stated, so that the pleadings may be understood by the party who is to answer them.³³ The essential facts must be stated directly in unequivocal language, and not left to be inferred.³⁴

The certainty required in pleading relates chiefly to time, place, person, and subject-matter.³⁵ This does not mean that in every pleading there must be certainty as to every one of these elements. It is only where averments as to any one of them are material that the rule applies.³⁶ Ordinarily the precise time when certain facts alleged occurred is not material, and so need not be alleged in a pleading. But when essential to the cause of action or defense the omission of the time renders the pleading defective.³⁷

²⁹ *Siter v. Jewett*, 33 Cal. 92.

³⁰ *Willson v. Cleaveland*, 30 Cal. 192. And see *San Joaquin County v. Budd*, 96 Cal. 47, 30 Pac. 967.

³¹ *McCaughy v. Shuette*, 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176.

³² *Van Valen v. Lapham*, 12 N. Y. Super. Ct. 689; *Ollis v. Orr*, 6 Idaho, 474, 56 Pac. 162; *Callahan v. Broderick*, 124 Cal. 80, 56 Pac. 782.

³³ *Gould's Pl. 72*; 1 *Chit. Pl. 233*.

³⁴ *Moore v. Besse*, 30 Cal. 572; *Jacobs v. Shenon*, 2 Idaho, 1007, 3 Idaho, 274, 29 Pac. 44; *Curtis v. Cutler*, 7 Neb. 318.

³⁵ *Gould's Pl. 77*; *Steph. Pl. 279*.

³⁶ *Backus v. Clark*, 1 Kan. 303, 83 Am. Dec. 437; *International etc. Ry. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526; *Barnes v. Matteson*, 5 Barb. 375.

³⁷ *Clyde v. Johnson*, 4 N. Dak. 92, 58 N. W. 512.

This rule, as well as the one requiring allegations to be by direct averment, renders argumentative pleadings improper.³⁸ Alternative allegations are also within the implied prohibition of this rule; a defendant is entitled to a distinct averment of the facts claimed to exist, and if the averments are in the alternative, the complaint is bad on demurrer, even if the alternative averments state a cause of action.³⁹ Hypothetical statements in pleadings are likewise improper, for the court has to deal with facts, not with hypotheses.⁴⁰ While, however, such statements are generally improper, a defendant may make them in an answer in many cases for the purpose of enabling him to plead all of his defenses.⁴¹

§ 91. Allegation of facts in ordinary and concise language.—The California code⁴² requires that the complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language. As was said in a California case,⁴³ “There never was a greater slander upon the code than to say that it permits long pleadings. On the contrary, it enjoins conciseness everywhere; and if in any pleading that was ever written under its rule there be an unnecessary word, it was put there in disregard of its provisions. Nor is it possible to frame or conceive of a system proceeding upon the idea of disclosing the facts of the case, which could require greater conciseness than is here required. If pleadings are not to set forth the real claim and defense, they are useless, and had better be dispensed with.”

Pleadings are merely the statement of the facts upon which the plaintiff, on the one hand, bases his claim for relief or redress, and the denial or admission of those facts by the defendant, on the other hand; and it is the aim of the code to have the parties make these statements in the same language that they would use in making them for any other purpose than that of raising an issue before a court. In other words, the cause of action or defense

³⁸ *Hibernia Sav. etc. Soc. v. Thornton*, 117 Cal. 481, 49 Pac. 573; *Austin v. Parker*, 13 Pick. 222; *Ahrens v. Adler*, 33 Cal. 608.

³⁹ *Jamison v. King*, 50 Cal. 132; *Salters v. Genin*, 10 Abb. Pr. 478; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131; *Ladd v. Ramsby*, 10 Or. 207.

⁴⁰ *Green v. Palmer*, 15 Cal. 414, 76

Am. Dec. 492; *Goodman v. Robb*, 41 Hun, 605; *Cincinnati etc. Ry. Co. v. Third Nat. Bank*, 1 Ohio C. C. 199.

⁴¹ *Dovan v. Dinsmore*, 33 Barb. 86; *McKasy v. Huber*, 65 Minn. 9, 67 N. W. 650.

⁴² Cal. Code Civ. Proc., § 426.

⁴³ *Green v. Palmer*, 15 Cal. 417, 76 Am. Dec. 492.

should be stated "in just such language as men use in conveying the knowledge of similar facts to one another."⁴⁴ This provision of the code is merely a re-enactment of the common-law rule.⁴⁵ It must be remembered, however, that while brevity is commendable, it should not be allowed to the sacrifice of a logical and complete statement of the ultimate facts constituting the cause of action or defense.⁴⁶

§ 92. Language.—Proceedings must be conducted in the English language; a pleading in any other language will not be permitted.⁴⁷ And where, in an action on a note, the complaint sets out the note in French, the court will require an amendment setting it out in the English language.⁴⁸ But this rule is not to be carried to absurdity and result in the condemnation of pleadings containing familiar foreign phrases or words. Thus "versus" and its abbreviation, "v.," have become so ingrafted upon the English language as to be unobjectionable;⁴⁹ and this is true also of the Latin phrase "Anno Domini."⁵⁰ And where a pleading is otherwise sufficient the use of the words "actio non" in place of the "plaintiff ought not to maintain his action" will be rejected, not because they are in Latin, but because they as thus used are meaningless.⁵¹

Under the code system of pleading, the terms employed in the code should be used, and not the obsolete technical terms taken from the common law.⁵²

§ 93. Errors in writing, grammar, or spelling, will not vitiate a pleading where the meaning is obvious. The omission of a word is no ground for objection if the sense of the pleading is unimpaired.⁵³ Errors which are obviously clerical, and leave the meaning of a pleading unimpaired, will be disregarded.⁵⁴ Such has

⁴⁴ Estee's Pl. & Pr., § 196; Green v. Palmer, 15 Cal. 414, 76 Am. Dec. 492; Jones v. Steamer Cortez, 17 Cal. 487, 79 Am. Dec. 142; Coffee v. Emigh, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125.

⁴⁵ Godwin v. Stebbins, 2 Cal. 105.

⁴⁶ Downing v. Agricultural Ditch Co., 20 Colo. 546, 39 Pac. 336.

⁴⁷ Dunton v. Montoyo, 1 Colo. 99.

⁴⁸ Meigs v. Guirand, 3 Ohio, 328.

⁴⁹ Smith v. Butler, 25 N. H. 521.

⁵⁰ Hale v. Vesper, Smith (N. H.), 283.

⁵¹ Berry v. Osborn, 28 N. H. 279.

⁵² Cohen v. Ottenheimer, 13 Or. 220, 10 Pac. 20.

⁵³ Trapnall v. Merrick, 21 Ark. 503; Evans v. Nealis, 69 Ind. 148; Moore v. Beem, 83 Ind. 219; Indiana etc. Ry. Co. v. Dailey, 110 Ind. 75, 10 N. E. 631; Hovey v. Brown, 59 N. H. 114.

⁵⁴ Briggs v. Mason, 31 Vt. 433.

been the holding where the word "defendant" was used when "plaintiff" was intended;⁵⁵ where "property" was used instead of "plaintiff";⁵⁶ "defendant" for "defendants";⁵⁷ "defendant" for "decedent";⁵⁸ "east" for "west."⁵⁹

⁵⁵ *Johnson v. Missouri Pacific Ry. Co.*, 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790.

⁵⁶ *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

⁵⁷ *Monmouth & Co. v. Erling*, 148 Ill. 521, 39 Am. St. Rep. 187, 36 N. E. 117; *German Exch. Bank v. New Jer-*

sey etc. Co., 13 Misc. 192, 34 N. Y. Supp. 133.

⁵⁸ *Kenney v. New York etc. R. R.*, 49 Hun, 535, 2 N. Y. Supp. 512, 15 Civ. Proc. Rep. 347.

⁵⁹ *Praigg v. Western etc. Co.*, 143 Ind. 358, 42 N. E. 750.

CHAPTER X.

ALLEGATIONS.

§ 94. Allegations of facts.—In view of what has already been said, it is perhaps superfluous to say that pleadings are statements of facts; that they should be nothing else.¹ The character and sufficiency of a pleading are to be determined by the facts which it alleges, not by what is denominated by the pleader.² The code system of procedure makes substance, not form, the thing to be desired, and it is in harmony with this idea that facts, and not forms, are made the essential requisites of good pleading, although approved forms may aid the pleader in setting forth the facts upon which the right claimed depends.³

The reasons for the existence of the facts alleged are not to be given, nor the evidence tending to prove them; but only the naked facts “disrobed of any circumstance connected with or pertaining to them.” And they must be given without inferences or conclusions, arguments, hypothetical statements, or statements of the law, or of the pretenses of the opposite party.⁴ Evidence of the facts alleged pertains to the trial and has no place in a pleading.⁵ In this connection it may be well to note that, while statements of evidence in a pleading are not necessarily fatal if the opposite party fails to ask that such statements be stricken out, yet the failure to have them stricken out cannot have the effect of rendering competent, incompetent testimony set out in a pleading.⁶

§ 95. Legal conclusions not to be alleged.—The rule we have just considered, that facts only should be stated, would of itself

¹ *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *Hicks v. Murray*, 43 Cal. 515; *Laffey v. Chapman*, 9 Colo. 304, 12 Pac. 152; *Robinson v. Dolores etc. Canal Co.*, 2 Colo. App. 17, 29 Pac. 750; *Ilfeld v. Ziegler*, 40 Colo. 401, 91 Pac. 825; *Rio Grande etc. Ry. Co. v. Colo. Fuel etc. Co.*, 41 Colo. 3, 91 Pac. 1114; *St. Mary's Hospital v. Perry*, 152 Cal. 338, 92 Pac. 864; *In re Lennon's Estate*, 152 Cal. 327, 125 Am. St. Rep. 58, 92 Pac. 870; *Streator v. Linscott*, 153 Cal. 285, 95

Pac. 42; *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522.

² *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278.

³ *Cramer v. Oppenstein*, 16 Colo. 495, 27 Pac. 713.

⁴ *Estee's Pl. & Pr.*, § 184.

⁵ *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 3; *Rio Grande etc. Ry. Co. v. Colorado Fuel etc. Co.*, 41 Colo. 3, 91 Pac. 1114.

⁶ *Ireton v. Ireton*, 59 Kan. 92, 52 Pac. 74.

make a statement of a legal conclusion bad pleading, for an allegation of a legal conclusion states no fact, but matter of law only.⁷ Such an allegation can never add to the effect of a pleading.⁸

As we observed in a previous chapter, there is no objection to the statement of facts according to their legal effect, but that such a *mode* of stating facts is to be carefully distinguished from the statement of legal conclusions. The latter class of averments is not to be tolerated under the code practice; the facts from which the conclusions follow must be averred, but not the conclusions. And if such conclusions are averred and denied, no issue is raised; if they are not denied, they are not admitted.⁹ "If counsel were permitted to aver conclusions of law, pleadings might be valuable as briefs, but worthless as statements of facts, the latter being the only object of pleadings."¹⁰

A pleading is not to be disregarded, however, because it improperly contains allegations of legal conclusions, if such conclusions are correct and properly deducible from the facts which are set out in the pleading.¹¹ In such a case the essential things, the facts, are averred.

§ 96. What are conclusions of law—Examples.—A conclusion of law has been defined as one which gives no fact, but matter of law only.¹² This definition, however, while strictly correct, is of little value to a pleader endeavoring to avoid the error we are considering. Indeed, any concise definition that may be framed, must be an unsafe guide to the distinction between a conclusion of law and an issuable fact. It must be remembered that it is not the presence of a legal conclusion in a pleading alone that makes the pleading objectionable, but the fact that a legal conclusion unnecessarily stated is not accompanied by the statement of necessary facts.

In any case a legal conclusion, although it be correct, is surplusage, and will be disregarded by the court,¹³ or be stricken out upon

⁷ Hatch v. Peet, 23 Barb. 583; Ollis v. Orr, 6 Idaho, 474, 56 Pac. 162; Bransford v. Norwich Union Fire Ins. Soc., 21 Colo. 34, 39 Pac. 419.

⁸ Downing v. Agricultural Ditch Co., 20 Colo. 546, 39 Pac. 336.

⁹ Levinson v. Schwartz, 22 Cal. 229; Lightner v. Menzel, 35 Cal. 460; Gale v. James, 11 Colo. 542, 19 Pac. 446;

Lake v. Steinbach, 5 Wash. 663, 32 Pac. 767.

¹⁰ Estee's Pl. & Pr., § 185.

¹¹ Texas etc. Ry. Co. v. Kirk, 62 Tex. 227.

¹² Hatch v. Peet, 23 Barb. 583.

¹³ Jones v. Phoenix Bank, 8 N. Y. 228; Board of Education v. Shaw, 15 Kan. 33; Spargur v. Romine, 38 Neb.

motion as irrelevant and redundant matter.¹⁴ As was said in a California case,¹⁵ such statements "will be treated as if they were not made, because, so far as they are correct, they are useless, and when erroneous, worse than useless." So where the essential facts are set out a pleading is not vitiated by the added statement of a conclusion of law.

§ 97. **Examples of conclusions of law.**—The meaning of the term can better be shown by examples than by any definition. The following are some of the most common allegations which, when unaccompanied by supporting facts, are declared by the courts to be objectionable:

Assent: The knowledge and assent of a party;¹⁶ that a partner assented to the making of a note by his copartner.¹⁷ *Assignment:* That a person is not the "legally appointed assignee."¹⁸ *Authority:* That an officer had or had not authority to do certain acts.¹⁹ *Bona fide holder:* That a person is the holder and owner of a note.²⁰ *Bound:* That one is bound to do certain things,²¹ or is bound by a judgment.²² *Capacity:* An allegation in a complaint to set aside a deed, that the grantor was of unsound mind.²³ *Contrary to law:* That a person has acted contrary to law.²⁴ *Credit:* That goods were purchased on credit, and the term of credit has not expired.²⁵ *Divorce:* The acts and conduct relied on as cruel treatment should be stated.²⁶ *Damage:* That an act will result in great and irreparable damage.²⁷ *Due:* That a sum is due and owing.²⁸ *Duly:*

736, 57 N. W. 523; *Ohm v. San Francisco*, 92 Cal. 437, 28 Pac. 580.

¹⁴ *Longshore Printing Co. v. Howell*, 26 Or. 535, 46 Am. St. Rep. 640, 38 Pac. 547, 28 L. R. A. 464; *Payne v. Treadwell*, 16 Cal. 246; *Dyer v. Bradley*, 89 Cal. 560, 26 Pac. 1103; *People v. Lathrop*, 3 Colo. 452.

¹⁵ *Ohm v. San Francisco*, 92 Cal. 449, 28 Pac. 580.

¹⁶ *Moore v. Westervelt*, 2 Duer, 59, 1 Bosw. 537, 21 N. Y. 103.

¹⁷ *Kemeys v. Richards*, 11 Barb. 312.

¹⁸ *Smith v. Kaufman*, 3 Okla. 568, 41 Pac. 722.

¹⁹ *Hentrager v. Richter*, 85 Iowa, 222, 52 N. W. 188.

²⁰ *White v. Brown*, 14 How. Pr. 282.

²¹ *Berley v. Newton*, 10 How. Pr. 490; *Casey v. Mann*, 5 Abb. Pr. 91.

²² *People v. Board of Supervisors*, 27 Cal. 655; *People v. Commissioners*, 11 How. Pr. 89.

²³ *Batman v. Snoddy*, 132 Ind. 480, 32 N. E. 327.

²⁴ *Smith v. Lockwood*, 13 Barb. 209.

²⁵ *Levinson v. Schwartz*, 22 Cal. 229.

²⁶ *Hubbell v. Hubbell*, 7 Cal. App. 661, 95 Pac. 664.

²⁷ *McCormick v. Riddle*, 10 Mont. 470, 26 Pac. 202; *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703; *Thorn v. Sweeny*, 12 Nev. 251.

²⁸ *Frisch v. Caler*, 21 Cal. 71; *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891; *McKyring v. Ball*, 16 N. Y. 303, 69 Am. Dec. 696.

That a person was duly appointed,²⁹ or duly authorized;³⁰ that a location was duly made.³¹ *Duty*: That it was or is a person's duty to do certain acts.³² *Effect*: The effect of certain acts or omissions.³³ *Forfeiture*: That certain acts or omissions operated as a forfeiture of a right.³⁴ *Fraud or mistake*: A general allegation of fraud or mistake as a ground of action or defense.³⁵ *Heirship*: The naked averment of heirship or relationship.³⁶ *Indebted*: That a party is indebted or remains indebted,³⁷ or a denial of indebtedness.³⁸ *Legality*: Averments of illegality or invalidity of certain acts,³⁹ or that a will is contrary to a certain statute.⁴⁰ *Lien*: That a person has or had a valid lien.⁴¹ *Obligation*: That certain duties or obligations exist, or that they have not been performed.⁴² *Performance*: That there has been a due performance of certain acts.⁴³ *Power*: That a corporation had power to do certain acts.⁴⁴ *Priority*: The bare allegation of priority of right.⁴⁵ *Possession*: That one is in possession by virtue of a certain deed, to show title.⁴⁶ *Release*:

²⁹ *Cruger v. Holliday*, 3 Edw. Ch. 565.

³⁰ *Myers v. Machado*, 14 How. Pr. 149.

³¹ *People v. Jackson*, 24 Cal. 632.

³² *Wilson v. Baillargeon etc. Co.*, 54 Ill. App. 250; *Biron v. St. Paul Water Commrs.*, 41 Minn. 519, 43 N. W. 482; *Coffin v. Grand Rapids etc. Co.*, 136 N. Y. 655, 32 N. E. 1076.

³³ *Wheeler v. Floral etc. Co.*, 9 Nev. 254; *Wainwright v. Queens County Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987.

³⁴ *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

³⁵ *Sukeforth v. Lord*, (Cal.) 23 Pac. 296; *Dyer v. Bradley*, 89 Cal. 577, 26 Pac. 1103; *Baker-Boyer Nat. Bank v. Hughson*, 5 Wash. 100, 31 Pac. 423. And see *Robinson v. Dolores etc. Canal Co.*, 2 Colo. App. 17, 29 Pac. 750.

³⁶ *Stephani v. Stephani*, 75 Hun, 188, 26 N. Y. Supp. 1039; *Public Admr. v. Watts*, 1 Paige, 348. But see *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167.

³⁷ *Wells v. McPike*, 21 Cal. 215; *Curtis v. Richards*, 9 Cal. 33; *Butts v. Phelps*, 79 Mo. 302; *California State Tel. Co. v. Patterson*, 1 Nev. 150.

³⁸ *McConoughey v. Jackson*, 101 P. P. F. Vol. I—6

Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; *Gale v. James*, 11 Colo. 540, 19 Pac. 446; *Swanholm v. Reeser*, 2 Idaho, 1167, 3 Idaho 476, 31 Pac. 804; *Heath v. White*, 3 Utah, 474, 24 Pac. 762.

³⁹ *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458; *People v. Lothrop*, 3 Colo. 428; *Miller v. Hurford*, 13 Neb. 13, 12 N. W. 832.

⁴⁰ *In re Lennon's Est.*, 152 Cal. 327, 125 Am. St. Rep. 58, 92 Pac. 870.

⁴¹ *Shea v. Johnson*, 101 Cal. 455, 35 Pac. 1023.

⁴² *Van Schaick v. Winne*, 16 Barb. 95; *Wilson v. Baillargeon etc. Co.*, 54 Ill. App. 250; *Biron v. St. Paul Water Commrs.*, 41 Minn. 519, 43 N. W. 482; *Coffin v. Grand Rapids etc. Co.*, 136 N. Y. 655, 32 N. E. 1076.

⁴³ *McEntee v. Cook*, 76 Cal. 187, 18 Pac. 258; *Heavilon v. Farmers' Bank of Frankfort*, 81 Ind. 249.

⁴⁴ *Branham v. Mayor of San Jose*, 24 Cal. 585.

⁴⁵ *Shea v. Johnson*, 101 Cal. 455, 35 Pac. 1023; *Farmers' etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; *First Nat. Bank v. Myers*, 44 Neb. 306, 62 N. W. 459.

⁴⁶ *Street v. Sederburg*, 41 Colo. 128, 92 Pac. 682.

That a claim was or was not released.⁴⁷ *Sufficiency*: That certain things were sufficient or insufficient,⁴⁸ or that plaintiff does not have adequate remedy at law.⁴⁹

Pleadings containing conclusions of law and other surplusage should be attacked by motion and not by demurrer.⁵⁰ Conclusions of law are not admitted on demurrer.⁵¹

§ 98. **What facts should be alleged—Essential facts.**—The rule that only facts should be stated in a pleading is further narrowed by the rule that the facts alleged must be essential facts. By this is meant that nothing should be stated which is not essential to the claim or defense, or, in other words, that none but *issuable facts* should be alleged.

What is and what is not essential may easily be determined. An unessential, or what is the same thing, an immaterial, allegation is one which may be stricken from a pleading without leaving it insufficient, and which, it follows, need not be proved or disproved. The following question furnishes an absolute test as to the essentiality of any allegation: "Can it be made the subject of a material issue?" In other words, "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact is not essential; it is not one of those which constitute the cause of action, defense, or reply.⁵²

From this it will be seen that "essential" is simply a synonym for "material" as applied to the allegation of facts in pleadings and as defined in the codes;⁵³ and that those facts, and those alone, must be stated which constitute the cause of action, defense, or reply.⁵⁴ But the effort of the pleader must not be directed solely

⁴⁷ Hatch v. Peet, 23 Barb. 575; Jones v. Phoenix Bank, 8 N. Y. 235; Kelso v. Fleming, 104 Ind. 180, 3 N. E. 830.

⁴⁸ Ollis v. Orr, 6 Idaho, 474, 56 Pac. 162.

⁴⁹ Streater v. Linscott, 153 Cal. 285, 95 Pac. 42.

⁵⁰ Raiche v. Morrison, 37 Mont. 244, 95 Pac. 1061.

⁵¹ Gill v. Manhattan Life Ins. Co., (Ariz.), 95 Pac. 89.

⁵² Green v. Palmer, 15 Cal. 416, 76 Am. Dec. 492.

⁵³ Cal. Code Civ. Proc., § 463; Or. B. & C. Codes, § 93.

⁵⁴ See on this point Dreux v. Domec, 18 Cal. 88; Smith v. Richmond, 19 Cal. 483; Bowen v. Aubrey, 22 Cal. 569; Grewell v. Walden, 23 Cal. 169; O'Connor v. Dingley, 26 Cal. 11; Johnson v. Santa Clara County, 28 Cal. 547; Larco v. Casaneuava, 30 Cal. 565; Racouillat v. Rene, 32 Cal. 456; Jones v. Petaluma, 36 Cal. 233; Joseph v. Holt, 37 Cal. 255; Bruck v. Tucker, 42 Cal. 351; Cline v. Cline, 3 Or. 359; Perkins v. Barnes, 3 Nev. 565; McNabb v. Wixom, 7 Nev. 172; Clark v. Bates, 1 Dak. 42, 46 Pac. 510; Clay County v. Simonsen, 1 Dak. 403, 430, 46 N. W. 592; Brown v. Galena Mining Co., 32 Kan. 528, 4 Pac. 1013.

to the exclusion of non-essential or immaterial allegations. Care must be taken to include all of the essential or material facts; for "should the pleadings be so framed that even the least important essential fact is left out, the cause of action is impaired."⁵⁵

As has been pointed out in a preceding section, however, a pleader must not allege all the facts that go to prove his case; that only the ultimate facts should be pleaded, and not the probative facts.⁵⁶ A pleader must allege the facts which he is required to prove, and will be precluded from proving any fact essential to his cause of action or defense not alleged;⁵⁷ nothing can be left to the imagination or surmise of the court.⁵⁸

A consequence of this rule is that given in the codes, that allegations and proof must correspond.⁵⁹ But this applies expressly to material allegations alone, and in no wise modifies the rule excluding allegations of probative facts, although it doubtless often results in the insertion of probative facts by pleaders, in the fear that otherwise evidence will be excluded. Evidence is always admissible to establish probative facts, although such facts are not alleged in the pleading, and it is error for a court to exclude evidence offered for that purpose.⁶⁰

The expression "facts constituting a cause of action" means the facts which the evidence upon the trial will prove, not the evidence required to prove their existence. They have been variously called physical facts,⁶¹ issuable facts,⁶² or real, traversable facts.⁶³

§ 99. Unnecessary averments.—By indicating what should be included in a pleading we have already shown, by a process of exclusion, what should be omitted, and what is said under this head is merely a summary of general rules.

⁵⁵ *Estee's Pl. & Pr.*, § 190.

⁵⁶ *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Latiallade v. Orena*, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924; *Rankin v. Newman*, 107 Cal. 602, 40 Pac. 1024; *Orman v. City of Pueblo*, 8 Colo. 292, 6 Pac. 931; *Meyer v. School Dist.*, 4 S. Dak. 420, 57 N. W. 68.

⁵⁷ *Green v. Palmer*, 15 Cal. 414, 76 Am. Dec. 492; *Willson v. Cleaveland*, 30 Cal. 192; *Hicks v. Murray*, 43 Cal. 522; *Gates v. Lane*, 44 Cal. 392.

⁵⁸ *Going v. Dinwiddie*, 86 Cal. 637, 25 Pac. 129.

⁵⁹ *Cal. Code Civ. Proc.*, § 1868.

⁶⁰ *Grewell v. Walden*, 23 Cal. 165; *Depuy v. Williams*, 26 Cal. 314; *Gillespie v. Jones*, 47 Cal. 259; *Sears v. Taylor*, 4 Colo. 43; *Sullivan v. Dunphy*, 4 Mont. 511, 2 Pac. 284; *Tarpey v. Deseret Co.*, 5 Utah, 215, 14 Pac. 338.

⁶¹ *Lawrence v. Wright*, 2 Duer, 674. And see *Drake v. Cockcroft*, 1 Abb. Pr. 203.

⁶² *Green v. Palmer*, 15 Cal. 416, 76 Am. Dec. 492.

⁶³ *Mann v. Morewood*, 5 Sandf. 557. See, also, *Wooden v. Strew*, 10 How.

The rule which comprehends all others under this head is that requiring that nothing be alleged affirmatively which is not required to be proved, or, in other words, which is not decisive of some part of the cause. For while it is the aim of the code to require pleadings to be so framed as to apprise the parties of the facts to be proved, it is equally its aim to narrow proofs at the trial. So merely formal allegations, such as require no proof at the trial, are unnecessary.

Thus it is not necessary to aver the fact of consideration for a promissory note sued on,⁶⁴ or in an action for libel, where the publication is libelous *per se*, to allege that it was done "falsely and maliciously;"⁶⁵ or in an action for assault and battery, to allege that it was "willful" or malicious.⁶⁶ The words, "duly," "wrongfully," and "unlawfully," when used in connection with issuable facts, while they will not vitiate a pleading, had better be omitted.⁶⁷ These words of themselves tender no issue.⁶⁸

Ordinarily, the time when facts occur is not material, and need not be alleged in a pleading.⁶⁹ The rule is otherwise, however, when the time is essential to the cause of action or the defense.

Facts independent of the cause of action, and proper to an affidavit accompanying a pleading, as in cases of arrest, should not be stated.⁷⁰ So, also, of facts in relation to a contemporaneous agreement varying the terms of a promissory note,⁷¹ and of facts in connection with a former adjudication which is set up in a pleading.⁷²

Where the facts are pleaded from which another necessarily results, that other need not be alleged.⁷³ Matters of which the

Pr. 50; *Carter v. Koezley*, 14 Abb. Pr. 150; *Cahill v. Palmer*, 17 Abb. Pr. 196.

⁶⁴ *County Bank v. Greenberg*, 127 Cal. 26, 59 Pac. 139; *Gambrill v. Brown Hotel Co.*, 11 Colo. App. 529, 54 Pac. 1025.

⁶⁵ *Hunt v. Bennett*, 19 N. Y. 173; *Root v. King*, 7 Cow. 620.

⁶⁶ *Andrews v. Stone*, 10 Minn. 72; *Sloan v. Speaker*, 63 Mo. App. 321.

⁶⁷ *Halleck v. Mixer*, 16 Cal. 574; *Payne v. Treadwell*, 16 Cal. 220; *Lay v. Neville*, 25 Cal. 545; *People v. Board of Supervisors*, 27 Cal. 655; *Richardson v. Smith*, 29 Cal. 529; *Miles v. McDermott*, 31 Cal. 271; *Feeley v. Shirley*, 43 Cal. 369.

⁶⁸ *Going v. Dinwiddie*, 86 Cal. 633, 25 Pac. 129; *Reardon v. San Francisco*, 66 Cal. 496, 6 Pac. 317, 56 Am. Rep. 109.

⁶⁹ *Backus v. Clark*, 1 Kan. 303, 83 Am. Dec. 437; *Clyde v. Johnson*, 4 N. Dak. 92, 58 N. W. 512; *Aultman v. Siglinger*, 2 S. Dak. 442, 50 N. W. 911.

⁷⁰ *Sellar v. Sage*, 12 How. Pr. 531, 13 How. Pr. 230; *Frost v. McGargar*, 14 How. Pr. 131; *Secor v. Roome*, 2 N. Y. Code Rep. 1. But see *Barber v. Hubbard*, 3 N. Y. Code Rep. 156.

⁷¹ *Smalley v. Bristol*, 1 Mann (Mich.), 153.

⁷² *Richardson v. Jones*, 57 Ind. 240.

⁷³ *Osborn v. Clark*, 60 Cal. 622; *Toby v. Ferguson*, 3 Or. 27.

court takes judicial notice need not be averred.⁷⁴ Ordinances of a municipal corporation will not be judicially noticed, however.⁷⁵ If there is an exception in the enacting clause of a statute, it must be negatived in a pleading; but a proviso need not be.⁷⁶

It is not necessary to aver as a fact any matter already appearing on record; for without oyer, the court will take notice of such facts.⁷⁷

§ 100. Immaterial, irrelevant, and redundant matter.—Sham and irrelevant answers and irrelevant and redundant matter should be omitted from pleadings. Such allegations or denials present no issue, and the codes expressly provide that they may be stricken out, upon such terms as the court may, in its discretion, impose.⁷⁸

As we have already seen, an immaterial allegation is an unessential allegation, one which presents no issuable fact, and which may be stricken from a pleading without impairing its sufficiency.⁷⁹ A plea is sham when it sets up matter the falsity of which is clear and indisputable.⁸⁰ Falsity in fact is the test, not the pleader's ignorance of its falsity.⁸¹ An irrelevant allegation is one that has no substantial relation to the controversy between the parties to the action;⁸² the term embraces prolixity and needless details of material matter, and matter out of which no cause of action or defense could arise between the parties to the particular suit.⁸³ The term "redundant" is almost a synonym for "irrelevant." Redundancy consists in irrelevant allegations or unnecessary repetitions or prolixity of statement of material facts.⁸⁴

⁷⁴ Goulett v. Cowdrey, 1 Duer, 139; South Missouri Lumber Co. v. Wright, 114 Mo. 326, 21 S. W. 811.

⁷⁵ Harker v. Mayor of New York, 17 Wend. 199.

⁷⁶ Lynch v. People, 16 Mich. 472; Fairbault v. Hulett, 10 Minn. 30; First Baptist Church Trustees v. Utica etc. R. Co., 6 Barb. 313.

⁷⁷ Tweedy v. Jarvis, 27 Conn. 42; Guild v. Richardson, 6 Pick. 364; Castro v. Whitlock, 15 Tex. 437.

⁷⁸ Ariz. Code, § 57; Cal. Code Civ. Proc., § 453; Idaho Rev. Codes, § 4208; Nev. Comp. Laws., § 3152; Or. B. & C. Codes, § 85; N. Y., § 160.

⁷⁹ Cal. Code Civ. Proc., § 463; Or.

B. & C. Codes, § 96; Green v. Palmer, 15 Cal. 416, 76 Am. Dec. 492.

⁸⁰ Wetherell v. Wiberg, 4 Saw. 232, Fed. Cas. No. 17917; Morton v. Jackson, 2 Minn. 219; Littlejohn v. Greeley, 22 How. Pr. 345, 13 Abb. Pr. 311.

⁸¹ Roome v. Nicholson, 8 Abb. Pr. (N. S.), 343.

⁸² Morton v. Jackson, 2 Minn. 219; Struver v. Ocean Ins. Co., 2 Hilt. 475, 9 Abb. Pr. 23; Fabbriotti v. Launitz, 1 Code Rep. (N. S.), 121; Stafford v. Mayor of Albany, 6 Johns. 1.

⁸³ Lee Bank v. Ritching, 20 N. Y. Super. 664, 11 Abb. Pr. 435.

⁸⁴ Wetherell v. Wiberg, 4 Saw. 232, Fed. Cas. No. 17917; Dundas v. Wey-

Surplusage is matter altogether superfluous and useless, and which may be rejected by the court, and the pleadings stand as if it were stricken out or had never been inserted.⁸⁵ The term is comprehensive and includes all the objectionable matters mentioned in the preceding paragraph, when such objectionable matters are inserted in a pleading otherwise good. In such case, these superfluous matters do not vitiate the pleadings.⁸⁶

Under this head may be included,—a false construction of the terms of a contract set up;⁸⁷ inconsistent allegations;⁸⁸ allegations which are absurd or the truth of which is impossible;⁸⁹ conclusions of law;⁹⁰ probative facts or evidence inserted in a pleading;⁹¹ ambiguous statements;⁹² hypothetical statements;⁹³ frivolous matter.⁹⁴

mouth, Cowp. 665; Barstow v. Wright, Doug. 668; Bowman v. Sheldon, 5 Sandf. 660; Rost v. Harris, 12 Abb. Pr. 446; Benedict v. Seymour, 6 How. Pr. 303; Clough v. Murray, 19 Abb. Pr. 97.

⁸⁵ Estee's Pl. & Pr., § 191; Orr Water Ditch Co. v. Reno Water Co., 19 Nev. 60, 6 Pac. 72; Sabine R. R. Co. v. Broussard, 69 Tex. 617, 7 S. W. 374.

⁸⁶ Magee v. Fisher, 8 Ala. 320; Jenness v. City of Black Hawk, 2 Colo. 578; Helms v. Wagner, 102 Ind. 385, 1 N. E. 730; Rollett v. Reiman, 120 Ind. 511, 22 N. E. 666, 16 Am. St. Rep. 340; Bunker v. Osborn, 132 Cal. 480, 64 Pac. 853.

⁸⁷ Stoddard v. Treadwell, 26 Cal. 294.

⁸⁸ Uridias v. Morrill, 25 Cal. 31; Klink v. Cohen, 13 Cal. 623. And see Conway v. Clinton, 1 Utah, 222.

⁸⁹ Sacramento County v. Bird, 31 Cal. 67.

⁹⁰ Halleck v. Mixer, 16 Cal. 574; Ohm v. San Francisco, 92 Cal. 437, 28 Pac. 580; Trustees v. Odlin, 8 Ohio St. 293.

⁹¹ Green v. Palmer, 15 Cal. 414, 76 Am. Dec. 492; Bowen v. Aubrey, 22 Cal. 566; Larco v. Casaneuava, 30 Cal. 560; Willson v. Cleaveland, 30 Cal. 192.

⁹² Doe v. Sanger, 78 Cal. 150, 20 Pac. 366; Henke v. Eureka Endowment Assoc., 100 Cal. 429, 34 Pac. 1089.

⁹³ Green v. Palmer, 15 Cal. 414, 76 Am. Dec. 492; Brown v. Rickman, 12 How. Pr. 313.

⁹⁴ Smith v. Countryman, 30 N. Y. 655; Lockwood v. Salhenger, 18 Abb. Pr. 136; Van Valen v. Lapham, 13 How. Pr. 240.

CHAPTER XI.

FORMAL PARTS OF PLEADINGS.

§ 101. **Introduction.**—Under this head will be treated briefly the caption, commencement, and prayer. The verification and signature will be made the subjects of the next chapter.

§ 102. **Caption.**—The caption of a pleading consists: 1. Of the name of the court; 2. Of the name of the state and county in which the action is brought; 3. Of the names of the parties plaintiff and defendant.¹ In the forms given in this work the word "caption" will be understood to include both the venue of the action and the names of the parties.

The caption is an essential part of a pleading, the codes generally requiring, with reference to the complaint, that it shall contain "the title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action."²

§ 103. **Name of court.**—It will be seen from this that every complaint must be entitled in the proper court, and that if no court is named no cognizance need be taken of the action.³ But this provision is to be reasonably construed, and the rule that the court must disregard any error or defect which does not affect the substantial rights of the parties⁴ applies to a misnomer in entitling the court upon the face of the complaint, while the cover of the complaint, the summons, and a writ of injunction contain the true name of the court.⁵

¹ Estee's Pl. & Pr., § 206.

² Cal. Code Civ. Proc., § 426; Or. B. & C. Codes, § 67. And see N. Y. Code Civ. Proc., § 481; Ind. Code Civ. Proc., § 341.

³ Ward v. Stringham, 1 Code Rep. 118. And see Garretson v. Hays, 70 Iowa, 19, 29 N. W. 786.

⁴ Cal. Code Civ. Proc., § 475.

⁵ Ex parte Fil Ki, 79 Cal. 584, 21 Pac. 974. See, also, Robinson v. Peru

etc. Wheel Co., 1 Okla. 140, 31 Pac. 988; McLeran v. Morgan, 27 Ark. 148. Under the New York practice, the service of summons being the commencement of an action, it is held that where the summons and complaint are served together, the omission of the name of the court from the complaint is a mere technical irregularity. This accords with the rule laid down in Ex parte Fil Ki, supra.

§ 104. **Venue.**—The name of the county, or, in other words, the venue, is technically necessary under the code provisions we are considering, and when it is once properly laid all matters following refer to it.⁶ The proper mode is to lay the venue in the title, and where this is done it is a sufficient designation of the county in which the plaintiff desires that the trial be had.⁷ It has been held that a venue laid in the body of a complaint is sufficient;⁸ and that where it is so laid the name of the county stated in the margin may be rejected as surplusage.⁹ The entire omission of any venue may, of course, be taken advantage of by demurrer.

§ 105. **Names of parties.**—A person's legal name is made up of his Christian name and his surname.¹⁰ The law recognizes but one Christian name, and intervening initials are no part of the name.¹¹ This rule is subject to qualification, however, in that a middle initial becomes material where the name is designated only by two initials in connection with the surname.¹² A Montana case has held that the designation of a Christian name by initials is improper;¹³ or where it appears that, with the exception of such middle name or initial, two persons have each the same name, and can only be distinguished by the middle name or initial of each.¹⁴ It seems that the word "junior" is no part of a name;¹⁵ nor the word "senior." These are mere unnecessary additions and have no place in a pleading. But as said by Mr. Estee, "We do not see why the term 'junior' or 'senior' may not properly be used in a complaint for the purpose of more clearly identifying the person."¹⁶ This addition would seem to be equally as necessary as

⁶ Estee's Pl. & Pr., § 216; *Cocke v. Kendall*, Hempst. 236, Fed. Cas. No. 2929b.

⁷ *Loehr v. Latham*, 15 Cal. 418; *Tappan v. Powers*, 2 Hall, 301; *Slate v. Post*, 9 Johns. 81; *Capp v. Gilman*, 2 Blackf. (Ind.), 45; *Davison v. Powell*, 13 How. Pr. 287; *Hughes v. Windpfennig*, 10 Ind. App. 122, 37 N. E. 432; *Dollman v. Munson*, 90 Mo. 85, 2 S. W. 134.

⁸ *Dwight v. Wing*, 2 McLean, 580.

⁹ *County Commrs. v. Wise*, 71 Md. 43, 18 Atl. 31, 1 Chit. Pl. 274.

¹⁰ *Euewold v. Olsen*, 39 Neb. 59, 42 Am. St. Rep. 557, 57 N. W. 765, 22 L. R. A. 573.

¹¹ *Garwood v. Hastings*, 38 Cal. 216; *People v. Smith*, 103 Cal. 563; 37 Pac. 516; *People v. Cook*, 14 Barb. 261; *Beattie v. National Bank*, 174 Ill. 571, 66 Am. St. Rep. 313, 51 N. E. 602, 43 L. R. A. 654.

¹² *Houghton v. Tibbetts*, 126 Cal. 57, 58 Pac. 318; *State v. Higgins*, 60 Minn. 1, 51 Am. St. Rep. 490, 61 N. W. 816, 27 L. R. A. 74.

¹³ *Wiebbold v. Hermann*, 2 Mont. 610.

¹⁴ *State v. Higgins*, 60 Minn. 1, 51 Am. St. Rep. 490, 61 N. W. 816, 27 L. R. A. 74.

¹⁵ *San Francisco v. Randall*, 54 Cal. 408; *People v. Cook*, 14 Barb. 261.

¹⁶ Estee's Pl. & Pr., § 211.

the middle name or initial, where there are two persons who would otherwise be indistinguishable. It has been held to be no ground of demurrer that the Christian name of one of the plaintiffs does not appear.¹⁷

Obviously the code provisions requiring that the names of the parties be stated requires that the caption contain the names of all the parties, plaintiff and defendant. If, however, some are named in the title, and all are correctly named in the body of the pleading, it will be sufficient.¹⁸ It is hardly necessary to say that when the names of the parties have once been stated in the pleading they may thereafter be designated simply as "plaintiff" and "defendant."

In designating the parties to an action, no title or other appellation is necessary, except where suit is brought by or against a person in his official capacity. In such a case it is proper that the character of the party be indicated.¹⁹ Where, however, there is no such reason for inserting an official title it will be treated as surplusage.²⁰ So the mere fact that the words "deputy sheriff" followed the defendant's name in the caption of a complaint was held not to make the action one against him as deputy sheriff. In such a case the word "as" not preceding the designation of official capacity, the presumption is that the defendant is sued as an individual, and the words "deputy sheriff" are merely *descriptio personæ*.²¹ And when a complaint shows a cause of action in favor of the plaintiff, not in his representative but in his individual capacity, the descriptive words may be rejected, leaving the action to stand as one brought in the individual capacity of the plaintiff.²² It may be proper to remark here that in an action against an estate an executor can be sued only in his representative capacity, and a complaint brought against him in such capacity cannot be amended so as to show an action against him

¹⁷ Nelson v. Highland, 13 Cal. 74; Andrews v. Wynn, 4 S. Dak. 42, 54 N. W. 1047.

¹⁸ Estee's Pl. & Pr., § 211; Hill v. Thacter, 2 Code Rep. 3, 3 How. Pr. 407; Collins v. Lightle, 50 Ark. 97, 6 S. W. 596.

¹⁹ Morrell v. Morgan, 65 Cal. 575, 4 Pac. 580; Sweeney v. Stanford, 67 Cal. 635, 8 Pac. 444; More v. Calkins, 85 Cal. 177, 24 Pac. 729; Hill v. Thac-

ter, 2 Code Rep. 3, 3 How. Pr. 407; Berolzheimer v. Strauss, 7 N. Y. Civ. Proc. Rep. 225.

²⁰ Sheldon v. Hay, 11 How. Pr. 15; Root v. Price, 22 How. Pr. 372; Butterfield v. Macomber, 22 How. Pr. 150.

²¹ Grieg v. Clement, 20 Colo. 167, 37 Pac. 960.

²² Litchfield v. Flint, 104 N. Y. 543, 11 N. E. 58; Thompson v. Whitmarsh, 100 N. Y. 35, 2 N. E. 273.

in his individual capacity, as such amendment would be an entire change of the party defendant and a different suit.²³

Where one of the defendants in an action is described by name in the summons, with the appended words "administrator with the will annexed," etc., and the summons refers to the complaint, in which it is alleged that such defendant, "as administrator," etc., has or claims an interest, the summons is not defective because it does not show that the administrator was sued in his representative capacity.²⁴

§ 106. Mistakes in names.—While the names of the parties must be correctly stated, a mistake in a name does not affect the pleading or the merits of the action. The mistake may be corrected upon motion of a party or by the court of its own motion.²⁵ It is not every mistake in the name of a party that will be regarded as material. The omission in a complaint and proceedings on attachment against a corporation defendant of the word "company" will not affect the attachment lien, and the error is waived by an appearance and answer of the corporation in its true name and without objection,²⁶ and the general rule is that a misnomer must be pleaded in abatement, or it is waived;²⁷ if the real party in interest is sued and served with process by the wrong name, and does not plead the misnomer, he will be bound by the judgment or decree rendered.²⁸

The doctrine of *idem sonans* renders many slight misnomers immaterial. Under this doctrine, if two names may be sounded alike without doing violence to the power of the letters found in the variant spelling, the difference is immaterial.²⁹ The question whether one name is *idem sonans* with another is not a question of spelling, depending less upon the rule than upon the usage.³⁰

²³ Sterrett v. Barker, 119 Cal. 492, 51 Pac. 695.

²⁴ Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891.

²⁵ Barnes v. Perine, 9 Barb. 202; Bank of Havana v. Magee, 20 N. Y. 356; Elliott v. Hart, 7 How. Pr. 25; Beavers v. Baucum, 33 Ark. 722.

²⁶ Hammond v. Starr, 79 Cal. 556, 21 Pac. 971.

²⁷ Young v. South T. I. Co., 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

²⁸ Pennsylvania Co. v. Sloan, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37.

²⁹ Hall v. Rice, 64 Cal. 443, 1 Pac. 891; McDonald v. Swett, 76 Cal. 257, 18 Pac. 324; Galliano v. Kilfoy, 94 Cal. 86, 29 Pac. 416; Donohoe-Kelly Banking Co. v. Southern Pacific Co., 138 Cal. 183, 94 Am. St. Rep. 28, 71 Pac. 93; Miltonville etc. Bank v. Kuhnle, 50 Kan. 420, 34 Am. St. Rep. 129, 31 Pac. 1057.

³⁰ Galliano v. Kilfoy, 94 Cal. 86, 29 Pac. 416.

The question is ordinarily one for the jury, especially where the name in question is foreign.³¹

§ 107. **Fictitious names.**—When the plaintiff is ignorant of the name of a defendant he must state that fact in the complaint, and such defendant may be designated in the pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding must be amended accordingly.³² It is to be noticed under this rule that when the true name is ascertained the pleading must be amended accordingly; otherwise no judgment can be taken and enforced against the party thus sued.³³ And where service has been made upon persons alleged to be sued under fictitious names, an order is properly made setting aside the service, where the plaintiff does not, in response to the motion, offer to have the true names inserted.³⁴ However, a failure to substitute the true name of a defendant will not now warrant a reversal of the cause, notwithstanding section 474 of the Code of Civil Procedure of California.³⁵ Until substitution is made of the true name of a defendant served with summons under a fictitious name, the rights of other parties to the action will not be affected by such service or by his appearance in the suit.³⁶

As has already been said, a person's legal name is made up of his given name and his surname, and to be ignorant of either is to be ignorant of such person's name within the meaning of the rule we are considering.³⁷ A defendant sued by a fictitious name is not entitled to have the service of summons set aside and the action dismissed upon showing that the plaintiff could have ascertained his true name had he exercised reasonable diligence in searching the public records of the county.³⁸

A defendant sued by a fictitious name is a party to the action from its commencement, and an amendment to the complaint by inserting the true name does not change the cause of action.³⁹

³¹ *People v. Fick*, 89 Cal. 144, 26 Pac. 759; *State v. Thompson*, 10 Mont. 561, 27 Pac. 349.

³² Cal. Code Civ. Proc., § 474; N. Y. Code Civ. Proc., § 451.

³³ *McKinley v. Tuttle*, 42 Cal. 577; *Campbell v. Adams*, 50 Cal. 205; *Baldwin v. Morgan*, 50 Cal. 585; *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700.

³⁴ *Rosencrantz v. Rogers*, 40 Cal. 489.

³⁵ *Blackburn v. Bucksport*, 7 Cal. App. 649, 95 Pac. 668.

³⁶ *Bachman v. Cothry*, 113 Cal. 499, 45 Pac. 814.

³⁷ *Euewold v. Olsen*, 39 Neb. 59, 42 Am. St. Rep. 557, 57 N. W. 765, 22 L. R. A. 573.

³⁸ *Irving v. Carpentier*, 70 Cal. 23, 11 Pac. 391.

³⁹ *Farris v. Merritt*, 63 Cal. 118.

§ 108. **Suits by or against corporations.**—A corporation is recognized in law only by its corporate name, and must sue and be sued by its corporate name,⁴⁰ and a suit against individuals as directors of a county school board is properly dismissed when the board is incorporated.⁴¹ It is pursuant to this rule that attachment or judgment is not available against a corporation not itself actually sued by name.⁴² So, also, if a statute, in cases where two or more persons are associated in business and transact such business under a common name, allows suit to be brought against them by such company name,⁴³ it does not permit a suit against them by a company name which is not that under which they transact their business. There is an added reason for this rule, in that such a statute is in derogation of the common law and must be strictly construed.⁴⁴ In New York a banking association formerly might sue either in its corporate name or in the name of its president.⁴⁵ But as pointed out by Mr. Estee, this did not dispense with averments in the complaint showing the officer's official capacity.⁴⁶

§ 109. **Commencement.**—The commencement of a pleading consists of those formal words used to introduce the subject-matter.⁴⁷ The designation of an amended complaint as a supplemental complaint is immaterial error.⁴⁸

§ 110. **Prayer.**—The prayer in a complaint, or, as it is frequently termed, the demand, varies according to the relief sought. Of course, where the recovery of money or damages is sought the amount thereof must be stated.⁴⁹ The general rule is that the plaintiff must insert in his complaint a demand for the relief which he claims.⁵⁰ But this rule is not so restrictive as it may at first appear, and although it limits the relief granted to the plaintiff, if there be no answer, yet in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.⁵¹ In other words, where there is an answer the right to recover depends not upon the prayer, but upon

⁴⁰ *Curtiss v. Murry*, 26 Cal. 633.

⁴¹ *Stewart v. Thornton*, 75 Va. 217.

⁴² *Curtiss v. Murry*, 26 Cal. 633;
Collins v. Montgomery, 16 Cal. 398.

⁴³ See Cal. Code Civ. Proc., § 388.

⁴⁴ *King v. Randlett*, 33 Cal. 321.

⁴⁵ *Leonardsville Bank v. Willard*, 25
N. Y. 574.

⁴⁶ *Estee's Pl. & Pr.*, § 220.

⁴⁷ *Estee's Pl. & Pr.*, § 229.

⁴⁸ *Scroggin v. Johnston*, 45 Neb.
714, 64 Pac. 236.

⁴⁹ Cal. Code Civ. Proc., § 426.

⁵⁰ *Id.*

⁵¹ Cal. Civ. Code, § 580.

the scope of the pleading and the issues made, or which might have been made, under it.⁵² And this is so in spite of code provisions making the prayer a part of the complaint.⁵³ In case of a defaulting defendant, however, the general prayer for relief cannot enlarge the power of the court to grant relief not prayed for.⁵⁴

A petition in insolvency need not conclude with a formal prayer for the debtor's discharge; it is sufficient if it contains an averment that the petitioner desires to be discharged from his debts and liabilities.⁵⁵

§ 111. Prayer for specific and general relief.—If specific relief cannot be granted, such relief as the case authorizes may be had under the prayer for general relief.⁵⁶ Thus under a general prayer the court may allow a deed to be reformed by inserting in it a power of revocation.⁵⁷ But counsel fees and the amount paid for taxes cannot properly be included in a judgment unless they are asked for in the prayer for relief.⁵⁸

§ 112. Prayer for legal and equitable relief.—The prayer of a complaint may seek both legal and equitable relief where the matter arises out of the same transaction;⁵⁹ but the causes of action must be separately stated in the complaint.⁶⁰ Where the right to such relief, however, is based upon the same facts, a demurrer on the ground that several causes of action are improperly joined cannot be sustained.⁶¹ The grounds for equitable interposition should be stated subsequently to and distinct from those upon which judgment at law is sought.⁶² In no case can a prayer include demands for two inconsistent kinds of relief.⁶³ But

⁵² *Johnson v. Polhemus*, 99 Cal. 245, 33 Pac. 908; *Rankin v. Newman*, 107 Cal. 610, 40 Pac. 1024.

⁵³ *Mont. Code Civ. Proc.*, § 671; *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49.

⁵⁴ *Staaeke v. Bell*, 125 Cal. 309, 57 Pac. 1012.

⁵⁵ *Matter of Choep*, 112 Cal. 630, 44 Pac. 1066.

⁵⁶ *People v. Turner*, 1 Cal. 152; *Cummings v. Cummings*, 75 Cal. 434, 17 Pac. 442; *Rollins v. Forbes*, 10 Cal. 299; *Nevin Lulu Mining Co.*, 10 Colo. 357, 15 Pac. 611; *Ross v. Purse*, 17 Colo. 24, 28 Pac. 473; *Kleinschmidt v. Steele*, 15 Mont. 181, 38 Pac. 827.

⁵⁷ *Grafton v. Remsen*, 16 How. Pr. 32.

⁵⁸ *Janson v. Smith*, Cal. Sup. Ct., Jan. Term, 1866.

⁵⁹ *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 224; *Hill v. Taylor*, 22 Cal. 191; *Gray v. Dougherty*, 25 Cal. 266; *More v. Massini*, 32 Cal. 595.

⁶⁰ *Gates v. Kieff*, 7 Cal. 124.

⁶¹ *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839.

⁶² *Natoma Water etc. Co. v. Clar-kin*, 14 Cal. 544.

⁶³ *Maxwell v. Farnam*, 7 How. Pr. 236; *Durant v. Gardner*, 10 Abb. Pr. 445.

the fact that a prayer is inartificially framed will not preclude relief.⁶⁴

§ 113. **Inconsistent prayer.**—Under the liberal rules of the codes the complaint must be taken as a whole, and mere failure to make the prayer conform to the causes of action set forth in the complaint, will not prevent the granting of the relief which the complaint seeks, but which the prayer omits.⁶⁵

There is no rule of pleading which requires a person to aver the precise amount he claims. Needless to say, a plaintiff cannot recover more than he claims in his prayer; but he may recover a less amount than that stated in his complaint.⁶⁶ An amendment is necessary to allow a recovery in excess of the specific amount demanded.⁶⁷ Where there are two independent counts in the complaint, each complete within itself, and a verdict for the plaintiff on one count only, the relief will follow the prayer of that count.⁶⁸

The court may always permit an amendment of the complaint to correct an inconsistency between the prayer and the complaint and the facts stated therein.⁶⁹

While the jurisdiction of the court in certain cases is to be determined by the relief demanded in the complaint, yet the prayer is not conclusive of the jurisdiction, if the record shows on its face that the dispute is feigned and not real.⁷⁰

⁶⁴ *People v. Turner*, 1 Cal. 152; *Truebody v. Jacobsen*, 2 Cal. 269.

⁶⁵ *Northern Ry. Co. v. Jordan*, 87 Cal. 23, 25 Pac. 273; *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; *Reed v. Norton*, 99 Cal. 617, 34 Pac. 333; *First Nat. Bank v. Campbell*, 2 Colo. App., 271, 30 Pac. 357; *Arnold v. Sinclair*, 11 Mont. 556, 28 Am. St. Rep. 489, 29 Pac. 340.

⁶⁶ *Meek v. McClure*, 49 Cal. 627.

⁶⁷ *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228; *Miles v. Walther*, 3 Mo. App. 96. But see *Ohio Creek Coal Co. v. Hinds*, 15 Colo. 173, 25 Pac. 502.

⁶⁸ *Nevada C. & S. C. Co. v. Kidd*, 37 Cal. 283,

⁶⁹ *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154.

⁷⁰ *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195.

FORMS OF PARTS OF PLEADINGS.

§ 114. Caption—Title of cause.

Form No. 15.

In the Superior Court of the County of . . . , State of . . . [or
in the Supreme Court of the State of . . .]

Adam Buck,		}
	Plaintiff,	
v.		
Charles Dart,		}
	Defendant.	

§ 115. Title of cause where some of the parties are unknown.

Form No. 16.

[STATE, COUNTY, AND COURT.]

Andrew Black,		}
	Plaintiff,	
v.		
Charles Dean, John Doe, and Richard		}
Roe,	Defendants.	

§ 116. Title of cause by or against corporation.

Form No. 17.

[VENUE.]

Alamo Brick Company (a corpora-		}
tion),	Plaintiff,	
v.		
California Dairy Association (a cor-		}
poration),	Defendant.	

§ 117. The state on the relation of an individual.

Form No. 18.

[STATE, COUNTY, AND COURT.]

The People of the State of California,	}
on the Relation of John Doe,	
Plaintiff,	
v.	
Richard Roe,	}
Defendant.	

§ 118. By guardian ad litem.

Form No. 19.

[STATE, COUNTY, AND COURT.]

John Doe, by his Guardian ad litem,	}
Richard Roe,	
Plaintiff,	
v.	
The Southern Pacific Railroad Com-	}
pany (a corporation),	
Defendant.	

§ 119. By assignee for creditors.

Form No. 20.

[STATE, COUNTY, AND COURT.]

John Doe, as Assignee for the Benefit	}
of the Creditors of James Roe,	
Plaintiff,	
v.	
Richard Black,	}
Defendant.	

§ 120. By and against national banks.

Form No. 21.

The First National Bank of . . . ,	}
Plaintiff,	
v.	
The Second National Bank of . . . ,	
Defendant.	

§ 121. By an officer of the state.

Form No. 22.

[STATE, COUNTY, AND COURT.]

Andrew Black, Comptroller of the State of California,	} <div style="display: inline-block; vertical-align: middle; text-align: center;"> Plaintiff, v. Defendant. </div>
Charles Dean,	

§ 122. Caption of papers used in probate proceedings—Decedent's estate.

Form No. 23.

[STATE, COURT, AND COUNTY.]

In the Matter of the Estate of John Doe, Deceased.	}
The petition of, etc.	

§ 123. The same—Minor's estate.

Form No. 24.

[STATE, COURT, AND COUNTY.]

In the Matter of the Estate of John Doe, a Minor.	}
The petition of, etc.	

§ 124. The same—Insane person's estate.

Form No. 25.

[STATE, COURT, AND COUNTY.]

In the Matter of the Estate of John Doe, an Insane Person.	}

§ 125. Caption of papers used in insolvency proceedings.

Form No. 26.

[STATE, COUNTY, AND COURT.]

In the Matter of the Estate of John Doe, an Insolvent Debtor.	}
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§ 126. Caption of papers on habeas corpus.

Form No. 27.

[STATE, COUNTY, AND COURT.]

In the Matter of John Doe, on }
Habeas Corpus.

§ 127. Caption of papers on disbarment of an attorney.

Form No. 28.

[STATE, COUNTY, AND COURT.]

In the Matter of the Application for }
the Disbarment of John Doe, a }
member of the bar of this court, }
and to revoke the certificate issued }
to him by this court.

§ 128. Caption of papers used in other courts.

Form No. 29.

John Doe,		Plaintiff,	} County Court, . . . County.
	v.		
Richard Roe,		Defendant.	

§ 129. Caption of papers used in justice's courts.

Form No. 30.

In the Justice's Court of the Township of . . . , County of . . . ,
State of California.

John Doe,		Plaintiff,	}
	v.		
Richard Roe,		Defendant.	

§ 130. Title and commencement.

Form No. 31.

[STATE, COUNTY, AND COURT.]

Andrew Black,		Plaintiff,	}
	v.		
Charles Dean,		Defendant.	

Plaintiff complains of the defendant, and alleges:

§ 131. Commencement—By one suing for himself and others.

Form No. 32.

[STATE, COUNTY, AND COURT.]

The plaintiff complains on behalf of himself and of all others (judgment creditors of the defendant), who shall in due time come in and seek relief by and contribute to the expenses of this action, and alleges:

§ 132. Conclusion of complaint.

Form No. 33.

Wherefore, the plaintiff demands judgment, etc.

E. F., Attorney for Plaintiffs.

[VERIFICATION.]

§ 133. Form of complaint—Complete.

Form No. 34.

[STATE, COUNTY, AND COURT.]

Andrew Black,	Plaintiff,	}
	v.	
Charles Dean,	Defendant.	

The plaintiff complains of the defendant, and alleges:

1. For a first cause of action:

I. That, etc.

II. That, etc.

III. That, etc.

2. For a second cause of action:

I. That, etc.

II. That, etc.

III. That, etc.

Wherefore the plaintiff demands judgment, etc.

E. F., Attorney for Plaintiff.

[VERIFICATION.]

§ 134. Amended complaint—Commencement.

Form No. 35.

[TITLE.]

Plaintiff, by leave of the court [or by stipulation] files this his amended complaint and alleges:

[State cause of action as before.]

§ 135. Formal parts of defendant's pleadings—Commencement of demurrer.

Form No. 36.

[TITLE.]

The defendant demurs to the complaint [or to the first alleged cause of action in the complaint] filed herein, and for cause of demurrer alleges:

- I. That, etc.
- II. That, etc.

§ 136. Form of answer.

Form No. 37.

[TITLE.]

The defendant, by G. H., his attorney, answers the complaint herein, and

1. For a first defense to the first alleged cause of action, denies:
I. That, etc.

2. For a second defense to said first alleged cause of action, defendant alleges:

- I. That, etc.

3. For a third defense to said first alleged cause of action, defendant alleges:

[Set forth facts constituting the defense, and if any of them have been alleged above, an express reference to them will suffice.]

4. And for a counterclaim to the second alleged cause of action, defendant alleges:

- I. That, etc.

Wherefore defendant demands, etc. [Stating demand on counterclaim.]

G. H., Attorney for Defendant.

[VERIFICATION.]

§ 137. Commencement of answer by defendant sued by a wrong name.

Form No. 38.

[TITLE.]

Defendant, C. D., in the summons and complaint in this action, called L. M., answers the complaint herein, and alleges [or denies]:

§ 138. Commencement of answer by an infant.

Form No. 39.

[TITLE.]

Defendant, an infant under the age of . . . years, by N. O., his guardian, answers the complaint herein, and alleges [or denies]:

§ 139. Commencement of an answer by an insane person.

Form No. 40.

Defendant, Q. R., an insane person [or a person of unsound mind, or an idiot], by S. T., his guardian, answers the complaint herein and alleges [or denies]:

§ 140. Commencement of answer by husband and wife.

Form No. 41.

[TITLE.]

A. X., one of the above-named defendants, and B. X., his wife, for answer to the complaint in this action, allege [or deny]:

§ 141. Commencement of separate answer of defendant.

Form No. 42.

[TITLE.]

The defendant, A. B., answers on his own behalf the complaint herein, and alleges [or denies]:

§ 142. Forms of petitions—Petition to the court.

Form No. 43.

[TITLE.]

To the Honorable, the Superior Court of the County of . . . ,
State of California, [or other court with full designation]:
The petition of . . . , of the city of . . . , shows:

§ 143. Petition to a judge.

Form No. 44.

[TITLE.]

To the Honorable . . . , Judge of the Superior Court of the County
of . . . , State of California [or other magistrate, giving full
official designation]:

The petition of, etc.

§ 144. Order of a court in an action.

Form No. 45.

At a regular term of the Superior Court of the City and County of . . . , State of California, held at the City Hall in the City and County of San Francisco, etc.

Present: The Honorable . . . , Judge.

§ 145. Caption, commencement, and conclusion of affidavits.

Form No. 46.

[STATE, COUNTY, AND COURT.]

John Doe,	Plaintiff,	} Affidavit for . . .
	v.	
Richard Roe,	Defendant.	
STATE OF CALIFORNIA,	} ss.	
COUNTY OF . . .		

John Doe, of . . . [and if there are two deponents, and James Doe, of . . . , severally], being duly sworn, say [each for himself]:

1. I am the plaintiff [or other description of the deponent].
2. I have, etc. [State facts sworn to].

[SIGNATURE.]

Subscribed and sworn to before me, this . . . day of . . . , 19..

[SEAL.]

E. F., Notary Public.

§ 146. Jurat, where deponent is blind or illiterate.

Form No. 47.

Sworn before me, this . . . day of . . . , 19.., the same having been in my presence [or by me] read to the deponent, he being blind [or illiterate], and he appearing to me to understand the same.

R. S., Notary Public.

§ 147. Jurat, where deponent is a foreigner.

Form No. 48.

Sworn before me, this . . . day of . . . , 19.., I having first sworn R. M., an interpreter, to interpret truly the same to the deponent, who is a foreigner and not understanding the language, and he having so interpreted the same to the deponent.

A. C., County Clerk.

§ 148. Clerk's certificate to copy of complaint.

Form No. 49.

I hereby certify the foregoing to be a full, true and correct copy of the original complaint on file in my office, in the above entitled action.

In witness whereof I have hereunto set my hand and affixed the seal of the above-named court, this . . . day of . . . , 19..

A. C., Clerk.

By J. S., Deputy Clerk.

§ 149. Certificate of clerk to affidavit.

Form No. 50.

STATE OF . . . , 1 }
COUNTY OF . . . } ss.

I, S. T., clerk of the county court of said county of . . . , do hereby certify that O. P., before whom the above affidavit was taken, is a judge of the county court [or other title], which is a court of record of said state [or county, as the case may be], having a seal, existing pursuant to the laws thereof, in and for said county [or country, district, or otherwise], and that he is duly qualified and commissioned as such, and that the subscription to the same is his genuine signature.

Witness my hand and the seal of said court, at . . . this . . . day of . . . , 19..

[SEAL.]

S. T., County Clerk.

CHAPTER XII.

VERIFICATION OF PLEADINGS.

§ 150. **In General.**—The codes of all states which have adopted the reformed system of procedure contain provisions in regard to verification of pleadings. In California, the code provides that every pleading must be subscribed by the party or his attorney; and where the complaint is verified, or when the state, or any officer of the state in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or unless an officer of the state, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause are unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reason why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof.¹ These statutes apply only to pleadings in actions or proceedings.²

§ 151. **Verification defined.**—At common law a verification consists merely of a concluding declaration of the bill, plea, or answer that the pleader is prepared to show the truth of the averments of his pleading. Under the code system it consists of an affidavit, separate from but immediately following and a part

¹ Cal. Code Civ. Proc., §§ 437, 446; Alaska Codes, pt. 4, ch. 10, §§ 71-72, 217-219; Ariz. Civ. Code, par. 1358; Idaho Rev. Codes, § 4199; Mont. Rev. Codes, §§ 6564, 6565; Nev. Comp. Laws, § 3150; N. Mex. Comp. Laws, § 2685; Or. B. & C. Codes, §§ 82, 83;

Utah Rev. Stats., § 2983; Wash. Bal. Codes, § 4925; Wyo. Rev. Stats., § 3576.

² Parke & Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 82 Pac. 51; Christopher v. Condodgeorge, 128 Cal. 581, 61 Pac. 174.

of the pleading, stating that its averments are true to the personal knowledge of the party, save as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true. The object of the verification is to secure good faith in the averments of the party.³

§ 152. Written pleadings.—The provision that every pleading must be subscribed by the party or his attorney makes it necessary for all pleadings to be in writing or printing.⁴ And a stipulation entered on the minutes waiving plea of the statute of limitations set up in an answer does not amount to an amendment of the answer so as to render finding on such issue unnecessary.⁵

§ 153. Authority to take.—Any persons given authority by statute to take affidavits to be used in any court of justice have authority to take verifications to pleadings, as in case of district attorney,⁶ county recorder,⁷ or the party's attorney, if he is a notary public.⁸

§ 154. Verification of complaint.—There is nothing in the statutes requiring the complaint to be verified, with the exception of complaints in certain actions where special relief is provided for, as in actions for injunction,⁹ actions against steamers, boats, and vessels,¹⁰ actions to remove or suspend attorneys,¹¹ actions for the voluntary dissolution of corporations,¹² actions to contest an election,¹³ actions submitted without controversy,¹⁴ a petition to perpetuate testimony,¹⁵ actions in forcible entry and unlawful de-

³ *Patterson v. Ely*, 19 Cal. 28.

⁴ *People v. Superior Court*, 114 Cal. 466, 46 Pac. 383.

⁵ *Spreckels v. Ord*, 72 Cal. 86, 13 Pac. 158.

⁶ *Haile v. Smith*, 128 Cal. 415, 60 Pac. 1032.

⁷ *Pfeiffer v. Riehn*, 13 Cal. 643.

⁸ *Kuhland v. Sedgwick*, 17 Cal. 123.

⁹ Cal. Code Civ. Proc., § 527; *Falkinburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76.

¹⁰ Cal. Code Civ. Proc., § 815.

¹¹ Cal. Code Civ. Proc., § 291; *Ariz. Civ. Code*, par. 403; *Idaho Rev. Codes*, § 4199; *Mont. Rev. Codes*, § 6565; *Nev. Comp. Laws*, § 2629; *Or. B. &*

C. Codes, § 1069; *Utah Rev. Stats.*, § 124.

¹² Cal. Code Civ. Proc., § 1229.

¹³ Cal. Code Civ. Proc., § 1115; *Ariz. Civ. Code*, par. 2419; *Idaho Rev. Codes*, § 5026; *Mont. Rev. Codes*, § 7238; *Utah Rev. Stats.*, § 917; *Wash. Bal. Codes*, § 1430; *Wyo. Rev. Stats.*, § 362.

¹⁴ Cal. Code Civ. Proc., §§ 1138-1140; *Alaska Codes*, pt. 4, ch. 29, §§ 248-250; *Idaho Rev. Codes*, §§ 5060-5063; *Or. B. & C. Codes*, §§ 41, 193, 195, 199, 413; *Utah Rev. Stats.*, §§ 3218-3220.

¹⁵ Cal. Code Civ. Proc., § 2084.

tainer,¹⁶ and like actions when required by statute. In actions for arrest,¹⁷ replevin or claim and delivery,¹⁸ attachment,¹⁹ and like proceedings, while the complaint need not be verified, it must be accompanied or followed by a separate affidavit. The safer and better practice, however, is to verify the complaint in all cases brought in courts of record. It is not required as to the claim in an action to foreclose a mechanic's lien.²⁰

§ 155. In disbarment proceedings.—Under the code provision that the accusation in disbarment proceedings must be verified by the oath of some person that the charges are true, a verification upon information and belief will not be considered.²¹ But where the proceeding is instituted by a petition of the state bar association, filed with the supreme court, and by that court referred to the attorney-general, with instructions to embody the charges in an information, neither the petition nor the information need be under oath.²² Also, an application by a disbarred attorney for reinstatement must be verified.²³

§ 156. In actions and defenses on written instruments.—When an action is brought or a defense to an action is founded upon a written instrument, a copy of which is contained in the pleading, the genuineness and due execution of such instrument is deemed admitted, unless the answer denying the complaint or an affidavit denying the answer be duly sworn to and served upon the party setting up such instrument.²⁴ However, such verification of such denial need not be made if the party setting up the instrument refuse, upon written demand, served by copy upon such party or his attorney, and filed with the papers in the case, to allow an inspection of the original.²⁵

In an action to determine heirship under section 1664 of the California Code of Civil Procedure, an unprobated will of decedent is not an instrument upon which a defense can be founded, so as

¹⁶ Cal. Code Civ. Proc., § 1166, as amended 1907.

¹⁷ Cal. Code Civ. Proc., § 481.

¹⁸ Cal. Code Civ. Proc., § 510.

¹⁹ Cal. Code Civ. Proc., § 538.

²⁰ *Parke & Lacy Co. v. Inter Nos O. & D. Co.*, 147 Cal. 490, 82 Pac. 51.

²¹ *Mont. Rev. Codes*, § 6412; *In re Weed*, 26 Mont. 241, 67 Pac. 308.

²² *People v. Mead*, 29 Colo. 344, 68 Pac. 241.

²³ *In re Newton*, 27 Mont. 182, 70 Pac. 510.

²⁴ Cal. Code Civ. Proc., §§ 447-448; *Nev. Comp. Laws*, § 3149; *Rianda v. Watsonville Water etc. Co.*, 152 Cal. 523, 93 Pac. 79.

²⁵ Cal. Code Civ. Proc., § 449.

to require plaintiff to deny the genuineness of such instrument by affidavit.²⁶

In Nevada, oral testimony is admissible for making the denial where the contract set up as a defense was not signed or executed by the parties.²⁷

A letter set out in the answer, merely giving construction to previous communications, is not a written instrument whose execution is admitted by failure to deny it under oath.²⁸ And though plaintiff does not file an affidavit denying a receipt pleaded by defendant, he is not prevented from proving surrounding circumstances by parol, and showing that it was executed through mistake or fraud.²⁹ Failure to deny the genuineness of a check set forth in defendant's answer is merely an admission thereof, but under section 462 of the Code of Civil Procedure the facts pleaded in the answer by way of defense are deemed controverted and the court cannot, then, grant judgment for defendant upon the pleadings.³⁰

§ 157. Effect of verifying complaint.—By verification of the complaint plaintiff can prevent defendant from interposing a general denial in suits on promissory notes or bills of exchange,³¹ and this even though verification of the answer be waived.³² A plea that denies the execution of the instrument, when required to be sworn to, if filed without affidavit, admits the execution of the instrument, but may be good for other purposes,³³ unless an inspection of the original is refused.³⁴ Unverified portions of the answer may be stricken out, letting the verified part stand.³⁵ The proper practice is to move to strike from the files, for judgment on the pleadings, or for judgment by default, for want of answer, in case of non-verification of an answer required to be verified.³⁶

²⁶ *In re Christensen Estate*, 135 Cal. 674, 68 Pac. 112.

²⁷ *Tonopah Lumber Co. v. Riley* (Nev.), 95 Pac. 1001.

²⁸ *Marx v. Raley & Co.*, 6 Cal. App. 479, 92 Pac. 519.

²⁹ *California Packers' Co. v. Merritt Fruit Co.*, 6 Cal. App. 507, 92 Pac. 509.

³⁰ *Newsom v. Woollacott*, 5 Cal. App. 722, 91 Pac. 347.

³¹ *Brooks v. Chilton*, 6 Cal. 640.

³² *Harney v. Porter*, 62 Cal. 511.

³³ Cal. Code Civ. Proc., § 447; *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Sacramento County v. Bird*, 31 Cal. 73; *Corcoran v. Doll*, 32 Cal. 88; *Burnett v. Stearus*, 33 Cal. 473.

³⁴ Cal. Code Civ. Proc., § 449.

³⁵ *Nichols v. Jones*, 14 Colo. 61, 23 Pac. 89.

³⁶ *Hearst v. Hart*, 128 Cal. 327, 60 Pac. 846; *Drum v. Whiting*, 9 Cal. 422; *McCullough v. Clark*, 41 Cal. 298; *Speer v. Craig*, 16 Colo. 478, 27 Pac. 891.

§ 158. **Verification of the answer.**—When the complaint is verified the answer must be verified also, or it may, upon motion, be stricken from the files, except when an admission of the truth of the complaint might subject the party to prosecution for felony or misdemeanor,³⁷ unless such prosecution is barred by the statute of limitations.³⁸ And defendant may show by affidavits that such admissions would subject him to such prosecution, if it does not appear from the pleadings themselves.³⁹ Also, if defendant would be excused from testifying as a witness to the truth of any matter denied by the answer, he need not verify the answer.⁴⁰ Mere charge of fraud in making an assignment does not excuse defendant from verifying his answer.⁴¹ A verified answer which in any part contains a distinct denial of a fact material to plaintiff's recovery cannot, whatever its defects, be treated as a nullity, so as to entitle plaintiff to a judgment on the pleadings.⁴² The answer may be verified though the complaint is not.⁴³ Where in *mandamus*, the answer was not verified as required, and respondent, upon his attention being called to the fact, made no application to amend, the answer cannot be regarded as controverting the facts stated in the petition.⁴⁴

§ 159. **Answer in condemnation suit.**—In condemnation proceedings by the county the answer need not be verified, plaintiff not being either the state or an officer of the state in official capacity.⁴⁵

§ 160. **Answer in tax suits.**—The acts in relation to the collection of delinquent taxes which compel the defendant to verify his answer do not change the rule⁴⁶ that where a complaint is not verified a general denial of its allegations in the answer will put in issue all the material allegations.⁴⁷

³⁷ Cal. Code Civ. Proc., § 446; *Drum v. Whiting*, 9 Cal. 422; *Wheeler v. Dixon*, 14 How. Pr. 151; *Anable v. Anable*, 24 How. Pr. 92.

³⁸ *Henry v. Salina Bk.*, 1 Comst. 86.

³⁹ *Scoville v. New*, 12 How. Pr. 319; *Blaisdell v. Raymond*, 5 Abb. Pr. 144.

⁴⁰ *Drum v. Whiting*, 9 Cal. 422.

⁴¹ *Wolcott v. Winston*, 8 Abb. Pr. 422.

⁴² *Ghirardelli v. McDermott*, 22 Cal. 539.

⁴³ *Porter v. Bichard*, 1 Ariz. 87, 25 Pac. 530.

⁴⁴ *People v. District Court*, 33 Colo. 77, 79 Pac. 1014.

⁴⁵ *Monterey v. Cushing*, 83 Cal. 507, 23 Pac. 700; *San Francisco v. Itsell*, 80 Cal. 60, 22 Pac. 74.

⁴⁶ Cal. Code Civ. Proc., § 437.

⁴⁷ *Rowley v. Howard*, 23 Cal. 401.

§ 161. **When verification may be made.**—Defendant may be allowed to verify his answer before or at the time of trial;⁴⁸ but inability of counsel to obtain defendant's verification in time will not prevent the granting of a motion to strike out the answer for want of such verification.⁴⁹ Or plaintiff may proceed as if no answer were filed to his verified complaint, and ask for judgment.⁵⁰ If plaintiff goes to trial on the merits without objecting to the non-verification of the answer, he will not be allowed to raise the point in the appellate court.⁵¹ And where the parties took depositions under the pleadings and went to trial, and plaintiff, at the close of his evidence, for the first time brought up an error in the verification of defendant's answer, the court should allow defendant to then verify his answer, and not grant a judgment by default.⁵²

§ 162. **Form and venue.**—As to the form of affidavit of verification, it has been held both that it must, and again that it need not, contain the venue, the jurat, and the signature or mark of the affiant. At any rate these are technical objections, and should be raised first in the lower court.⁵³ So, also, a pleading in the form of an affidavit, without a separate verification, has been held,⁵⁴ and denied, to be a verified pleading.⁵⁵ The party's attorney, being a notary also, may take the verification.⁵⁶

The verification should be subscribed by the party making it,⁵⁷ and such subscription may be considered sufficient subscription to the complaint,⁵⁸ and it is defective if neither is subscribed.⁵⁹

§ 163. **Sufficient and defective verification.**—A verification is sufficient if it conforms substantially to the statute.⁶⁰ An error

⁴⁸ Angier v. Masterson, 6 Cal. 61; Arrington v. Tupper, 10 Cal. 464; Lattimer v. Ryan, 20 Cal. 628.

⁴⁹ Drum v. Whiting, 9 Cal. 422.

⁵⁰ Strout v. Curran, 7 How. Pr. 36; McCullough v. Clark, 41 Cal. 298.

⁵¹ McCullough v. Clark, 41 Cal. 298; San Francisco v. Itsell, 80 Cal. 57, 22 Pac. 74; Nichols v. Jones, 14 Colo. 61, 23 Pac. 89; Speer v. Craig, 16 Colo. 478, 27 Pac. 891.

⁵² Arrington v. Tupper, 10 Cal. 464; Lattimer v. Ryan, 20 Cal. 628.

⁵³ Kuhland v. Sedgwick, 17 Cal. 123.

⁵⁴ Garretson v. Board etc., 61 Cal. 54.

⁵⁵ Woods v. Varnum, 85 Cal. 640, 24 Pac. 843.

⁵⁶ Kuhland v. Sedgwick, 17 Cal. 123.

⁵⁷ Laimbeer v. Allen, 2 Sandf. 648, 2 Code Rep. (N. Y.), 15.

⁵⁸ Hubbell v. Livingston, 1 Code Rep. (N. Y.), 63.

⁵⁹ Laimbeer v. Allen, 2 Sandf. 648, 2 Code Rep. (N. Y.) 15.

⁶⁰ Ely v. Frisbie, 17 Cal. 250; Kirk v. Rhoads, 46 Cal. 399; Perras v. Denver & R. G. R. Co., 5 Colo. App. 21, 36 Pac. 637.

in dating the verification may be corrected by parol testimony, and will not affect the validity of the claim.⁶¹ The verification is no part of the complaint, and cannot render it defective.⁶² A defect in the verification merely relieves defendant from verifying his answer, unless it is an action in which verification is specifically required,⁶³ when it should be attacked by motion to strike out instead of by demurrer.⁶⁴ Filing of answer waives any defective verification not attacked in the answer, or prior thereto.⁶⁵ Statement that matters set forth in the foregoing answer are true is equivalent to statement that the foregoing answer is true.⁶⁶

§ 164. By guardian.—In an action by an infant appearing by a guardian *ad litem*, the complaint may properly be verified by the guardian, and he need not do so as the agent or attorney for the infant, but may as the plaintiff.⁶⁷

§ 165. By attorney or agent.—A pleading must be verified by the affidavit of one of the parties, unless the parties are absent from the county where the attorney resides, or from some cause are unable to verify it, or the facts are within the knowledge of the attorney or other person verifying the same. When verified by attorney, or any other person, except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties,⁶⁸ and statement that the attorney resided in the county, and plaintiffs are absent from the county, is sufficient in itself,⁶⁹ or that claimant is a corporation and none of its officers reside in the county.⁷⁰ Such verification by an agent must disclose the nature of the agency,⁷¹ but it is not necessary to verify by the agent who knows most about the matter.⁷²

And when the party is not within the county where the attorney resides, a verification made by the attorney is good, though he

⁶¹ Bell v. City of Spokane, 30 Wash. 508, 71 Pac. 31.

⁶² George v. McAvoy, 6 How. Pr. 200.

⁶³ Gilmore v. Hempstead, 4 How. Pr. 153.

⁶⁴ Seattle Coal Co. v. Thomas, 57 Cal. 197; Warner v. Warner, 11 Kan. 121; Pudney v. Burkhardt, 62 Ind. 179.

⁶⁵ Greenfield v. The Gunnell, 6 Cal. 69.

⁶⁶ Fleming v. Wells, 65 Cal. 336, 4 Pac. 197; Cady v. Case, 11 Wash. 124, 39 Pac. 375.

⁶⁷ Anable v. Anable, 24 How. Pr. 92

⁶⁸ Cal. Code Civ. Proc., § 446.

⁶⁹ Stephens v. Parrish, 83 Cal. 561, 23 Pac. 797.

⁷⁰ Empire St. Min. Co. v. Mitchell, 29 Mont. 55, 74 Pac. 81.

⁷¹ Boston Locomotive Works v. Wright, 15 How. Pr. 253.

⁷² Drevert v. Appsert, 2 Abb. Pr. 165.

have no personal knowledge of the truth of the allegations,⁷³ although it appears that the client has a resident agent through whom the attorney has obtained his information.⁷⁴

Under the California code it is not necessary that the attorney or agent state his grounds of belief, but in Oregon he must.⁷⁵ If the attorney can only verify by reason of fact that he has personal knowledge of the facts, his verification must be from such facts and not from information and belief.⁷⁶ Merely that the facts are more fully known to the attorney than to defendant is not sufficient.⁷⁷

§ 166. By one of several parties.—One of several plaintiffs may verify,⁷⁸ but in certain cases it has been held that where the action is joint, the parties should unite in the verification.⁷⁹ And in an action against husband and wife, where her interest is separate, the answer must be verified by both, if relied on as the answer of both.⁸⁰ But their joint claim against a city for damages need be verified by only one of them.⁸¹

§ 167. By an officer of a corporation.—A verification made by an officer or manager of a corporation is a verification of the corporation and need not state the grounds of belief or source of knowledge.⁸² The statutes do not require an affidavit of a higher degree than could be made on the part of the officer from whom it is demanded.⁸³ When a corporation is a party, the verification may be made by any officer thereof,⁸⁴ and affiant's mere statement that he is vice-president of the corporation is sufficient.⁸⁵

§ 168. On information and belief.—There seems to be no reason why the California statute prescribes that the verification

⁷³ *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *Ely v. Frisbie*, 17 Cal. 250; *Patterson v. Ely*, 19 Cal. 28.

⁷⁴ *Drevert v. Appsert*, 2 Abb. Pr. 165.

⁷⁵ Or. B. & C. Codes, § 79.

⁷⁶ *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297; *Columbia S. Co. v. Warner L. Co.*, 138 Cal. 445, 71 Pac. 498.

⁷⁷ *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297; *Jones v. Kruse*, 138 Cal. 613, 72 Pac. 146.

⁷⁸ *Patterson v. Ely*, 19 Cal. 28; *Claiborne v. Castle*, 98 Cal. 30, 32 Pac. 807; *Butterfield v. Graves*, 138 Cal. 155, 71 Pac. 510.

⁷⁹ *Andrews v. Storms*, 5 Sandf. 609; *Hull v. Ball*, 14 How. Pr. 305.

⁸⁰ *Youngs v. Seely*, 12 How. Pr. 395.

⁸¹ *McLeod v. City of Spokane*, 26 Wash. 346, 67 Pac. 74.

⁸² *Glaubenslee v. Hamburg etc. Packet Co.*, 9 Abb. Pr. 104. Compare *Anable v. Anable*, 24 How. Pr. 92.

⁸³ *Bank of British North America v. Madison*, 99 Cal. 129, 33 Pac. 762.

⁸⁴ Cal. Code Civ. Proc., § 446.

⁸⁵ *In re Close*, 106 Cal. 574, 39 Pac. 1067.

shall be "upon information or belief," instead of "upon information and belief." In New York the word "and" is used. If the language of the verification were to follow the language of the pleading, either "or" or "and" would be used. The word "belief" is to be taken in its ordinary sense, and means the actual conclusion of the party drawn from information. Positive knowledge and mere belief cannot exist together.⁸⁶

If the pleader avers matters "upon information and belief" or "upon information or belief," the verification will be sufficient, if his affidavit states that as to the matters thus alleged he believes the pleading to be true.⁸⁷

If nothing is stated on information or belief, the verification need not mention the same. It is a higher class of verification.⁸⁸ If, however, there are such allegations in the pleading, an allegation that "the same are true according to the best of his knowledge and belief" is insufficient.⁸⁹ The words "and belief" are treated as surplusage if affiant states he is acquainted with the contents and that it is true of his own knowledge and belief.⁹⁰

In some states the matters alleged on information and belief must be stated to be so made, while in others, with like provisions in their codes, the allegations made on personal knowledge need not be distinguished from those made on information and belief. And if a statute directs a statement to be verified without prescribing a form, the verification need not be unqualified and positive. The legislature does not intend to require an affidavit of a higher degree than could be made on the part of the officer from whom it is demanded, and where an officer of a bank bases his belief upon information received from employees of the bank, his verification is sufficient if it states that it is made to the best of his knowledge and belief.⁹¹

Facts which are particularly within the knowledge of defendant may without valid objection be alleged upon information and belief, even if defendant's books are open to the inspection of plaintiff.⁹²

⁸⁶ *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621.

⁸⁷ *Patterson v. Ely*, 19 Cal. 28; *Kirk v. Rhoads*, 46 Cal. 403.

⁸⁸ *Patterson v. Ely*, 19 Cal. 28; *Kinkaid v. Kipp*, 1 Duer, 692; *Kelly v. Kelly*, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732, 1 West Coast Rep. 143.

⁸⁹ *Van Horne v. Montgomery*, 5 How. Pr. 238.

⁹⁰ *Seattle C. & T. Co. v. Thomas*, 57 Cal. 197; *Christopher v. Condo-george*, 128 Cal. 581, 61 Pac. 174.

⁹¹ *Bank of British North America v. Madison*, 99 Cal. 129, 33 Pac. 762.

⁹² *McDermont v. Anaheim U. W. Co.*, 124 Cal. 112, 56 Pac. 779.

§ 169. **Counter statements.**—If a fact is directly averred in one part of a verified pleading and directly denied in another, whether it be in the statement of several causes of action in a complaint or several defenses in an answer, the party verifying it is guilty of perjury, and, on the trial, the averment which bears most strongly against the pleader will be taken as true.⁹³

FORMS OF VERIFICATION OF PLEADINGS.

§ 170. Verification by sole plaintiff or sole defendant.

Form No. 51.

STATE OF CALIFORNIA, }
CITY AND COUNTY OF . . . } ss.

A. B., the plaintiff [or defendant] above named, being duly sworn, says as follows:

I have read the foregoing complaint [or answer] and know the contents thereof, and that the same is true to the best of my knowledge.

[SIGNATURE.]

Subscribed and sworn to before me, this . . . day of . . . , 19..

J. K., County Clerk.

§ 171. On information and belief.

Form No. 52.

[VENUE.]

A. B., the plaintiff above named, being duly sworn, says as follows:

I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to those matters therein stated on information or [and] belief, and as to those matters I believe it to be true.

[SIGNATURE.]

Subscribed and sworn to before me, this . . . day of . . . , 19..

J. K., Notary Public.

§ 172. By one of several plaintiffs or defendants.

Form No. 53.

[VENUE.]

A. B., being duly sworn on his own behalf, and on behalf of R. S., one of the other defendants therein, says as follows:

⁹³ Bell v. Brown, 22 Cal. 671.

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1. I am one of the defendants in the above-entitled action.

2. I have read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge, except as to the matters which are therein stated on information or [and] belief, and as to those matters I believe it to be true.

[JURAT.]

[SIGNATURE.]

§ 173. By two parties, severally.

Form No. 54.

[VENUE.]

A. B. and C. D., the plaintiffs [or defendants] above named, being duly sworn, say, each for himself, as follows:

I have read the foregoing complaint [or answer], and know the contents thereof, and the same is true of my own knowledge (except as to those matters stated therein on information and belief, and as to those matters I believe it to be true).

[JURAT.]

[SIGNATURE.]

§ 174. By officer of corporation.

Form No. 55.

[VENUE.]

A. B., being duly sworn, says as follows:

1. I am an officer of . . . company, the plaintiffs [or defendants] above named, to-wit, the president thereof.

2. I have read the foregoing complaint [or answer], and know the contents thereof, and the same is true of my own knowledge (except as to those matters which are therein stated on information or [and] belief, and as to those matters I believe it to be true).

[JURAT.]

[SIGNATURE.]

§ 175. By attorney or agent, when the facts are within his personal knowledge.

Form No. 56.

[VENUE.]

A. B., being first duly sworn, says:

1. I am the attorney of the plaintiff in this action [or agent, as the case may be].

2. I have read [or heard read] the foregoing complaint [or answer], and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein averred

to be upon information or belief, and as to these matters I believe it to be true.

3. The reason why the verification is not made by the plaintiff [or defendant], is that the facts stated in said complaint [or answer] are not within his personal knowledge.

[JURAT.]

[SIGNATURE.]

§ 176. By agent when the party is absent from the county.

Form No. 57.

[VENUE.]

A. B., being duly sworn, says as follows:

1. I am the attorney [or one of the attorneys] of the plaintiff [or defendant] in this action.

2. I have read the foregoing complaint [or answer] and know the contents thereof, and that it is true of my own knowledge (except as to those matters therein stated on information or [and] belief, and as to those matters I believe it to be true).

3. The reason this verification is not made by the plaintiff [or defendant] is that he is not within the county of . . . which is the county wherein I reside.

[JURAT.]

[SIGNATURE.]

§ 177. Where the absent plaintiff is a corporation.

Form No. 58.

[VENUE.]

A. B., being first duly sworn, says: I am the attorney of the plaintiff in this action. I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge (except, etc.)

The reason why the complaint in this cause is not verified by an officer of said corporation is, that its place of business is at . . . , in the state of . . . , and that none of its officers are now within the county of . . . where I reside.

[JURAT.]

[SIGNATURE.]

§ 178. Verification of petition.

Form No. 59.

[Insert venue, introduction, and description of deponent, and add]:

I have read the foregoing petition subscribed by me, and know the contents thereof; that the same is [or, where such papers are

annexed, and that the same and the accounts and inventories hereunto annexed are] true of my own knowledge (except as to the matters therein stated on information or [and] belief, and as to those matters I believe it to be true).

[JURAT.]

[SIGNATURE.]

§ 179. Formal parts of affidavit in an action.

Form No. 60.

[TITLE OF COURT AND CAUSE.]

STATE OF . . .
COUNTY OF . . . } ss.

A. B., being duly sworn, says he is the plaintiff [or defendant, or the attorney or agent of the plaintiff or defendant] in the above-entitled action, and that [here state facts to be sworn to].

A. B.

Subscribed and sworn to before me, this . . . day of . . ., 19..

C. D., Notary Public . . . County.

§ 180. Jurat, affiant blind or illiterate.

Form No. 61.

Subscribed and sworn to before me this . . . day of . . ., 19.., the same having been by me read to the affiant, he being blind [or unable to read], and he appearing to me to fully understand the same.

C. D., Notary Public . . . County.

§ 181. Jurat, affiant a foreigner.

Form No. 62.

Subscribed and sworn to before me, this . . . day of . . ., 19.., I having first sworn E. F., an interpreter, to interpret truly the same to the deponent, who is a foreigner and not understanding the English language, and he having interpreted the same to the affiant, who appeared to me to understand the same.

C. D., Notary Public . . . County.

§ 182. Authentication of official character of officers taking affidavit without the state for use within the state.

Form No. 63.

[VENUE.]

I, A. B., who am a clerk [or prothonotary] of the . . . court of . . . county, in said state, do hereby certify that said court

is a court of record having a seal, and that C. D., Esq., whose name is subscribed to the jurat of the foregoing affidavit, was at the date of said jurat a notary public in and for said state [or other official, giving his proper title] duly appointed, qualified, and acting and was by the laws of said state duly authorized to take said affidavit and to administer oaths; that I am well acquainted with the handwriting of the said C. D. and verily believe his signature attached to said jurat to be genuine.

Witness my hand and the seal of said court, at the city of . . . in said county and state, this . . . day of . . . , 19..

A. B.,

Clerk of the . . . Court of . . .

[SEAL OF COURT.]

County, State of . . .

§ 183. Jurat taken before commissioner without the state.

Form No. 64.

The above affidavit was subscribed and sworn to before me the undersigned, a commissioner for the state of . . . , residing at . . . in the state of . . . , this . . . day of . . . , 19..

[Official Seal.]

[SIGNATURE AND TITLE OF COMMISSIONER.]

[Add authentication of secretary of state if required. It is not generally necessary.]

CHAPTER XIII.

THE COMPLAINT.*

§ 184. Form and requisites in general—What it is.—Under the code system of procedure the complaint is the first pleading in the action, and upon it all subsequent proceedings are based. It is a substitute for the declaration at common law and for the bill in equity, and is the initial paper containing the allegations showing the plaintiff's cause of action whether at law or in equity. The allegations of the complaint must determine the character and object of the action.¹

In all of the code states, the contents of the complaint are prescribed by statute, substantially as follows: 1. The title of the action, the name of the county in which the action is brought, and the names of the parties to the action; 2. A statement of the facts constituting the cause of action in ordinary and concise language; 3. A demand for the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.²

§ 185. Parties.—In another portion of this work will be found a general treatment of the code requirements as to title, venue, and names of parties.³ It is only the provision with reference to parties that requires any further consideration in connection with the complaint.

We have already determined what constitutes the name of a party who sues as an individual, or rather in his individual capacity, and under this head we will consider the allegations as to the character in which a person sues and his capacity to sue.

*For complaints and forms thereof in particular classes of actions, in actions by or against particular classes of persons, and in actions relating to particular rights, see Vols. III and IV.

¹ Marshall Silver Min. Co. v. Kirtley, 12 Colo. 410, 21 Pac. 492; Hunt v. Eureka etc. Mining Co., 14 Colo.

451, 24 Pac. 550; Buena Vista etc. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386; Board School Commrs. v. Center Township, 143 Ind. 391, 42 N. E. 808.

² Cal. Code Civ. Proc., § 426.

³ See chapter XI, ante, entitled "Formal Parts of Pleadings."

Where a plaintiff sues in an official or representative character or capacity, the complaint itself must contain allegations of such character or capacity in addition to the inferential statement in the title.⁴ While it is customary and proper, in stating the title in the complaint in such cases, to add to the name of the party his official designation, e. g. "A. B., Executor," "C. D., Sheriff," yet this will not dispense with the necessity for the formal averment of capacity. Such a designation standing alone in the title would be a mere *descriptio personæ*.⁵

No formal mode of allegation is essential; it is only necessary that the plaintiff's right to maintain the action be substantially shown so that issue may be joined thereon.⁶ A very short averment, if clear in its terms, is sufficient,⁷ though a special authority must be averred with sufficient fullness to make it clearly apparent. An officer suing as such need not state in his complaint how he acquired his office; it is enough to show that he is such officer in fact.⁸ And an averment that a certain person acted as under-sheriff in a suit against him as such, without alleging that he acted so wrongfully, implies that he was under-sheriff *de jure* as well as *de facto*.⁹

The character of agent of a company suing as such must be averred.¹⁰ So, also, the character of assignee must be averred when the plaintiff sues in that capacity.¹¹ The form of the assignment, or the consideration therefor, need not be alleged.¹² But a positive transfer, and the character of it, must be averred.¹³

⁴ Gould v. Glass, 18 Barb. 185; Smith v. Levinus, 8 N. Y. 472.

⁵ Merritt v. Seaman, 6 N. Y. 168; Hallett v. Harrower, 33 Barb. 537; Barfield v. Price, 40 Cal. 535.

⁶ Halleck v. Mixer, 16 Cal. 574; Barfield v. Price, 40 Cal. 535.

⁷ Smith v. Levinus, 8 N. Y. 472; Root v. Price, 22 How. Pr., 372; Hallett v. Harrower, 33 Barb. 537.

⁸ Kelly v. Breising, 33 Barb. 123.

⁹ People v. Otto, 77 Cal. 45, 18 Pac. 869.

¹⁰ Tolmie v. Dean, 1 Wash. T. 46.

¹¹ Murdock v. Brooks, 38 Cal. 596; King v. Felton, 63 Cal. 66.

¹² Fowler v. New York Indem. Ins. Co., 23 Barb. 151; Morange v. Mudge, 6 Abb. Pr. 243.

¹³ Stearns v. Martin, 4 Cal. 227; Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890.

CHAPTER XIV.

COMPLAINT—STATEMENT OF CAUSE OF ACTION.

§ 186. **In General.**—Every complaint in an action must be founded upon a theory under which the plaintiff is entitled to recover, and must state all the facts essential to support such theory; failing to do so, it is radically defective, and does not state facts sufficient to constitute a cause of action.¹ It should state expressly, and in direct terms, the facts constituting the cause of action, and leave no essential fact in doubt or to be inferred or deduced by argument from the other facts stated, as inference, argument, or hypothesis cannot be tolerated in pleading.² The plaintiff must state his cause of action with sufficient particularity to inform the defendant of its real character,³ and he must recover, if at all, upon the cause of action set out in his complaint.⁴

A cause of action being the right a person has to institute and carry through a proceeding,⁵ and the object of the complaint being to present the facts upon which the action is founded in ordinary and concise language,⁶ the manner in which those facts are stated becomes a matter of importance, not only with reference to those facts which should be alleged, but with reference to those facts which need not be alleged and which should be omitted from the complaint.

This does not mean, however, that a complaint will be held bad because the facts stated do not entitle the plaintiff to all the relief demanded.⁷ The demand in the complaint is no part of the statement of the cause of action, and does not give it character. The facts alleged do this, and the plaintiff is entitled to as much relief as they warrant.⁸ So, also, where there is one

¹ Buena Vista etc. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386.

² Joseph v. Holt, 37 Cal. 250; Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492.

³ Puget Sound Iron Co. v. Worthington, 2 Wash. T. 472, 7 Pac. 882, 886.

⁴ Burke v. Levy, 68 Cal. 32, 8 Pac. 527; Gregory v. Cleveland Railroad

Co., 112 Ind. 385, 14 N. E. 228; Frary v. Dakin, 7 Johns. 75.

⁵ Meyer v. Van Collem, 28 Barb. 231.

⁶ Cal. Code Civ. Proc., § 426.

⁷ Patoka Township v. Hopkins, 131 Ind. 142, 31 Am. St. Rep. 417.

⁸ Strain v. Babb, 30 S. C. 342, 14 Am. St. Rep. 905, 9 S. E. 271.

good count in a complaint, the plaintiff is entitled to relief on that count, notwithstanding another alleged cause of action may not be properly stated.⁹ And in the absence of a special demurrer for ambiguity or uncertainty, a complaint showing the liability of the defendant will be sustained although the facts are imperfectly stated, or not stated with the clearness or precision which good pleading requires.¹⁰

§ 187. Accrual of right and allegation thereof.—Needless to say, the cause of action stated in the complaint must be one existing at the time the action is commenced. The complaint refers to conditions existing at the time it is filed, and the rights of the parties are to be determined as they existed at that time. Thus an allegation that the plaintiff is entitled to a certain right means that he was entitled to it at the time the pleading was filed.¹¹ And it has been held that allegations in the present tense relate to the date of verification.¹² The rule, however, that a *status* or condition which is shown to have existed in the past is presumed to continue is a rule of evidence, not of pleading.¹³

§ 188. Facts to be stated.—Those facts, and those only, should be stated which constitute the cause of action, and the kind of relief should be explicitly demanded.¹⁴ By this is meant material facts only.¹⁵ And such facts should be stated in an intelligible and issuable form, capable of trial.¹⁶ If they are omitted, evidence upon them cannot be allowed;¹⁷ and neither stipulations nor admissions can aid the pleading.¹⁸ If, however,

⁹ Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137.

¹⁰ Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186; Marix v. Stevens, 10 Colo. 261, 15 Pac. 350; Mariott v. Clise, 12 Colo. 561, 21 Pac. 909.

¹¹ McCormick v. Blossom, 40 Iowa, 256; Townshend v. Norris, 7 Hun, 239; Brown v. Galena Min. etc. Co., 32 Kan. 528, 4 Pac. 1013.

¹² Prindle v. Caruthers, 15 N. Y. 425.

¹³ Pryce v. Jordan, 69 Cal. 569, 11 Pac. 185.

¹⁴ Green v. Palmer, 15 Cal. 413, 76 Am. Dec. 492; Willson v. Cleaveland, 30 Cal. 192; Racouillat v. Rene, 32

Cal. 455; Spring Valley v. San Francisco, 82 Cal. 321, 16 Am. St. Rep. 116, 22 Pac. 910, 1046, 6 L. R. A. 756; United States v. Williams, 6 Mont. 385, 12 Pac. 85; Cline v. Cline, 3 Or. 359; Meyer v. School District, 4 S. Dak. 425, 57 N. W. 68.

¹⁵ Hentsch v. Porter, 10 Cal. 555; Hicks v. Murray, 43 Cal. 522; Ortega v. Cordero, 88 Cal. 226, 26 Pac. 80; Tucker v. Parks, 7 Colo. 68, 298, 1 Pac. 427, 3 Pac. 486.

¹⁶ Los Angeles v. Signoret, 50 Cal. 298; Boyce v. Brown, 7 Barb. 81.

¹⁷ Hicks v. Murray, 43 Cal. 522.

¹⁸ Tucker v. Parks, 7 Colo. 68, 298, 1 Pac. 427, 3 Pac. 486.

an allegation of a fact is merely defective it may be cured by a default or verdict.¹⁹

It may be laid down as a general rule that the complaint must contain all the facts which upon a general denial the plaintiff will be called upon to prove in the first instance to protect himself from a nonsuit, and show himself entitled to a judgment.²⁰ And this statement must be made in ordinary and concise language and without unnecessary repetition.²¹ The code provisions in this respect are only declaratory of the common law, and are applicable to all pleadings whether in law or equity.²²

Under the rule just stated, it is evident that a complaint is materially defective if, to lay the foundation for a recovery, the proof must go further than the allegations contained in the pleadings. It must be so framed as to raise upon its face the question whether, admitting the facts stated to be true, the plaintiff is entitled to judgment, instead of leaving that question to be raised or determined upon the trial.²³ For where a complaint shows no legal cause of action upon its face, a judgment by default can no more be taken than it can over a general demurrer.²⁴

If a complaint fails to state facts sufficient to constitute a cause of action, advantage may be taken of the defect by demurrer, by motion for judgment on the pleadings, or upon motion for a new trial.²⁵

Another important rule in connection with the statement of the cause of action is that where the complaint proceeds upon a certain theory the plaintiff cannot recover upon any other theory.²⁶ A party is bound by his theory of the cause and its

¹⁹ Russell v. Mixer, 42 Cal. 475; Mercier v. Lewis, 39 Cal. 535.

²⁰ 1 Van Santv. Pl. 215; Green v. Palmer, 15 Cal. 414, 76 Am. Dec. 492; Northern Ry. v. Jordan, 87 Cal. 23, 25 Pac. 273.

²¹ Oregon B. & C. Codes, § 67; N. Y. Code Civ. Proc., § 142. And see Cal. Code Civ. Proc., § 426.

²² Godwin v. Stebbins, 2 Cal. 103; Piercy v. Sabin, 10 Cal. 27, 70 Am. Dec. 692; Cordier v. Schloss, 12 Cal. 147; Goodwin v. Hammond, 13 Cal. 169, 73 Am. Dec. 574; Riddle v.

Baker, 13 Cal. 302; Payne v. Treadwell, 16 Cal. 243.

²³ 1 Van Santv. Pl. 216; Buena Vista etc. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386.

²⁴ Abbe v. Marr, 14 Cal. 211; Territory v. Virginia Road Co., 2 Mont. 101; Selz, Schwab & Co. v. Tucker, 10 Utah, 135, 37 Pac. 249.

²⁵ Kelley v. Kreiss, 68 Cal. 210, 9 Pac. 129.

²⁶ Green v. Groves, 109 Ind. 519, 10 N. E. 401.

logical sequence.²⁷ For example, a plaintiff cannot sue a railroad company as an employee and recover as a passenger.²⁸ Nor can a plaintiff suing for goods sold and delivered recover a balance due where the proof shows that the goods were shipped on consignment.²⁹

²⁷ State v. Schnitger, 16 Wyo. 479,
95 Pac. 698.

²⁸ Newell v. Nicholson, 17 Mont.
389, 43 Pac. 180.

²⁹ Evansville etc. Co. v. Barnes, 137
Ind. 306, 36 N. E. 1092.

CHAPTER XV.

COMPLAINT—JOINDER OF CAUSES.

§ 189. Provisions of the codes as to joinder.—Without exception, the codes provide that a plaintiff may unite certain causes of action in the same complaint. The California statute, from which those of other states differ only in matters of detail, provides that two or more causes of action may be joined in a complaint, where they all arise out of—1. Contracts, express or implied; 2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; 3. Claims to recover specific personal property, with or without damages for the withholding thereof; 4. Claims against a trustee by virtue of a contract, or by operation of law; 5. Injuries to character; 6. Injuries to person; 7. Injuries to property; 8. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section. The causes of action so united must belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.¹ The Ohio code section 80 (5019) permits the joinder of causes of action for injuries, with or without force, to person and property, or either. The Wisconsin code section 31 is the same as the Ohio code. The Iowa code section 2630 is as follows: "Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same party, and against the same party in the same rights, and if suit on all may be brought and tried in that county, may be joined in the same petition; but the court, to prevent confusion therein, may direct all or any portion of the issues joined therein to be tried separately, and may de-

¹ Cal. Code Civ. Proc., § 427, as amended 1907; N. Y. Code Proc., § 484; Idaho Rev. Codes, § 4169; Mont. Rev. Codes, § 6533; Or. B. & C. Code, § 94; Wash. Bal. Code, § 412.

termine the order thereof." Under this section, tort and contract may be joined.² The fact that part of certain contracts for the direct payment of money are secured and part are not does not prevent their union.³

§ 190. **Contract and tort.**—Some of the Pacific states follow the New York code in allowing the joinder of claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with the same subject of action.⁴

While the California statute contains no such express provision for the joinder of claims arising out of the "same transaction," the courts, by what appears to be a sound construction allow such joinder.⁵ In *Jones v. Steamship Cortes*,⁶ the supreme court of California said on this point: "We have but one form of action, and nothing more is required than a statement in ordinary language of the facts relied upon for a recovery. The statute makes no distinction in matters of form between actions of contract and those of tort, and relief is administered without reference to the technical and artificial rules of the common law upon this subject. . . . Our system of pleading is formed upon the model of the civil law, and one of its principal objects is to discourage protracted and vexatious litigation. . . . The provisions for avoiding a multiplicity of suits are to be liberally and beneficially construed, and we see no reason why all matters arising from and constituting part of the same transaction should not be litigated and determined in the same action. Causes of complaint differing in their nature, and having no connection with each other, cannot be united, but the object of the rule is to prevent the confusion and embarrassment which would necessarily result from the union of diverse and incongruous matters, and it has no application to a case embracing a variety of circumstances so connected as to constitute but one transaction."

² *Turner v. First Nat. Bank*, 26 Iowa, 562. Dak. Code, § 136, is copied from the Ohio Code; Nev. Comp. St., § 3109; Or. B. & C. Code, § 91.

³ *Baldwin v. Napa & S. W. Co.* 137 Cal. 646, 70 Pac. 732.

⁴ Wyo. Rev. Stats., § 2408; N. Dak. Code Civ. Proc., § 136; S. Dak. Code Civ. Proc., § 136; Okla. Code Civ. Proc., § 83.

⁵ *Jones v. Steamship Cortes*, 17 Cal. 499, 79 Am. Dec. 142; *Pfister v. Dascey*, 65 Cal. 405, 4 Pac. 393; *Sloane v. Southern California Ry. Co.* 111 Cal. 677, 44 Pac. 320, 32 L. R. A. 193; *Waters v. Stevenson*, 13 Nev. 164, 29 Am. Rep. 293; *Zeile v. Moritz*, 1 Utah, 286.

⁶ 17 Cal. 499, 79 Am. Dec. 142.

An action for breach of contract and for conversion by defendant of property used by plaintiff in performing his part of the contract may be united;⁷ as also may an action for breach of carrier's contract be united with an action for personal injury from being ejected from a train.⁸ In action on an attachment bond the value of the goods not returned, expenses incurred in dissolving the attachment, loss of time, and attorney's fees may all be joined, since the damage all flows from the same cause.⁹

§ 191. **Meaning of term "same transaction."**—The meaning of the term "same transaction," when a cause of action may be said to "arise out" of it, what is meant by "the same subject of action," and when transactions may be deemed connected with it, are subjects which have given the courts no little trouble, and cases involving practically the same state of facts are frequently found to be irreconcilable in their conclusions. Probably no general rule can be laid down which would apply to all cases, and the courts must determine the question as it is presented by the facts of each particular case. In *Wiles v. Suydam*,¹⁰ the court said: "To invent a rule for determining what the 'same transaction' means, and when a cause of action shall be deemed to 'arise out' of it, and what the 'same subject of action' means, has taxed the ingenuity of many learned judges, and I do not deem it necessary to make the effort to find a solution for these questions. . . . There is certainly ample scope for construction, but it is sometimes difficult to determine what interpretation will best promote the ends of justice."

As stated by Mr. Baylies,¹¹ "A general allegation in the complaint that the several causes of action therein set forth arose out of the same transaction or transactions connected with the same subject of action does not establish that fact. It should appear satisfactorily and clearly by the pleading itself from the statement of the facts therein that the several causes of action originated in the same transaction. If legal and equitable causes of action are joined, the pleadings must be made broad enough to include both causes of action, and facts must be alleged which would be sufficient to entitle the plaintiff to the relief had he

⁷ *McCorkle v. Mallory*, 30 Wash. 632, 71 Pac. 186.

⁸ *Clark v. Great Northern Ry. Co.*, 31 Wash. 658, 72 Pac. 477.

⁹ *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697.

¹⁰ 64 N. Y. 177.

¹¹ Code Pl. ch. 9, § 7.

sought it in separate actions." And again the same author points out that because two causes of action originated or happened at the same time it does not follow that each arose out of the same transaction. Time, therefore, is not necessarily an important element.

As instances where the courts have held the joinder to be proper, the following may be mentioned: An action wherein the plaintiff sought damages for the breach of a contract of carriage, and also for fraudulent and oppressive conduct on the part of the carrier, producing great bodily and mental suffering;¹² an action to set aside conveyances alleged to be fraudulent and to recover possession of the land;¹³ an action to recover damages for breach of a contract of carriage and for violation of the defendant's duty as a common carrier;¹⁴ an action for damages for the breach of a contract relating to property and for injury to the property;¹⁵ an action to reform a policy of insurance and for recovery on the reformed policy;¹⁶ an action to set aside a release of damages for personal injuries and for recovery of damages;¹⁷ an action to abate a nuisance and to recover a penalty of ten dollars for every day the nuisance remained after notice to remove it.¹⁸

§ 192. Must affect all parties to the action.—Another positive provision of the code is that the causes of action so united must affect all the parties to the action, and not require different places of trial. It will be noted that there is no requirement that all the parties shall be affected equally. "The test is whether or not the parties joined in the suit have one connected interest centering in the point in issue in the cause, or one common point of litigation. If so, unconnected parties may be joined, even where different relief is sought against them."¹⁹ In other words, all of the plaintiffs and all of the defendants must have a common interest or connection centering in the point in issue.

¹² Jones v. Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142.

¹³ Pfister v. Dasey, 65 Cal. 405, 4 Pac. 393.

¹⁴ Sloane v. Southern California Ry. Co., 111 Cal. 677, 44 Pac. 320, 32 L. R. A. 193.

¹⁵ Badger v. Benedict, 1 Hilt. (N. Y.), 414.

¹⁶ McHoney v. German Ins. Co., 44 Mo. App. 426.

¹⁷ Blair v. Chicago etc. R. R. Co., 89 Mo. 383, 1 S. W. 350.

¹⁸ Bailey v. Dale, 71 Cal. 34, 11 Pac. 804.

¹⁹ Baylies' Code PL, ch. 9, § 8.

A cause of action for a separate tort cannot be united with one for a joint tort;²⁰ nor a cause of action against one defendant with a cause of action against both.²¹ And in an action against two or more persons, founded on a joint promise, recovery cannot be had on proof of a separate and distinct promise by each.²² A vendor cannot unite in the same action a claim against a broker for damages for the fraudulent sale of land with a claim against the purchaser for a reconveyance.²³ In such a case there is no common point of litigation affecting both defendants. An action against a sheriff and his official bondsmen, alleging only a cause of action against the sheriff as a trespasser, and against his sureties as signers of his bond, and not otherwise, involves a misjoinder of causes of action.²⁴ In an action by the owners in severalty of distinct parcels of land to restrain the defendant from depriving them of water carried by various ditches to their respective lands, and to recover damages for past diversions of water, it was held that the cause of action for damages was several as to each of the defendants, and could not be joined with a cause of action for an injunction, which was common to all of them.²⁵

On the other hand, we can readily see the propriety of joining in an action by a judgment creditor against a judgment debtor to have a conveyance set aside, all parties having liens or incumbrances on the property conveyed. In such a case the common point in litigation is the fraudulent transfer of the property, and it affects all of the parties.²⁶ So, also, an action in the nature of a creditor's bill may be brought against several judgment debtors to reach legacies bequeathed to the defendants in severalty.²⁷

§ 193. **Separate statement of causes of action.**—Under the same provision of the code²⁸ it is required that each cause of action so united must be separately and distinctly stated. And a complaint which fails to keep separate the different grounds

²⁰ *White v. Preston* (Tex. App.), 15 S. W. 712.

²¹ *Atchison R. R. Co. v. Sumner County*, 51 Kan. 617, 33 Pac. 312; *Addicken v. Schrubbe*, 45 Iowa, 315; *Hess v. Buffalo etc. R. R. Co.*, 29 Barb. 391.

²² *Jackson v. Bush*, 82 Ala. 396, 1 South. 175.

²³ *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192.

²⁴ *Ghirardelli v. Bourland*, 32 Cal. 585.

²⁵ *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. 689.

²⁶ *Mahler v. Schmidt*, 43 Hun, 512.

²⁷ *Bradner v. Holland*, 33 Hun, 288.

²⁸ Cal. Code Civ. Proc., § 427.

of action, but confuses and blends them in one statement, is open to the objection of duplicity.²⁹ Each separate and distinct proposition of each cause of action should be separately set forth, and logical order should be observed in the statement of the premises, leaving the conclusions of law deducible therefrom to be drawn by the court. The better practice is to number each cause of action, and each proposition of each cause of action.³⁰ The causes of action required to be separately stated are such as by law entitle the plaintiff to separate actions, and each of which would be a perfect cause of action in itself. And each statement should be introduced with appropriate words to designate it as such.³¹

Each statement must be complete in itself, or must be made so by express reference to other parts of the pleadings.³² The common law permitted reference to be made to other allegations in a pleading. This practice has become quite prevalent in the code states, and where the reference to a preceding count is definite and certain it would seem that no valid objection can be taken to it.³³

Where two causes of action are not separately stated, the objection cannot be raised by demurrer on the ground that several causes of action are improperly united; the remedy is by a motion to make the pleading more certain and definite by separating and distinctly stating the different causes of action.³⁴ The mere fact that both legal and equitable relief are sought in the same action does not make the pleading objectionable in this respect, if the right to such relief is based on the same facts.³⁵

The separate statement of causes of action required under the code system is in harmony with the common-law practice of introducing several counts in the declaration.³⁶ It has been

²⁹ *Hough v. Hough*, 25 Or. 218, 35 Pac. 249.

³⁰ *Benedict v. Seymour*, 6 How. Pr. 298; *Blanchard v. Strait*, 8 How. Pr. 83.

³¹ *Benedict v. Seymour*, 6 How. Pr. 298; *Lippencott v. Goodwin*, 8 How. Pr. 242.

³² *Watson v. San Francisco etc. R. Co.*, 41 Cal. 17.

³³ *Bidwell v. Babcock*, 87 Cal. 29, 25 Pac. 752; *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Treweek v. Howard*, P. P. F. Vol. I—9

105 Cal. 442, 39 Pac. 20; *Jasper v. Hazen*, 2 N. Dak. 406, 51 N. W. 583.

³⁴ *City Carpet etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Sutter County v. McGriff*, 130 Cal. 126, 62 Pac. 412; *San Francisco Pav. Co. v. Fairfield*, 134 Cal. 226, 66 Pac. 255.

³⁵ *San Diego Water Co. v. Flume Co.*, 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839.

³⁶ *Benedict v. Seymour*, 6 How. Pr. 298.

somewhat loosely held that the paragraphs in a code complaint take the place of the counts in a common-law declaration;³⁷ but this statement is apt to be misleading and the use of paragraphs alone will not always determine the question whether the pleader is attempting to set out more than one cause of action. Thus in an action for false arrest, where the complaint alleged two arrests on different days, and each arrest was set out in a different paragraph, the court could not determine whether the plaintiff intended to set forth two causes of action, and held that a motion to require the plaintiff to separately state and number the causes of action should be granted.³⁸ The only safe rule is to so frame the statement of each cause of action that it will contain in and of itself all the facts necessary to a recovery, so that if everything else were stricken from the pleading the plaintiff would still be entitled to judgment.

§ 194. Accounts.—When separate accounts between the same parties are separate causes of action, they may be separately stated.³⁹ The plaintiff may demand in the same action that defendant account for and refund a proportion of the outfit and advances made on a joint adventure.⁴⁰

§ 195. Causes of action may be united.—The plaintiff may unite several causes of action in the same complaint when they arise from and constitute part of the same transaction,⁴¹ if such union does not amount to a misjoinder, in which case the objection can be raised only by demurrer.⁴² Actions so united must affect all the parties to the action, and not require different places of trial; but the defendants need not be all equally affected.⁴³ If defendant is clearly entitled to a change of venue, to the county of his residence, plaintiff cannot abridge that right

³⁷ *Norman v. Rogers*, 29 Ark. 365; *Hunt v. City of San Francisco*, 11 Cal. 250.

³⁸ *Oakley v. Tuthill*, 7 Civ. Proc. Rep. (N. Y.), 339. In *Prows v. Ohio Valley Ins. Co.*, 2 Cin. Sup. Ct. Rep. 14, a complaint made up of several paragraphs was held to state only one cause of action. See also *Keens v. Gaslin*, 24 Neb. 310, 38 N. W. 797.

³⁹ *Phillips v. Berick*, 16 Johns. 136; 8 Am. Dec. 299; *Stevens v. Lockwood*, 13 Wend. 644, 28 Am. Dec. 492;

Staples v. Goodrich, 21 Barb. 317; *Secor v. Sturgis*, 2 Abb. Pr. 69.

⁴⁰ *Garr v. Redman*, 6 Cal. 574.

⁴¹ Cal. Code Civ. Proc., § 427; *Eatrella Vd. Co. v. Butler*, 125 Cal. 234, 57 Pac. 980.

⁴² *Fritz v. Fritz*, 23 Ind. 388.

⁴³ *Earle v. Scott*, 50 How. Pr. 506. See *Van Wagenen v. Kemp*, 7 Hun, 328; *Ladd v. James*, 10 Ohio St. 437. See *Nichols v. Drew*, 25 Hun, 315, 94 N. Y. 22.

by joining in the complaint a third cause of action properly triable in the county where suit is brought.⁴⁴ An action for goods sold and one for the price of goods wrongfully taken from a third person and sold, may be joined, the tort in the latter having been waived by its assignment.⁴⁵ All causes of action joined must belong to the same class,⁴⁶ and must be consistent with each other.⁴⁷

In an action for divorce and alimony it is not an improper joinder of causes of action to seek at the same time to set aside certain fraudulent conveyances on which an award of alimony is dependent.⁴⁸ In an action by a stockholder in a mining corporation to recover against the directors the statutory penalty for failure to post a verified balance-sheet for the previous month, a complaint which alleges in one count more than one failure on the part of the directors to make the required posting, and seeks to recover a penalty of one thousand dollars for each failure, does not join several distinct causes of action.⁴⁹ Where the complaint sets forth only one cause of action for fraudulent misappropriation by a trustee of the funds of a corporation, and the relief sought has reference only to this cause of action, it is no objection to the complaint that the relief sought is not single.⁵⁰

Where actions are united, the court should require the pleadings to be reconstructed as in one suit, and one judgment should be rendered settling the entire controversy.⁵¹

The court should determine what costs, if any, should be charged to either party in the original suits, the subsequent costs being chargeable only in the consolidated action.⁵²

§ 196. Claims in two capacities.—Claims against trustees by virtue of a contract, or by operation of law, may be joined.⁵³ So a trust and a vendor's lien may be united in one action.⁵⁴ Counts on promises to the testator and to his executor in his representative capacity may be joined.⁵⁵ Where the same person

⁴⁴ Bond v. Hurd, 31 Mont. 314, 78 Pac. 579.

⁴⁵ Hawk v. Thorn, 54 Barb. 164.

⁴⁶ Cleveland v. Barrows, 59 Barb. 364; Thomas v. Utica R. R. Co., 97 N. Y. 245; Bowen v. Mandeville, 95 N. Y. 237; Krower v. Reynolds, 99 N. Y. 245, 1 N. E. 775.

⁴⁷ Smith v. Hallock, 8 How. Pr. 73.

⁴⁸ Prouty v. Prouty, 4 Wash. 174, 29 Pac. 1049.

⁴⁹ Loveland v. Garner, 71 Cal. 541, 12 Pac. 616.

⁵⁰ Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

⁵¹ Handley v. Sprinkle, 31 Mont. 57, 77 Pac. 296; Mont. Rev. Codes, § 7187.

⁵² Handley v. Sprinkle, 31 Mont. 57, 77 Pac. 296.

⁵³ Cal. Code Civ. Proc., § 427.

⁵⁴ Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142.

⁵⁵ Brown v. Webber, 6 Cush. 571; Sullivan v. Holker, 15 Mass. 374.

owns one half of a mortgage, and, as executrix, represents the other half, in an action of foreclosure, she properly appears as plaintiff jointly in the two capacities.⁵⁶ Counts on promises made by the testator may be joined with counts on promises made by the administrator, as such.⁵⁷ After counts by the plaintiff, as executor, for an excessive distress, and for distraining for more rent than was due, the declaration proceeded thus: "And the plaintiff, as such executor as aforesaid, also sues the defendant for money paid by the plaintiff as such executor as aforesaid, for the defendant, at his request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on an account stated between them. And the plaintiff, as such executor as aforesaid, claims," etc. It was held, on demurrer, that the declaration was bad for misjoinder.⁵⁸

§ 197. Class-common counts.—Where the form of the action is the same, and where the same plea may be pleaded and the same judgment given on all the counts, they are well joined.⁵⁹ So the common counts may be united in one complaint, if separately stated.⁶⁰ The material matter of each separate cause of suit stated in a pleading must be complete within itself,⁶¹ but a complaint which incorporates by reference certain paragraphs set forth in the first cause of action in subsequent causes of action is not bad on demurrer.⁶² But they cannot be united in one count as one cause of action, without any specification of the sums due upon each several cause.⁶³

§ 198. Contracts.—Causes of action arising from contracts, express or implied, may be united.⁶⁴ Thus claims due as damages

⁵⁶ *Casey v. Gibbons*, 136 Cal. 368, 68 Pac. 1032.

⁵⁷ *Hapgood v. Houghton*, 10 Pick. 154; *Dixon v. Ramsay*, 1 Cranch, C. C., 472, Fed. Cas. No. 3932.

⁵⁸ *Davies v. Davies*, 1 Hurl. & Colt. 451.

⁵⁹ *Fairfield v. Burt*, 11 Pick. 244; *Worster v. Proprietors of Canal Bridge*, 16 Pick. 541.

⁶⁰ *Freeborn v. Glazer*, 10 Cal. 337; *De Witt v. Porter*, 13 Cal. 171; *Buckingham v. Waters*, 14 Cal. 146; *Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78; *Birdseye v. Smith*, 32 Barb. 217.

See City Carpet etc. Works v. Jones, 102 Cal. 506, 36 Pac. 841; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95.

⁶¹ *Moore v. Halliday*, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801; *Harvey v. Southern Pac. Co.*, 46 Or. 505, 80 Pac. 1061.

⁶² *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485, 63 Pac. 871.

⁶³ *Buckingham v. Waters*, 14 Cal. 146.

⁶⁴ *Bade v. Hibberd*, 50 Or. 501, 93 Pac. 364; Or. B. & C. Codes, § 94; Wash. Bal. Codes, § 4942, (*Pierce's*

for delay, and a demand to set aside an award, all growing out of the same contract, may be united in one action.⁶⁵ To reform a written contract, and for judgment thereon, when reformed.⁶⁶ For reformation of a contract, and for damages for breach of it.⁶⁷ A cause of action to recover back money paid by mistake of facts rests upon an implied contract, and may be joined with a cause of action upon an express contract for the recovery of rent upon premises leased.⁶⁸ Damages for false representations, and for breach of contract.⁶⁹ Loss of goods by carrier, and also for freight overpaid.⁷⁰ A cause of action for money lost through the negligence of a bailee, cannot be joined with a cause of action for the conversion of the money to the use of the defendant.⁷¹ A cause of action for false representations in inducing the plaintiff to enter into a contract, and a cause of action for a breach of the same contract, may be joined.⁷² Plaintiff may sue on both the express contract, and upon a *quantum meruit* for the same services and materials.⁷³ On the joinder of ordinary claims in contract with claims for which defendant is arrestable, the plaintiff may waive arrestability in the latter case.⁷⁴

§ 199. Contract of partners.—A complaint, after stating cause of action on a contract against partners, and demanding judgment therefor, contained also allegations that the defendants were insolvent, and had fraudulently confessed judgment to hinder their creditors, and demanded an injunction and a receiver. *Held*, that although the last matter might be obnoxious to a motion to strike out, its insertion did not render the complaint demurrable.⁷⁵ In Massachusetts, a surviving partner may join

Code, § 412); *Moylan v. Moylan*, 49 Wash. 341, 95 Pac. 271.

⁶⁵ See *v. Partridge*, 2 Duer, 463.

⁶⁶ *Story's Eq. Jur.*, §§ 157-161; 2 Johns. Ch. 585; 4 id. 144; *Gooding v. M'Alister*, 9 How. Pr. 123.

⁶⁷ *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263.

⁶⁸ *Olmstead v. Dauphiny*, 104 Cal. 635, 38 Pac. 505.

⁶⁹ *Hurwitz v. Gross*, 5 Cal. App. 614, 91 Pac. 109; *Robinson v. Flint*, 16 How. Pr. 240, 7 Abb. Pr. 393, note. See, however, *Waller v. Raskan*, 12 How. Pr. 28.

⁷⁰ *Adams v. Bissell*, 28 Barb. 382.

As to contracts, with allegations of matters of fraud, see *Roth v. Palmer*, 27 Barb. 652.

⁷¹ *Stark v. Wellman*, 96 Cal. 400, 31 Pac. 259.

⁷² *Robinson v. Flint*, 7 Abb. Pr. 393, note; and see, also, *Freer v. Denton*, 61 N. Y. 492; *Jones v. Johnson*, 10 Bush, 649.

⁷³ *Neuman v. Grant*, 36 Mont. 77, 92 Pac. 43; *Mont. Rev. Codes*, § 6533; *Berry v. Craig*, 76 Kan. 345, 91 Pac. 913.

⁷⁴ *Hickox v. Fay*, 36 Barb. 9-14.

⁷⁵ *Meyer v. Van Collem*, 7 Abb. Pr. 222.

in the same action a demand due to the firm, and another due to himself in his own right, or demands due to him as the surviving partner of two firms.⁷⁶

§ 200. Each cause complete.—Each separate cause of action, as stated, must be complete in itself, and must stand by itself.⁷⁷ And conversely, that numerous items of a distinct class should be stated in distinct counts.⁷⁸

§ 201. Injuries to the person.—Claims for injuries to character, or injuries to character and malicious arrest and prosecution, may be united.⁷⁹ Plaintiff may recover in an action for the combined injury to character and person, when the matters arise from and constitute a part of the same transaction.⁸⁰

§ 202. Injuries to person and property.—It seems that negligence and the damage arising therefrom, both to the person and property of plaintiff, may be united.⁸¹ For one injury, all the acts of negligence should be alleged in one count.⁸² Injuries resulting to both person and property from the same negligent act constitute but one cause of action.⁸³ A complaint does not join a cause of action for recovery of real property with one for personal property, in violation of section 427 of the Code of Civil Procedure,

⁷⁶ *Stafford v. Gold*, 9 Pick. 533. Misjoinder of causes of action involving partnership transactions. See *Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509. But compare *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 859.

⁷⁷ *Lattin v. McCarty*, 17 How. Pr. 239, 8 Abb. Pr. 225. See, also, *Watson v. San Francisco etc. R. R. Co.*, 41 Cal. 17; *Harsen v. Bayaud*, 5 Duer, 656; *Dorman v. Kellam*, 14 How. Pr. 184; § 193, ante.

⁷⁸ *Adams v. Holley*, 12 How. Pr. 326; *Hillman v. Hillman*, 14 How. Pr. 456. And see, also, *Longworthy v. Knapp*, 4 Abb. Pr. 115.

⁷⁹ Cal. Code Civ. Proc., § 427; *Howe v. Peckham*, 6 How. Pr. 229, S. C., 10 Barb. 656; *Hull v. Vreeland*, 42 Barb. 543, 18 Abb. Pr. 182; *Brown v. Rice*, 51 Cal. 489; *Carter v. De*

Camp, 40 Hun, 258; *Watts v. Hilton*, 3 Hun, 606.

⁸⁰ *Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142.

⁸¹ Cal. Code Civ. Proc., § 427; *Williams v. Holland*, 10 Bing. 112, 117; *Blin v. Campbell*, 14 Johns. 433; *Wilson v. Smith*, 10 Wend. 328; 1 Chit. Pl. 27; *Howe v. Peckham*, 6 How. Pr. 229; *Freeman v. Webb*, 21 Neb. 160, 31 N. W. 656.

⁸² *Dickens v. New York Cent. R. R. Co.*, 13 How. Pr. 228.

⁸³ *Howe v. Peckham*, 10 Barb. 656, S. C., 6 How. Pr. 229. A cause of action for an injury to the person is improperly united with a separate cause of action for a subsequent injury to the complainant's property. *The- lin v. Stewart*, 100 Cal. 372, 34 Pac. 861.

though the prayer ask for both, if the facts pleaded entitle a recovery for only one of the two.⁸⁴

§ 203. **Nuisance.**—Any number of separate causes of action for distinct nuisances may be joined in one complaint, if they affect all parties.⁸⁵ Also, in an injunction suit plaintiff may ask for both legal and equitable relief.⁸⁶

§ 204. **Injuries to property.**—Actions for injuries to property may be united.⁸⁷ The union in one count of a complaint of an allegation that defendants “have wrongfully built dams and flumes across said Mormon creek . . . so as to turn the water of said creek out of its natural channel,” etc., and thus divert it from plaintiff, with an allegation that defendants “have constructed gates, etc., in their said dams and flumes, which they . . . hoist for the purpose of clearing out said dams and flumes of slum, stone, and gravel, the accumulation of which renders the water useless to plaintiff,” does not make the complaint demurrable on the ground that it unites several distinct causes of action in one count.⁸⁸ In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant’s dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages for preventing plaintiff from working his claim.⁸⁹ Detention of property, and injury to it while detained, may be united.⁹⁰ Value of property destroyed, and damages, may be united.⁹¹ Allegations for conversion and detention, and prayer for specific delivery are permissible, being held a demand for only one kind of remedy;⁹² also for violation of agreement, and for injury to personal property.⁹³ Damages and injunction may be joined in an action for threatened injury to property. The owner of land may, as assignee, join in the same complaint a

⁸⁴ *Levy v. Noble*, 135 Cal. 559, 67 Pac. 1033.

⁸⁵ *Astill v. South Yuba W. Co.*, 146 Cal. 55, 79 Pac. 594; *Rooney v. Gray*, 145 Cal. 753, 79 Pac. 523.

⁸⁶ *Durga v. Lincoln Creek Lumber Co.*, 47 Wash. 477, 92 Pac. 343; Wash. Bal. Codes, § 4793.

⁸⁷ Cal. Code Civ. Proc., § 427; *More v. Massini*, 32 Cal. 590; *Howe v. Peckham*, 6 How. Pr. 229; *Cleveland v. Barrows*, 59 Barb. 364.

⁸⁸ *Gale v. Tuolumne Water Co.*, 14 Cal. 25.

⁸⁹ *Fraler v. Sears Union Water Co.*, 12 Cal. 555, 73 Am. Dec. 562.

⁹⁰ *Smith v. Orser*, 43 Barb. 187.

⁹¹ *Tendeson v. Marshall*, 3 Cal. 440.

⁹² *Vogel v. Badcock*, 1 Abb. Pr. 176.

⁹³ *Badger v. Benedict*, 1 Hilt. 414, 4 Abb. Pr. 176.

claim for damages, caused by a trespass on the land while it was owned by his grantor, and a claim for an injunction for a threatened injury to the land. The plaintiff may join in the same complaint a cause of action for distinct and independent injuries to property, and the property injured in each cause of action may be the same or different, and may be either personal or real.⁹⁴

§ 205. **Jurisdiction.**—Where the separate causes of action amount together to more than the sum required to give jurisdiction, if joined in one declaration they will give jurisdiction.⁹⁵

§ 206. **Money counts and warranty.**—Money counts may be added to a count on the warranty. Or a count for deceit may be added to a count on the warranty.⁹⁶ But a claim in *assumpsit* for warranty of a horse, and for wrongfully concealing his defects, may not be united.⁹⁷ But when the form of action in tort is adopted, it is not necessary, to enable plaintiff to recover upon the count for false warranty, that a *scienter* should be averred.⁹⁸

§ 207. **Money had.**—A claim for money had and received, and a claim for the delivery of a satisfied promissory note arising out of the same transaction, may be united.⁹⁹

§ 208. **Quantum meruit.**—A *quantum meruit* or a *quantum valebat* may be joined with counts upon a specialty.¹⁰⁰

§ 209. **Separate demands.**—Separate demands under one and the same right may likewise properly be joined in the same count.¹⁰¹ Where the exact legal nature of plaintiff's right depends upon facts peculiarly within the knowledge of defendant, plaintiff may set forth the same single cause of action in several counts, so as to meet the possible proofs.¹⁰² Several grounds of liability against the same defendant, arising out of the same transaction,

⁹⁴ More v. Massini, 32 Cal. 590.

⁹⁵ Ridgway v. Pancost, 1 Cranch, C. C., 88, Fed. Cas. No. 11818.

⁹⁶ Vail v. Strong, 10 Vt. 457; Dobbin v. Foyles, 2 Cranch, C. C., 65, Fed. Cas. No. 3942.

⁹⁷ Sweet v. Ingerson, 12 How. Pr. 331; Springstead v. Lawson, 23 How. Pr. 302.

⁹⁸ Brown v. Edgington, 2 Man. & G. 279; Holman v. Dord, 12 Barb. 336; Schuchardt v. Allens, 1 Wall. 359, 17 L. Ed. 642.

⁹⁹ Cahoon v. Bank of Utica, 7 How. Pr. 401.

¹⁰⁰ Smith v. Proprietors of First Cong. Meeting-house of Lowell, 8 Pick. 178; Van Deusen v. Blum, 18 Pick. 229, 29 Am. Dec. 582.

¹⁰¹ Longworthy v. Knapp, 4 Abb. Pr. 115. And see Wood v. Sidney Sash etc. Co., 92 Hun, 22, 37 N. Y. Supp. 885.

¹⁰² Spotswood v. Morris, 10 Idaho, 129, 77 Pac. 216.

may be joined in one action,¹⁰³ and cannot be divided into several claims and separate actions;¹⁰⁴ as by the plaintiff, as devisee, for rent, and, as executrix, for breach of covenant, all arising out of the same lease.¹⁰⁵ So, also, claims against the same defendant in different capacities may be united.¹⁰⁶ For money received on account of an estate, and also for a promissory note which is part of the estate, but payable to the executor individually.¹⁰⁷ So of claims against various parties, liable to contribute their proportion for repairs, for the general benefit of all.¹⁰⁸ Against a constable for different breaches of duty, and against his surety, held capable of joinder.¹⁰⁹ It would also seem that in New York, a claim by a stockholder, who is also a judgment creditor of a corporation, may in certain cases maintain an action against the corporation, and against its other stockholders, and its other creditors, with a view to ascertain and provide for the rights of all parties.¹¹⁰

§ 210. **Several counts.**—A complaint which contains a count setting forth the facts attending the purchase of a county warrant by plaintiff, and charging that defendants are liable upon an implied contract to repay the purchase money, and a second count charging defendants as indorsers of negotiable paper, and a third count in the usual form for money had and received, is not demurrable on the ground of a misjoinder of causes of action.¹¹¹ In Iowa, a party may state in one count a cause of action on a note, and in another a cause of action on the consideration of a note.¹¹²

§ 211. **Single cause of action.**—A complaint for the enforcement of an attorney's lien, in which both parties to the suit and sureties upon the appeal-bond are made defendants, does not state more than one cause of action.¹¹³

§ 212. **Specific performance.**—A claim for specific performance of a contract to convey real estate, and for payment of a reason-

¹⁰³ *Durant v. Gardner*, 19 How. Pr. 94, 10 Abb. Pr. 445.

¹⁰⁴ *Tootle v. Kent*, 12 Okla. 674, 73 Pac. 310.

¹⁰⁵ *Armstrong v. Hall*, 17 How. Pr. 76.

¹⁰⁶ *Pugsley v. Aikin*, 11 N. Y. 494; *Lord v. Vreeland*, 13 Abb. Pr. 195.

¹⁰⁷ *Welles v. Webster*, 9 How. Pr. 251.

¹⁰⁸ *Denman v. Prince*, 40 Barb. 213.

¹⁰⁹ *Moore v. Smith*, 10 How. Pr. 361.

¹¹⁰ *Geery v. New York etc. S. S. Co.*, 12 Abb. Pr. 268.

¹¹¹ *Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78.

¹¹² *Camp v. Wilson*, 16 Iowa, 225.

¹¹³ *Coombe v. Knox*, 28 Mont. 202, 72 Pac. 641.

able sum for use and occupation, is not setting up two distinct causes of action which cannot be united.¹¹⁴ A cause of action for damages for breach of a contract and one for specific performance of the same contract may properly be joined in the same complaint without separately stating them.¹¹⁵ Grantor with warranty, and holder of an incumbrance, may be joined, to obtain satisfaction of such incumbrance, and a recovery over for any amount found due on it.¹¹⁶

§ 213. **Specific personal property.**—Claims for the recovery of specific personal property, with or without damages for the withholding thereof, may be joined.¹¹⁷ So, also, replevin and fraud may be united.¹¹⁸

§ 214. **Specific real property.**—Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits on the same may be united,¹¹⁹ but the common-law rule prevails, and they cannot be united in absence of such statutory provision.¹²⁰ A complaint in ejectment may be for two separate and distinct pieces of land, but the causes of action must be separately stated, and affect all the parties to the action, and not require different places of trial.¹²¹ Otherwise, it would appear that the old form of declaring in ejectment by separate counts is no longer admissible.¹²² Two causes of action to enforce distinct and different trusts respecting different tracts of land, and arising out of different acts of fraud, may properly be united.¹²³ A property-owner suing a railroad company for injuries from fire escaping from its premises may allege both statutory and common-law liability, and not be compelled to elect between the two causes.¹²⁴

¹¹⁴ *Spier v. Robinson*, 9 How. Pr. 325.

¹¹⁵ *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839.

¹¹⁶ *Wandle v. Turney*, 5 Duer, 661.

¹¹⁷ Cal. Code Civ. Proc., § 427.

¹¹⁸ *Truebody v. Jacobson*, 2 Cal. 269.

¹¹⁹ Cal. Code Civ. Proc., § 427; *Sullivan v. Davis*, 4 Cal. 291; *Hoffman v. Tuolumne Water Co.*, 10 Cal. 413; *Gale v. Tuolumne Water Co.*, 14 Cal. 25; *Hotchkiss v. Auburn etc. R. R.*

Co., 36 Barb. 600; *Sternberger v. McGovern*, 56 N. Y. 12; *Perry v. Richardson*, 27 Ohio St. 110.

¹²⁰ *McKenzie v. Porter*, 40 Colo. 340, 91 Pac. 916.

¹²¹ *Boles v. Cohen*, 15 Cal. 150.

¹²² *St. John v. Pierce*, 22 Barb. 362.

¹²³ *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *Trubody v. Trubody*, 137 Cal. 172, 69 Pac. 968.

¹²⁴ *Crissey etc. Lumber Co. v. Denver etc. R. R. Co.*, 17 Colo. App. 275, 68 Pac. 670.

§ 215. **Specific relief.**—Claims by a debtor to have obligations delivered up and canceled, and an account of the securities pledged for them, and payment of the overplus, is but one cause of action.¹²⁵ A cause of action for reformation of mortgage, and for simultaneous foreclosure, may be united.¹²⁶ So suit against indorser for liability on note, and for decree against mortgagor foreclosing the mortgage, may be united;¹²⁷ and a claim to reform an assignment in part, and for accounting under it when reformed.¹²⁸ An action for damages and for injunction to prevent further damage is properly united, and it is not necessary to have the equitable issues first tried by the court.¹²⁹ Under the Oklahoma Code of Civil Procedure, all the rights of the parties, both legal and equitable, so far as they are consistent with one another and affect the rights of the same parties, may be united in one action.¹³⁰

§ 216. **Trespass.**—In Massachusetts, under trespass, the several species of *quare clausum* and *de bonis asportatis* may be joined.¹³¹ Counts in trespass upon the case may be joined with a count in trover.¹³² So a cause of action for cutting wood, and also one for the conversion of wood, may be combined.¹³³ A cause of action for damages for a trespass, and a cause of action for an injunction to restrain further or additional trespass threatened to be committed upon the same property, may be joined;¹³⁴ and the objection that they are not separately stated cannot be reached by demurrer on that ground, but only by motion, unless the complaint is thereby made ambiguous, unintelligible, or uncertain.¹³⁵ Under subdivision 9 of section 484 of the New York Code of Civil Procedure, a cause of action for trespass upon land, and a cause of action for conversion of personal property, when both arise out of the same transaction, may be united.¹³⁶ A complaint setting forth two causes of action, one for entering upon

¹²⁵ Cahoon v. Bank of Utica, 7 N. Y. 486, S. C., 7 How. Pr. 401, reversing 7 How. Pr. 134.

¹²⁶ De Peyster v. Hasbrouck, 11 N. Y. 582.

¹²⁷ Rollins v. Forbes, 10 Cal. 299; Eastman v. Turman, 24 Cal. 382.

¹²⁸ Garner v. Wright, 28 How. Pr. 92.

¹²⁹ Stoner v. Mau, 11 Wyo. 366, 72 Pac. 193, 73 Pac. 548.

¹³⁰ Tootle v. Kent, 12 Okla. 674, 73 Pac. 310.

¹³¹ Bishop v. Baker, 19 Pick. 517.

¹³² Ayer v. Bartlett, 9 Pick. 160.

¹³³ Rodgers v. Rodgers, 11 Barb. 595.

¹³⁴ Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119.

¹³⁵ Id.

¹³⁶ Polley v. Wilkisson, 5 Civ. Proc. Rep. 135.

the plaintiff's land under water and taking and carrying away fish, the other for a like entry upon the plaintiff's land and catching and killing animals thereon, states two causes of action for injuries to real estate, which may be properly joined.¹³⁷ The additional allegations of injuries to personal property are not statements of separate causes of action, but mere averments in aggravation of the wrongful entry.¹³⁸ Allegations as to seduction, in a complaint for breach of promise of marriage, are merely in aggravation of damages, and do not make the complaint open to the charge of embracing two causes of action, where seduction is not actionable at the suit of the person seduced.¹³⁹ Counts may be joined in the same declaration for malicious prosecution and slander.¹⁴⁰ A complaint in an action to remove a cloud on title is not obnoxious to the objection that it improperly unites several causes of action because it sets out several reasons why the outstanding title is invalid.¹⁴¹ Nor is a complaint in an action by a principal for an accounting from an agent demurrable for misjoinder of different causes of action because it alleges various kinds of misconduct on the part of the agent.¹⁴² A complaint against an executor individually and to recover a deposit of purchase money paid him as executor is demurrable for misjoinder of parties defendant and for misjoinder of causes of action.¹⁴³ A joint action will not lie against the separate owners of dogs which unite in destroying the property of a third person. Each owner is liable only for the damage done by his own dog, and not for that which is done by the dogs which do not belong to him.¹⁴⁴

§ 217. Cause of action under the money counts.

Form No. 65.

[TITLE.]

The plaintiffs complain, and allege:

I. That at the times hereinafter mentioned, the plaintiffs were partners, doing business at the city and county of San Francisco,

¹³⁷ Whatling v. Nash, 41 Hun, 579.

¹³⁸ Id.; Gilbert v. Pritchard, 41 Hun, 46. But compare Gunn v. Fel-lows, 41 Hun, 257.

¹³⁹ Getzelson v. Bernstein, 37 N. Y. Supp. 220, 15 Misc. 627, 72 N. Y. St. Rep. 799.

¹⁴⁰ Bible v. Palmer, 95 Tenn. 393, 32 S. W. 249.

¹⁴¹ Day v. Schnider, 28 Or. 457, 43 Pac. 650.

¹⁴² San Pedro Lumber Co. v. Reynolds, 111 Cal. 588, 44 Pac. 309.

¹⁴³ Schlicker v. Hemenway, 110 Cal. 579, 52 Am. St. Rep. 116, 42 Pac. 1063.

¹⁴⁴ State (Nierenberg) etc. v. Wood, 59 N. J. L. 112, 35 Atl. 654.

state of California, under the firm name of A. B. & Co., and the defendants were partners doing business at the said city and county of San Francisco, under the firm name of C. D. & Co.

First.—For a first cause of action, the plaintiffs allege:

I. That on the . . . day of . . . , 19.., at . . . , at the request of the defendants, the plaintiffs deposited with the defendants the sum of . . . dollars, gold coin of the United States, which sum the defendants promised to pay to the plaintiffs on demand.

II. That on the . . . day of . . . , 19.., at . . . , the plaintiffs demanded payment of the same from the defendants, but they have not paid the same.

Second.—And for a second cause of action, the plaintiffs allege:

I. That on the . . . day of . . . , 19.., at . . . , the defendants received . . . dollars from one E. F., to be paid to the plaintiffs.

II. That the defendants have not paid the same.

Third.—And for a third cause of action, the plaintiffs allege:

I. That on the . . . day of . . . , 19.., at . . . , the plaintiffs loaned to the defendants . . . dollars.

II. That the defendants have not paid the same.

[DEMAND OF JUDGMENT.]

CHAPTER XVI.

COMPLAINT—SPLITTING OF CAUSES.

§ 218. **The rule in general.**—It is a familiar principle of law, and one not at all peculiar to the code system of pleading, that a party having an entire demand cannot split it up into separate causes of action.¹ There are no maxims more firmly established or salutary than those designed to prevent repeated litigation between the same parties over the same thing, and this rule forbidding the severance of entire demands has its basis in the two maxims, *Interest rei publicæ, ut sit finis litium*, and *Nemo debet bis vexari pro una et eadem causa*.² A single wrong gives only one cause of action, and the damages resulting therefrom must be assessed and recovered in one suit; and this is true although the right to damages developed at different times;³ and if a plaintiff attempts to split his demand, it constitutes a waiver of part of his demand, and a recovery of a part bars any recovery as to the residue.⁴ In such a case the entire demand will be deemed to be merged in the first judgment recovered.⁵

Where several actions are brought by the same plaintiff against the same defendant on the same transaction, and it is apparent that the same general defenses would be made in each, the court may, upon application properly made, order the actions to be consolidated.⁶ In most instances the application for consolidation comes from the defendant, and a court may make the order without the plaintiff's consent.⁷ It has been held that a court should not consolidate without the consent of the defendant.⁸

It is not to be concluded, however, from this statement of the rule, that the law requires distinct causes of action to be presented in the same suit, although they are coexistent and might be united

¹ *Cooley v. Calaveras County*, 121 Cal. 482, 53 Pac. 1075.

² *United States v. Throckmorton*, 98 U. S. 65, 25 L. Ed. 93.

³ *Wheeler Savings Bank v. Tracey*, 141 Mo. 252, 64 Am. St. Rep. 505, 42 S. W. 946.

⁴ *Liddell v. Chidester*, 84 Ala. 508, 5 Am. St. Rep. 387, 4 South. 426.

⁵ *O'Dougherty v. Remington Paper Co.*, 81 N. Y. 496.

⁶ *Logan v. Mechanics' Bank*, 13 Ga. 201, 58 Am. Dec. 507; *Brewster v. Stewart*, 3 Wend. 441.

⁷ *Burnham v. Dalling*, 16 N. J. Eq. 310.

⁸ *Groff v. Musser*, 3 Serg. & R. 262. But see *Briggs v. Gaunt*, 2 Abb. Pr. 77.

in one action. It cannot be assumed that a single contract can give rise to but one cause of action, and that in every instance a suit under a contract would bar any other suit under the same contract.⁹ Where the causes are distinct the plaintiff may elect to sue upon them separately,¹⁰ even though they belong to the class of causes which might be joined. That they belong to the same class is immaterial; identity is the test under this rule.¹¹

§ 219. Entire cause of action, what is.—No single rule can be formulated which will serve as a test in all cases for determining whether a cause of action is entire and indivisible. The question must be answered upon a consideration of each particular case. The difficulty in this respect is pointed out in a statement by Judge Cooley in a Michigan case: "If the two bills constituted one demand in their origin, they must have become two for all legal purposes when the one fell due before the other; and if united again by the other falling due, they would be again separated when the remedy on one was barred, or whenever anything occurred which should render one the subject of a suit when the other was not."¹² In general, it may be said with reference to contracts that each contract embraces only one cause of action;¹³ and with respect to torts it may be said that a single tort gives but one cause of action, no matter how many items of damage there may be.¹⁴ The real difficulty lies in determining whether what is supposed to be one contract cannot be split into several, and whether what appears to be a single wrongful act does not in fact involve the commission of several at the same time. As we have already observed, time is not always the determining factor.

§ 220. Entirety of cause of action under contract.—In his work on contracts, Parsons lays down the following rules for the determination of this question in actions on contracts:

⁹ *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663.

¹⁰ *Phillips v. Berick*, 16 Johns. 140, 8 Am. Dec. 299; *Secor v. Sturgis*, 16 N. Y. 554.

¹¹ *Staples v. Goodrich*, 21 Barb. 317.

¹² *Stickel v. Steel*, 41 Mich. 350, 1 N. W. 1046.

¹³ *Wetmore v. City of San Francisco*, 44 Cal. 295; *Millard v. Missouri*

etc. R. R. Co., 86 N. Y. 441; *Madden v. Smith*, 28 Kan. 798; *Gapen v. Bretternitz*, 31 Neb. 302, 47 N. W. 918.

¹⁴ *Wichita etc. Ry. Co. v. Beebe*, 39 Kan. 465, 18 Pac. 502; *City of Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. 1; *Herriter v. Porter*, 23 Cal. 385; *Filer v. New York Cent. Ry. Co.*, 49 N. Y. 42.

If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. The contract is severable where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But the mere fact that the subject of the contract is sold by weight or measure, and the value is ascertained by the price affixed to each pound, or yard, or bushel of the quantity contracted for, will not be sufficient to render the contract severable. If the consideration is entire, this makes the contract one and indivisible.¹⁵

It will be seen that two causes of action may spring out of the same contract, and a judgment on one not be a bar to a suit on the other. Thus a claim by an employee for wages earned and a claim for wrongful dismissal are each separate and distinct causes of action.¹⁶ So, also, a contract may contain several independent stipulations, and an action may be maintained on each stipulation as it is broken.¹⁷ But while actions may be brought to recover for breaches of distinct covenants as they occur, yet all breaches existing at any one time constitute but a single cause of action.¹⁸ So, also, where several claims, payable at different times, arise out of the same contract suit may be brought as each liability accrues; but if suit is not brought until more than one has become due all must be sued for in the one action.¹⁹ Where several notes are given as part of the same transaction they may be sued on separately as they fall due; nor is there any obligation on the holder to include in one suit all the notes due at the time suit is brought.²⁰

A creditor cannot assign his debt in parcels, and thus by splitting up the cause of action subject his debtor to costs and expenses of several suits.²¹ A joint cause of action vested in two

¹⁵ 2 Parsons on Contracts, 517.

¹⁶ Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663.

¹⁷ McIntosh v. Lown, 49 Barb. 550; Boyce v. Christy, 47 Mo. 70; Wehrly v. Morfoot, 103 Ill. 183.

¹⁸ Bearnagle v. Cocks, 19 Wend. 207; Coggins v. Bulwinkle, 1 E. D. Smith, 434; Whitaker v. Hawley, 30 Kan. 317, 1 Pac. 508; Kansas City Hotel Co. v. Sigement, 53 Mo. 176.

¹⁹ Reformed etc. Church v. Brown, 54 Barb. 191; Union Ry. etc. Co. v. Traube, 59 Mo. 355; Nickerson v. Rockwell, 90 Ill. 460; Love v. Waltz, 7 Cal. 250.

²⁰ Nathans v. Hope, 77 N. Y. 420; Williams v. Kitchen, 40 Mo. App. 604.

²¹ Marziou v. Pioche, 8 Cal. 536; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

or more cannot be split.²² But the fact that several persons employ a common agent does not make a contract by him in that capacity a single one.²³

§ 221. **Entirety of cause of action for tort.**—The test to be applied to determine whether one wrongful act gives more than one cause of action is, Is the injury occasioned an infringement of different rights? If so, there are as many causes of action as there are rights infringed.²⁴ The mere fact that there was but one transaction does not of itself limit the plaintiff to one cause of action. So the recovery by a passenger of the statutory penalty for an overcharge does not bar a suit for damages for his ejection from the train.²⁵ And a suit for the hire of a horse, buggy, and harness is not a waiver of the right to sue for injuries done to the buggy and harness while in the bailee's possession.²⁶ A single trespass ordinarily gives but one cause of action for the acts done.²⁷ So, also, where a trespass is continuous, as in the trespass of cattle upon land day after day, there is only one cause of action.²⁸ But a judgment for an act of trespass is not a bar to a suit for similar trespasses occurring prior to those alleged in the former action.²⁹ The taking of several articles in one act cannot give a right of action in trover for some and a right of action in replevin for the remainder.³⁰ Each assault and battery constitutes a distinct transaction, and so gives several rights of action.³¹ So, also, does every publication of slander,³² and different acts of waste.³³

²² *Coster v. New York etc. R. R. Co.*, 6 Duer, 46.

²³ *Clegg v. Aikens*, 5 Abb. N. Cas. 95.

²⁴ *Brundser v. Humphrey*, 14 Q. B. Div. 141. This is a leading case on this point. There the plaintiff sued in the county court for damages caused to his cab by the defendant's negligence. After recovering in that suit, he brought an action in the high court of justice for injuries to his person caused by the same act of negligence, and the court held that the action was not barred by the first recovery. The doctrine of this case has been reaffirmed. *Howe v. Peckham*, 10 Barb. 656.

²⁵ *St. Louis etc. Ry. Co. v. Trimble*, 54 Ark. 354, 15 S. W. 899.

²⁶ *Shaw v. Beers*, 25 Ala. 449.

²⁷ *Hempstead v. City of Des Moines*, 63 Iowa, 36, 18 N. W. 676.

²⁸ *De La Guerra v. Newhall*, 53 Cal. 141.

²⁹ *De La Guerra v. Newhall*, 55 Cal. 21.

³⁰ *Funk v. Funk*, 35 Mo. App. 246; *Moran v. Plankinton*, 64 Mo. 337; *Stevens v. Tuite*, 104 Mass. 328.

³¹ *Adams v. Haffards*, 20 Pick. 127.

³² *Rockwell v. Brown*, 36 N. Y. 207; *Woods v. Pangburn*, 75 N. Y. 495.

³³ *Rutherford v. Aiken*, 2 Thomp. & C., 281.

§ 222. **Effect of splitting of cause of action.**—If plaintiff split his cause of action in the same complaint into two causes, one for costs of abating a nuisance and the other for permanent injury to the property, a judgment recovered upon either cause of action is a bar to recovery upon the other.³⁴ The statement of each cause of action is practically a complaint in itself. No interdependence exists.³⁵

³⁴ *Murray v. City of Butte*, 35 Mont. 161, 88 Pac. 789; *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950-958.

³⁵ *Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146.

CHAPTER XVII.

COMPLAINT—RIGHT OF PLAINTIFF AND LIABILITY OF
DEFENDANT.

§ 223. **In general.**—To say that a complaint must show the plaintiff's right to a recovery and the defendant's liability to the plaintiff is merely to say that the complaint must state facts sufficient to constitute a cause of action. Just what constitutes a proper statement of the right of the plaintiff and the corresponding liability on the part of the defendant, however, is probably the most difficult question that confronts the pleader. As we have already observed, every complaint must be founded on a theory under which the plaintiff is entitled to recover, and must state all the facts essential to support such theory, and failing to do so it is radically defective, and does not state facts sufficient to constitute a cause of action.¹

In previous chapters we have discussed the code rules as to construction of pleadings and the mode or manner of stating the necessary facts, assuming that in all cases the pleader understood the respective rights and liabilities of plaintiffs and defendants, and knew, at least in a general way, what must be stated to authorize a recovery by a plaintiff against a defendant in a particular action.

In the present chapter we shall endeavor to determine, in as short space as possible, what facts must be stated in particular classes of actions.²

§ 224. **Actions on contracts.**—The requisites which must be carefully observed in the complaint in an action on contract, are: 1. The existence of the contract sued upon and its terms; 2. Performance or a readiness to perform, and a tender of performance on the part of the plaintiff, must be shown; 3. The breach must be clearly apparent; 4. Special damages resulting from the breach must be specifically and clearly averred.

The existence of the contract should be stated, and if it was an alternative or conditional engagement, or qualified by excep-

¹ Buena Vista etc. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386.

² For a fuller discussion of matters applicable to particular classes of actions see vols. III and IV.

tions, this should appear in the complaint.³ If the contract be in writing, it may be set out *in hæc verba*, or it may be stated according to its legal effect. It is probably more consistent with the code system of pleading to set out the contract in terms.⁴ In some cases the pleader must state the contract according to its legal import; for the rule which permits him to declare upon it *in hæc verba* must of necessity be limited to those cases where the instrument set out contains the formal contract, showing in express terms the promises and undertakings on both sides.⁵ Of course, it goes without saying that the plaintiff need not do both; if he sets out the contract merely in substance, the court will construe the contract for him, and determine its legal effect; if he sets out the contract in terms, it would be superfluous to go further and state its legal effect.⁶

It is by far the better practice to plead a contract, if it be in writing, by setting forth a copy of it or by annexing a copy to the complaint,⁷ the same as in actions upon written instruments for the payment of money only;⁸ for if the contract be declared upon according to its legal effect, the defendant may, in a proper case, demand the production of the instrument, and, if it appears that its contents have been misstated, he may set the contract out *in hæc verba* and demur on the ground of the variance.⁹

In either case, whatever is pleaded should be truly pleaded, for where a pleading purports to recite an instrument *in hæc verba*, trifling variances, if material, will be deemed fatal.¹⁰ The instrument set forth must be free from defect or ambiguity; if it be ambiguous, the pleader must put some definite construction upon it by averment.¹¹ But the meaning of words or abbreviations

³ Stone v. Knowlton, 3 Wend. 374; Hatch v. Adams, 8 Cow. 35; Crane v. Maynard, 12 Wend. 408; Barilari v. Ferrea, 59 Cal. 1.

⁴ Stoddard v. Treadwell, 26 Cal. 300; Murdock v. Brooks, 38 Cal. 603; White v. Soto, 82 Cal. 654, 23 Pac. 210.

⁵ Joseph v. Holt, 37 Cal. 253; American etc. Contract Co. v. Bullen Bridge Co., 29 Or. 549, 46 Pac. 138; Hudson v. Archer, 4 S. Dak. 128, 55 N. W. 1099; Jacobs Sultan Co. v. Mercantile Co., 17 Mont. 61, 42 Pac. 109.

⁶ North v. Kizer, 72 Ill. 172; Van Norman v. Wheeler, 13 Tex. 316; Pat-

rick v. Colorado Smelting Co., 20 Colo. 268, 38 Pac. 236.

⁷ Fairbanks v. Bloomfield, 2 Duer, 349; Quirk v. Clark, 7 Mont. 31, 14 Pac. 669.

⁸ Fiske v. Soule, 87 Cal. 313, 25 Pac. 430.

⁹ Stoddard v. Treadwell, 26 Cal. 300; Los Angeles v. Signoret, 50 Cal. 298; Aultman v. Siglinger, 2 S. Dak. 446, 50 N. W. 911.

¹⁰ Ferguson v. Harwood, 7 Cranch, 408, 3 L. Ed. 386.

¹¹ Durkee v. Cota, 74 Cal. 315, 16 Pac. 5; Lambert v. Haskell, 80 Cal. 613, 22 Pac. 327.

used in the writing may be proved at the trial, for the purpose of enabling the court to interpret it, and the oral evidence as to their meaning need not be stated in the pleading; nor do abbreviations contained in the contract render the pleading bad on special demurrer.¹² Preliminary and collateral matters of substance must be alleged, and mere recitals in the instrument cannot serve as such allegations.¹³

Records and papers cannot be made a part of a pleading by merely referring to them and praying that they may be taken as part of such pleading, without annexing the originals or copies as exhibits or incorporating them so far as to form a part of the record in the cause.¹⁴ By pleading a record with the words, "as appears by the record," or "as appears of record," the party proffers that issue and is bound to maintain it literally; and this is true where the averment has reference to particulars which need not, as well as to those which must, be specifically stated on the record.¹⁵

§ 225. **Assumpsit—Common counts.**—The right to rely upon the common counts has been established by the California decisions.¹⁶ So a complaint in *assumpsit* which states a cause of action need not set forth the items of the account; but if the defendant desires more particular information as to the items, he may demand a bill of particulars.¹⁷ While, however, the common counts are in some cases sufficient under the codes, they are insufficient in those cases where they were insufficient under the old system of pleading.¹⁸

Where a complaint framed in accordance with the common counts clearly indicates that the same cause of action was stated in each count, a finding for the plaintiff on one of the counts,

¹² Callahan v. Stanley, 57 Cal. 476; Berry v. Kowalsky, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

¹³ Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327; Leadville Water Co. v. Leadville, 22 Colo. 297, 45 Pac. 362; Tooker v. Arnoux, 76 N. Y. 397; Weiner v. Lee Shing, 12 Or. 276, 7 Pac. 111; United States Life Ins. Co. v. Gage, 3 N. Y. Supp. 398.

¹⁴ People v. De La Guerra, 24 Cal. 78. See Ward v. Clay, 82 Cal. 505, 23 Pac. 50, 227; Simon v. Durham, 10 Or. 55.

¹⁵ Purcell v. McNamara, 9 East, 160; Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17526.

¹⁶ Buckingham v. Waters, 14 Cal. 146; De Witt v. Porter, 13 Cal. 171; Farwell v. Murray, 104 Cal. 464, 38 Pac. 199; Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998; Brown v. Board of Education, 103 Cal. 531, 37 Pac. 503.

¹⁷ Farwell v. Murray, 104 Cal. 464, 38 Pac. 199.

¹⁸ Barrere v. Soms, 113 Cal. 97, 45 Pac. 177.

without findings on the others, is sufficient to support a judgment in his favor.¹⁹ A complaint in an action by a contractor to enforce a mechanic's lien, in which the special contract between the contractor and the owner of the building is stated, may be changed by amendment into an action on the contract, which may be counted on specially, or the common counts may be used, in accordance with the general rules applicable thereto.²⁰ A contractor is not bound, as a matter of pleading, to declare upon the contract, but may declare for work and materials and prove the contract.²¹

§ 226. **Allegations of promise.**—Where the contract declared upon contains an express promise, it should be alleged and proved. In such case the promise itself is the fact constituting the cause of action, but if the promise is to be implied from other facts alleged it need not be averred. And in the absence of an express promise every fact essential to fix the liability of the defendant should be stated; for, of course, where the plaintiff does not allege a contract or agreement in his pleadings he cannot recover upon it.²²

An implied promise is a mere conclusion of law, and the facts from which such promise is to be implied must be stated. But the rule is different in the case of an express promise, which is an ultimate fact, and must be pleaded as such, though the word "express" need not be used in pleading the promise. When a promise is alleged in a pleading it must be deemed to have been express.²³ In an action to enforce a promise alleged to have been made by the defendant on a certain day, the plaintiff is entitled to recover upon proof that the promise was made at any time prior to the commencement of the action. He need not prove that it was made at or about the time alleged in the complaint.²⁴ So, also, a party who has wholly performed a special

¹⁹ *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937.

²⁰ *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127. See, also, *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Galvin v. Mac-Milling Co.*, 14 Mont. 508, 37 Pac. 366.

²¹ *Kirchner v. Laughlin*, 39 N. Y. Supp. 312.

²² *Wilkins v. Stidger*, 22 Cal. 235, 83 Am. Dec. 64; *Shade v. Sisson Co.*,

115 Cal. 367, 47 Pac. 135; *Campbell v. Shiland*, 14 Colo. 492, 23 Pac. 324; *Busta v. Wardall*, 3 S. Dak. 146, 52 N. W. 418; *Blackwell Durham Tobacco Co. v. McElwel*, 96 N. C. 71, 60 Am. Rep. 404, 1 S. E. 676. See, also, *Ankeny v. Clark*, 1 Wash. 554, 20 Pac. 583.

²³ *Poly v. Williams*, 101 Cal. 648, 36 Pac. 102.

²⁴ *Biven v. Bostick*, 70 Cal. 639, 11 Pac. 790.

contract on his part may count upon the implied agreement of the other party to pay the stipulated price, and is not bound to specially declare on the agreement.²⁵

In pleading a contract which the statute of frauds requires to be in writing it is not necessary to allege the facts relied upon to take the case out of the statute. It is sufficient to allege that the contract was made. There is no reason for departing, under the code, from the well-settled rules in law and equity;²⁶ and where a contract within the statute is declared upon the court will presume that it was in writing.²⁷ In other words, the existence or non-existence of such a writing is a matter of evidence, and its non-existence is a matter of defense.²⁸

§ 227. Allegations of consideration.—It is always necessary in actions of contract to allege consideration, except in those cases where the law imports consideration.²⁹ In those cases where the law imports consideration the averment is surplusage. It may be stated as a general rule, however, that in all cases the consideration must appear on the face of the complaint, either impliedly, as where the character of the instrument imports consideration,³⁰ or expressly, wherever proof of it is necessary to support the action, for in its absence no action can be maintained.³¹

In California, any written instrument is presumptive evidence of a consideration.³² So a complaint which alleges that a corporation defendant executed a contract in writing, whereby it agreed

²⁵ *Steeple v. Newton*, 7 Or. 110, 33 Am. Dec. 705; *Tribou v. Strowbridge*, 7 Or. 156.

²⁶ *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; *Etling v. Vanderlyn*, 4 Johns. 237; *Myers v. Morse*, 15 Johns. 425.

²⁷ *Wakefield v. Greenhood*, 29 Cal. 598; *Mills v. Thorne*, 38 Cal. 337, 99 Am. Dec. 384; *McMenomy v. Talbot*, 84 Cal. 279, 23 Pac. 1099; *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233; *Bowman v. Ainslie*, 1 Idaho, 644; *Sweetland v. Barrett*, 4 Mont. 217, 1 Pac. 745; *Alber v. Alber*, 3 Or. 322; *Russell v. Swift*, 5 Or. 233; *Kilpatrick-Koch etc. Co. v. Box*, 13 Utah, 494, 45 Pac. 629.

²⁸ *Livingston v. Smith*, 14 How. Pr. 490; *Wakefield v. Greenhood*, 29 Cal. 597; *McDonald v. Mission View etc. Assoc.*, 51 Cal. 210; *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. 753; *Barnard v. Lloyd*, 85 Cal. 131, 24 Pac. 658.

²⁹ *Moore v. Waddle*, 34 Cal. 145; *McFadden v. Crawford*, 39 Cal. 662; *Hayden v. Steadman*, 3 Or. 550; *Felt v. Judd*, 3 Utah, 414, 4 Pac. 243; *Wills v. Kempt*, 17 Cal. 99; *Henke v. Eureka Endowment Assoc.*, 100 Cal. 432, 34 Pac. 1089; *Northern Kansas Town Co. v. Oswald*, 18 Kan. 339.

³⁰ *McCarty v. Beach*, 10 Cal. 461; *Wills v. Kempt*, 17 Cal. 98.

³¹ *Bristol v. The Rensselaer & Co.*, 9 Barb. 158.

³² Cal. Civ. Code, § 1614.

and promised to pay the plaintiff on a given date a certain sum of money, states facts from which the law will presume a consideration, though the contract is not set out *in hæc verba*.³³ And the burden of proving the want of consideration sufficient to support a written instrument lies upon the party seeking to avoid it on that ground.³⁴

The recital in a complaint of an executed or past consideration is not usually traversable, and requires little certainty, either of name, place, person, or subject-matter,³⁵ although it should be known to both parties at the time of making the contract that the subject-matter is liable to a contingency by which it may be destroyed. If this contingency has already happened at the time, the agreement is without consideration.³⁶

§ 228. Alleging performance or excusing non-performance.—Where performance by the plaintiff is a condition precedent to his right to demand performance of the defendant, such performance must be averred in the complaint,³⁷ and if the performance of a condition precedent not contained in the contract is necessary to create a right of action, such performance must be alleged.³⁸ Of course, where non-performance is excusable the excuse must be alleged;³⁹ e. g. where performance is prevented by sickness or death,⁴⁰ or by act of law,⁴¹ or by the destruction of the subject-matter by fire,⁴² or by the act of the defendant.⁴³ So, also, where the defendant has repudiated the contract on his part, or has disabled himself from performing,⁴⁴ in which cases the allegation of the fact without any averment of performance is sufficient. And where the defendant has waived performance by the plaintiff,

³³ Henke v. Eureka Endowment Assoc., 100 Cal. 429, 34 Pac. 1089.

³⁴ Cal. Civ. Code, § 1615; Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962; Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189.

³⁵ Gebhart v. Francis, 32 Pa. St. 78.

³⁶ Allen v. Hammond, 11 Pet. 63, 9 L. Ed. 633.

³⁷ Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Dennis v. Strassburger, 89 Cal. 583, 26 Pac. 1070.

³⁸ Dye v. Dye, 11 Cal. 167; Rhoda v. Alameda County, 52 Cal. 350; People v. Jackson, 24 Cal. 632; Himmelman v. Danos, 35 Cal. 448.

³⁹ Wolfe v. Howes, 24 Barb. 174, 666.

⁴⁰ Wolfe v. Howes, 24 Barb. 174, 666; Fahy v. North, 19 Barb. 341.

⁴¹ Jones v. Judd, 4 N. Y. 411.

⁴² Lord v. Wheeler, 1 Gray, 282.

⁴³ Ruhle v. Massey, 2 Ind. 636; Clarke v. Crandall, 27 Barb. 73; Crist v. Armour, 34 Barb. 378; Rivara v. Ghio, 3 E. D. Smith, 264; Little v. Mercer, 9 Mo. 218; Burns v. Fox, 113 Ind. 205, 14 N. E. 541.

⁴⁴ Dowd v. Clarke, 54 Cal. 48; Merrill v. Merrill, 95 Cal. 334, 30 Pac. 542; Newcomb v. Brackett, 16 Mass. 161.

only the facts showing such waiver need be alleged. But this is imperative, for the plaintiff cannot plead performance and then recover upon proof of waiver of performance.⁴⁵ It must be said, however, that this rule seems to be of little importance in view of the power of amendment given in the code.⁴⁶

In pleading the performance of conditions precedent in a contract it is not necessary to state the facts showing such performance. It is sufficient to state generally that the plaintiff duly performed all the conditions on his part, and then if such allegations be controverted, the plaintiff must, at the trial, establish the facts showing performance.⁴⁷ The object of this rule is to avoid prolixity by permitting plaintiff to aver generally, by grouping all the conditions to be "performed by him, that he has duly performed them all."⁴⁸ And it is a sufficient averment to allege that he has fully and faithfully performed the said contract on his part."⁴⁹

It seems that the word "party," in the code provision that "it may be stated generally that the party duly performed all the conditions on his part,"⁵⁰ means the person or persons by whom the conditions were to be performed, and does not necessarily refer to the plaintiff.⁵¹ In an action on a contract by which the plaintiff had bound himself to do certain acts and to procure third parties to do certain acts the complaint alleged performance as follows: "And the plaintiff further says, that he and those on whose behalf the agreement was made and entered into by him have fully and faithfully performed and fulfilled all and singular the covenants and agreements in the said agreement contained." This was held to be sufficient.⁵²

It must also be borne in mind that performance must be averred according to the intent of the parties. Thus a vendor of land who sues upon an agreement of sale containing a covenant on his part

⁴⁵ *Jerome v. Stebbins*, 14 Cal. 457; *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867; *Romeyn v. Sickles*, 108 N. Y. 653, 15 N. E. 698; *McDermott v. Grimm*, 4 Colo. App. 39, 34 Pac. 909. But see *West v. Norwich Ins. Soc.*, 10 Utah, 442, 37 Pac. 685.

⁴⁶ Cal. Code Civ. Proc., §§ 472, 473.

⁴⁷ Cal. Code Civ. Proc., § 457; *Fisk v. Henarie*, 13 Or. 156, 9 Pac. 322; *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925; *Louisville Underwriters v. Durland*, 123 Ind. 544, 24

N. E. 221, 7 L. R. A. 399; *Phoenix Ins. Co. v. Golden*, 121 Ind. 524, 23 N. E. 503.

⁴⁸ *Woodbury v. Sackrider*, 2 Abb. Pr. 402; *Graham v. Machado*, 6 Duer, 515; *Rowland v. Phalen*, 1 Bosw. 43.

⁴⁹ *Griffiths v. Henderson*, 49 Cal. 570; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696.

⁵⁰ Cal. Code Civ. Proc., § 457.

⁵¹ *Rowland v. Phalen*, 1 Bosw. 43.

⁵² *Id.*

that he will "make a deed for the property" must aver not only his readiness to "deliver a deed," but that he has a good title, free of incumbrance, which he is ready and willing to convey by a legal deed;⁵³ and his failure to so allege is not cured by verdict.⁵⁴

Where the promise declared on is in part conditional, and the performance or happening of the condition upon which the promise is to become absolute is not averred, the complaint is not sufficient to sustain a recovery as to such conditional part of the promise.⁵⁵

§ 229. **Allegations as to performance where conditions are concurrent.**—With reference to contracts containing reciprocal covenants or mutual conditions which are to be performed at the same time, it may be stated as a sound rule that the mere allegation of readiness or willingness to perform is insufficient, and that the plaintiff must aver an actual tender of performance. It has been held that an allegation of performance or readiness to perform is all that is necessary;⁵⁶ but the contrary rule has the unquestioned support of authority.⁵⁷ Where, however, performance on the part of the plaintiff depends upon acts previously to have been done by the defendant, an averment of readiness and willingness will be sufficient.⁵⁸ And where the promises in a contract are mutual, but not dependent upon each other, the plaintiff need not aver or prove performance on his part, and the defendant cannot avail himself of an allegation of breach by the plaintiff.⁵⁹

While the rule just stated is well settled, difficulty is often encountered when it comes to determining what are and what are not independent covenants. Whether the stipulations in a contract are conditions precedent to the right to enforce performance

⁵³ *Washington v. Ogden*, 1 Black, 456, 17 L. Ed. 203; *Ankeny v. Clark*, 1 Wash. 557, 20 Pac. 587.

⁵⁴ *Washington v. Ogden*, 1 Black, 456, 17 L. Ed. 203.

⁵⁵ *Patrick v. Colorado Smelting Co.*, 20 Colo. 268, 38 Pac. 236.

⁵⁶ *Porter v. Rose*, 12 Johns. 209, 7 Am. Dec. 306; *Topping v. Root*, 5 Cow. 404; *West v. Emmons*, 5 Johns. 179; *Ducker v. Cochrane*, 92 N. C. 597; *Van Norman v. Wheeler*, 13 Tex. 316.

⁵⁷ *Heine v. Treadwell*, 72 Cal. 217, 13 Pac. 503; *Englander v. Rogers*, 41 Cal. 420; *Bailey v. Lay*, 18 Colo. 418, 33 Pac. 407; *Jones v. Gardner*, 10 Johns. 266; *Gazley v. Price*, 16 Johns. 267; *Parker v. Parmele*, 20 Johns. 130; *Lester v. Jewett*, 11 N. Y. 453.

⁵⁸ *West v. Emmons*, 5 Johns. 179.

⁵⁹ *Corcoran v. Dougherty*, 4 Cranch, C. C. 205, Fed. Cas. No. 3227; *Sumner v. Parker*, 36 N. H. 449; *Smith v. Crews*, 2 Mo. App. 272; *Turner v. Millier*, 59 Mo. 526; *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137.

is to be determined by the intention of the parties, derived from the contract itself, "by the application of common sense to each particular case, rather than by technical rules of construction."⁶⁰ In general, it may be stated that where the acts stipulated in a contract are to be done at different times the covenants are to be construed as independent of each other.⁶¹ The question of consideration is often important. Where a covenant goes to only part of the consideration on both sides, and the defendant has actually received a partial benefit, the covenant is independent.⁶² If a time is stipulated for the performance of an act before the thing is to be performed which is the consideration of the act, an action may be brought for failure to do the act without alleging tender by the plaintiff.⁶³ And a contract is generally severable which apportions payment to different parts of the thing to be done, although the thing to be done may be in its nature single and entire.⁶⁴

It is also to be remembered, in connection with the rule that the intent governs, that stipulations in a contract are not to be construed as conditions precedent unless that construction is made necessary by the terms of the contract.⁶⁵ So time will not be deemed of the essence of a contract unless it appears from the terms of the contract, in the light of all the circumstances, that such was the intention of the parties.⁶⁶

§ 230. Averment of breach.—In a suit on a contract the breach of the contract is the gist of the action, and it must be specifically averred in unequivocal language;⁶⁷ although a general allegation will be sufficient to admit proof, and is subject only to a

⁶⁰ *Leonard v. Dyer*, 26 Conn. 172, 68 Am. Dec. 382. And see *Hutchens v. Sutherland*, 22 Nev. 363, 40 Pac. 409.

⁶¹ *Goldsborough v. Orr*, 8 Wheat. 217, 5 L. Ed. 600; *Paducah etc. R. R. Co. v. Parks*, 86 Tenn. 562, 8 S. W. 845.

⁶² *Bennet v. Pixley*, 7 Johns. 249; *Tompkins v. Elliot*, 5 Wend. 496; *Morton v. Kane*, 18 Ind. 191; *Payne v. Bettisworth*, 2 A. K. Marsh. (Ky.) 429.

⁶³ *Underhill v. Saratoga etc. Ry.*, 20 Barb. 455; *Havens v. Bush*, 2 Johns. 387; *Seers v. Fowler*, 2 Johns.

272; *Wilcox v. Ten Eyck*, 5 Johns. 78.

⁶⁴ *Siegel etc. Co. v. Eaton & Co.*, 165 Ill. 550, 46 N. E. 449; *Bower v. Bagley*, 9 Wash. 642, 38 Pac. 164.

⁶⁵ *Deacon v. Blodget*, 111 Cal. 418, 44 Pac. 159.

⁶⁶ *Beverly v. Blackwood*, 102 Cal. 83, 36 Pac. 378.

⁶⁷ *Moore v. Besse*, 30 Cal. 570; *People v. Central Pacific R. R.*, 76 Cal. 29, 18 Pac. 90; *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379; *Schenck v. Naylor*, 2 Duer, 675; *Terre Haute, etc. Co. v. Sherwood*, 132 Ind. 129, 32 Am. St. Rep. 239, 31 N. E. 781, 17 L. R. A. 339.

motion to render it more certain.⁶⁸ The failure to allege a breach cannot be cured by verdict.⁶⁹ The rule is otherwise, however, where the allegation of breach is merely defective,⁷⁰ and in such case the defect can be taken advantage of only by special demurrer.⁷¹

In alleging a breach it is generally sufficient to follow and negative the words of the covenant declared upon,⁷² except where such an assignment of breach does not necessarily imply that the covenant has been broken.⁷³ If a number of acts are included in one clause, the complaint must set forth the breach of each particular act upon which the plaintiff relies.⁷⁴ But there is no objection to stating several breaches of an entire contract in one count or paragraph.⁷⁵ The covenant need not be set out *in hæc verba*; a statement according to legal effect will be sufficient.⁷⁶ Care should be taken that the breach assigned is neither broader nor narrower than the covenant declared on.⁷⁷

Where the contract sued on is in the alternative the breach of both alternatives must be averred;⁷⁸ and if the contract contain an exception or proviso it must be stated.⁷⁹

Where the action is brought to redress a wrong worked by the breach of a contract, and the plaintiff only seeks to recover the general damages which have resulted, he need only set up the contract, state the facts constituting the breach, and allege generally that he has been damaged in a specified sum,⁸⁰ and a demurrer on the ground that the complaint does not state facts sufficient is not well taken, since the plaintiff is entitled to

⁶⁸ Trimble v. Stilwell, 4 E. D. Smith, 512.

⁶⁹ Morgan v. Menzies, 60 Cal. 341; Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094; De Costa v. Comfort, 80 Cal. 507, 22 Pac. 218; Richards v. Travelers Ins. Co., 80 Cal. 507, 22 Pac. 939; Ballentine v. Willey, 3 Idaho, 496, 95 Am. St. Rep. 17, 31 Pac. 994; Miller v. Pine Co., 3 Idaho, 493, 35 Am. St. Rep. 290, 31 Pac. 803.

⁷⁰ Thomas v. Roosa, 7 Johns. 461.

⁷¹ Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094; Bliss v. Sneath, 103 Cal. 43, 36 Pac. 1029.

⁷² Wolfe v. Luyster, 1 Hall, 146, (161); Brown v. Stebbins, 4 Hill, 154; Delavergne v. Norris, 7 Johns. 358, 5 Am. Dec. 281.

⁷³ Breckenridge v. Lee, 3 Bibb, 329; Julliard v. Burgott, 11 Johns. 6; Whitehill v. Shickle, 43 Mo. 537.

⁷⁴ Wolfe v. Luyster, 1 Hall, 146 (161); Brown v. Stebbins, 4 Hill, 154.

⁷⁵ Brown v. Stebbins, 4 Hill, 154.

⁷⁶ Potter v. Bacon, 2 Wend. 583; Schenck v. Naylor, 2 Duer, 675.

⁷⁷ Pumeroy v. Bruce, 13 Serg. & R. 186; Harris v. Mantle, 3 T. R. 307.

⁷⁸ Fisher v. Pearson, 48 Cal. 472.

⁷⁹ Latham v. Rutley, 2 Barn. & C. 20; Jones v. Cowley, 4 Barn. & C. 446; Tempamy v. Burnand, 4 Camp. 20.

⁸⁰ City of Pueblo v. Griffin, 10 Colo. 366, 15 Pac. 616; School Dist. v. Ross, 4 Colo. App. 493, 36 Pac. 560.

nominal damages at least.⁸¹ In any case, however, the allegations of both contract and breach must be made, and they must be consistent with each other.⁸²

A complaint showing a good cause of action for breach of contract is not bad because of unnecessary averments contained in it.⁸³

§ 231. **Allegations of special damages.**—For the breach of a contract an action lies, though no actual damages be sustained.⁸⁴ And damages which materially and necessarily arise from the breach of the contract need not be stated, as they are covered by the general damages laid in the declaration; but special damages must be specially stated.⁸⁵ It is sufficient, so far as the demurrer is concerned, to aver in the complaint the contract, the breach complained of, and the general damages.⁸⁶ But the omission to aver specially the damages laid in the complaint, is waived by going to trial without objection.⁸⁷ In an action for special damages for injuries, such damages as are the natural although not the necessary result of the injury must be specially stated, and the facts out of which they arise must be specially averred in the complaint.⁸⁸ A complaint showing a breach of contract by the defendant in refusing to pay an agreed compensation to the plaintiff as attorney, who was prevented by the defendant from fully performing, and alleging that a certain sum of money and interest is due under the contract, is not in-

⁸¹ *Sunnyside Land Co. v. Willamette Bridge Ry. Co.*, 20 Or. 544, 26 Pac. 835. And see *Wisner v. Barber*, 10 Or. 342; *Wilson v. Clarke*, 20 Minn. 367.

⁸² *Du Brutz v. Jessup*, 70 Cal. 75, 11 Pac. 498; *McPhee v. Young*, 13 Colo. 80, 21 Pac. 1014.

⁸³ *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Orr Water Co. v. Reno Water Co.*, 19 Nev. 60, 6 Pac. 72.

⁸⁴ *McCarty v. Beach*, 10 Cal. 461; *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618.

⁸⁵ *Bas v. Steele*, 3 Wash. C. C. 381, Fed. Cas. No. 1088; *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882; *Tucker v. Parks*, 7 Colo.

62, 298, 1 Pac. 427; 3 Pac. 486; *City of Pueblo v. Griffin*, 10 Colo. 360, 15 Pac. 616; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *Ennis v. Buckeye Publishing Co.*, 44 Minn. 105, 46 N. W. 314.

⁸⁶ *Barber v. Cazalis*, 30 Cal. 92.

⁸⁷ *Neary v. Bostwick*, 2 Hilt. 514.

⁸⁸ *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107; *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Squier v. Gould*, 14 Wend. 159; *Strang v. Whitehead*, 12 Wend. 64; 1 Chit. Pl. 371; *Sedg. on Dam.* 67; *Say on Dam.* 313; *Tuolumne Water Co. v. Columbia etc. Water Co.*, 10 Cal. 193; *Mallory v. Thomas*, 98, Cal. 644, 33 Pac. 757; *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623; *Smith v. Railway Co.*, 98 Cal. 210, 33 Pac. 53.

sufficient in not containing a specific allegation of damages, the facts being stated which in law constitute his damages and their measure.⁸⁹

A judgment cannot award compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters.⁹⁰

The want of any averment of special damages cannot be reached by demurrer. Such averment is only necessary where the right of action itself depends upon the special injury received.⁹¹ Matters in aggravation of damages need not be alleged; the *quo animo* may be proved without being pleaded,⁹² and therefore should not be pleaded.⁹³ When the complaint contains no averment which would sustain a recovery for temporary or special damages a question as to such damages should not be submitted to the jury.

§ 232. Allegations in actions for injuries resulting from negligence.—Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but is always relative to some circumstances of time, place, or person.⁹⁴ The prudence and propriety of men's actions are not judged by the event, but by circumstances under which they act. If they conduct themselves with reasonable prudence and good judgment, they are not to be made responsible because the event, from causes which could not be foreseen nor reasonably anticipated, has disappointed their expectations.⁹⁵ Where the safety of human life is in question a very high degree of care is required.⁹⁶ But a casualty happening without the will

⁸⁹ Bartlett v. Odd Fellows Savings Bank, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743.

⁹⁰ Dabovich v. Emeric, 12 Cal. 171.

⁹¹ McCarty v. Beach, 10 Cal. 461; Denver etc. R. R. Co. v. Pulaski Irr. Ditch Co., 19 Colo. 367, 35 Pac. 910.

⁹² Rustell v. Macquister, 1 Camp. 49; Shock v. McChesney, 2 Yeates (Pa.), 473; Wallis v. Mease, 3 Binn. 546; Kean v. McLaughlin, 2 Serg. & R. 469.

⁹³ Warne v. Crosswell, 2 Stark. 457; Molony v. Dows, 15 How. Pr. 265. See, however, Root v. Foster, 9 How.

Pr. 37; Brewer v. Temple, 15 How. Pr. 286.

⁹⁴ Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681. And see Barrett v. Southern Pacific Co., 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; Gunn v. Ohio Riv. R. R. Co., 36 W. Va. 165, 32 Am. St. Rep. 842, 14 S. E. 465; Tetherow v. St. Joseph etc. R. R. Co., 98 Mo. 74, 14 Am. St. Rep. 617, 11 S. W. 310.

⁹⁵ The Amethyst, Davies, 20; 2 N. Y. Leg. Obs. 312.

⁹⁶ Castle v. Duryea, 32 Barb. 480.

and without the negligence or other default of the party is, as to him, an inevitable casualty.⁹⁷

§ 233. Degrees of negligence.—Ordinary care or common prudence is such a degree of care and caution as will be in due proportion to the injury or damage to be avoided.⁹⁸ Thus the question of negligence must depend upon the facts of the case, and it is not an abstract question of law.⁹⁹ Hence it will not be necessary in a complaint to aver the degrees of negligence in each case, as they are matters of proof to be decided from the facts stated.¹⁰⁰ Negligence implies gross as well as ordinary negligence; and a general averment of negligence is all that is required.¹⁰¹ If an employment requires skill, failure to exert it is culpable negligence, for which an action lies.¹⁰² The negligence for which a recovery is sought must be alleged in the complaint.¹⁰³ And it is held in some jurisdictions that the plaintiff must state the facts constituting his cause of action. He must allege in his complaint the acts or omissions of the defendant upon which he bases his right to recovery, and show that they occurred through or by the negligence of the defendant. A general allegation of negligence is held not to charge any fact.¹⁰⁴

§ 234. Contributory negligence.—In New York, in an action for damages caused by negligence, it must appear that the plaintiff's acts or omissions did not contribute in any degree to the result.¹⁰⁵ The rule that where the injury has been caused by the

⁹⁷ 1 T. R. 27; *Hodgson v. Dexter*, 1 Cranch C. C. 109, Fed. Cas. No. 6565; *The Lotty*, Olc. 329, Fed. Cas. No. 8524.

⁹⁸ *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9, 90 Am. Dec. 761.

⁹⁹ *Baxter v. Second Ave. R. R. Co.*, 30 How. Pr. 219; *Welling v. Judge*, 40 Barb. 193.

¹⁰⁰ *Nolton v. Western R. R. Co.*, 15 N. Y. 444, 69 Am. Dec. 623.

¹⁰¹ *Oldfield v. New York etc. R. R. Co.*, 14 N. Y. 310; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308.

¹⁰² *The New World v. King*, 16 How. 469, 14 L. Ed. 1019. See, also, *Needham v. San Francisco etc. R. R. Co.*, 37 Cal. 409; *Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447;

McCoy v. California Pacific R. R. Co., 40 Cal. 532, 6 Am. Rep. 623.

¹⁰³ *Roseworn v. Washington etc. Min. Co.*, 84 Cal. 219, 23 Pac. 1035.

¹⁰⁴ *Woodward v. Oregon etc. Nav. Co.*, 18 Or. 289, 22 Pac. 1076; *McPherson v. Pacific Bridge Co.*, 20 Or. 486, 26 Pac. 560. And see *Current v. Missouri R. R. Co.*, 86 Mo. 62; *Jones v. White*, 90 Ind. 255; *Cleveland Ry. Co. v. Wynant*, 100 Ind. 160; *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29.

¹⁰⁵ *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 430; *Ernst v. Hudson River R. R. Co.*, 24 How. Pr. 97; *Gorusch v. Cree*, 8 Com. B. (N. S.) 572, 598; *Delafield v. Union Ferry Co.*, 10 Bosw. 216; *Chisholm v.*

negligence of the party injured he has no redress has been commented on and qualified in California;¹⁰⁶ where it is also held that the negligence which disables a plaintiff from recovering must be a negligence which directly or by natural consequence conduces to the injury. It must have been the proximate cause,—that is, negligence at the time the injury happened.¹⁰⁷

It is not necessary to allege in the complaint in an action for damages to either person or property that the plaintiff is without fault,¹⁰⁸ as it may fairly be presumed that the plaintiff exercised usual care for his own safety.¹⁰⁹ The right to recover damages for injuries to the person depends upon two concurring facts: 1. The party alleged to have done the injury must be chargeable with some degree of negligence, if a natural person; if a corporation, with some degree of negligence on the part of its servants or agents; 2. The party injured must have been entirely free from any degree of negligence which contributed proximately to the injury.¹¹⁰ Where negligence consists in the omission of a duty, the facts relied on as implying that duty must be alleged.¹¹¹ The allegation that the injury continued to be done from time to time, from the date of the wrongful act until the commencement of the suit, claiming special damages as a matter of aggravation, need not state the time or times when the damages were sustained, as the legal effect of the allegation is that they were sustained

State, 141 N. Y. 246, 36 N. E. 184; *Francisco v. Troy etc. R. R. Co.*, 78 Hun, 13, 29 N. Y. Supp. 247; *Weston v. City of Troy*, 139 N. Y. 281, 34 N. E. 780.

¹⁰⁶ *Richmond v. Sacramento Valley R. R. Co.*, 18 Cal. 351.

¹⁰⁷ *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *Needham v. San Francisco etc. R. R. Co.*, 37 Cal. 409; *Flynn v. San Francisco etc. R. R. Co.*, 40 Cal. 14, 6 Am. Rep. 595; *Maumus v. Champion*, 40 Cal. 121; *Hearne v. Southern Pacific R. R. Co.*, 50 Cal. 482.

¹⁰⁸ *Wolfe v. Supervisors of Richmond*, 11 Abb. Pr. 270, 19 How. Pr. 370; *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455, 43 Pac. 370; *Melhado v. Poughkeepsie Transp. Co.*, 27 Hun, 99; *Coughtry v. Willamette*

etc. R. R. Co., 21 Or. 245; 27 Pac. 1031; *Johnston v. Oregon etc. R. R. Co.*, 23 Or. 94, 31 Pac. 283; *Durgin v. Neal*, 82 Cal. 595, 23 Pac. 133, 375. But see, *Brannen v. Kokomo etc. Road Co.*, 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202; *City of Guthrie v. Nix*, 3 Okla. 136, 41 Pac. 343.

¹⁰⁹ *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375.

¹¹⁰ See cases cited above.

¹¹¹ *Buffalo City v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *Taylor v. Atlantic Mutual Ins. Co.*, 2 Bosw. 106; *Congreve v. Morgan*, 4 Duer, 439; *Seymour v. Maddox*, 16 Q. B. 326, 71 Com. Law Rep. 326. And see *McGinity v. Mayor etc.*, 5 Duer, 674; *Gregory v. Oaksmith*, 12 How. Pr. 134.

when the wrongful act was committed, and on divers days between that time and the commencement of the suit.¹¹²

Damages which are not the necessary result of the injury must be specially pleaded. The future and permanent effect of injuries necessarily resulting to the plaintiff from the negligence of the defendant need not be specially alleged in order to warrant a recovery therefor, but are recoverable under the general *ad damnum* clause.¹¹³

¹¹² McConnel v. Kibbe, 33 Ill. 175. 574. 13 Am. St. Rep. 175, 22 Pac.

¹¹³ Treadwell v. Whittier, 80 Cal. 266, 5 L. R. A. 498.

CHAPTER XVIII.

COMPLAINT—ANTICIPATING DEFENSES.

§ 235. As we have already observed, the only allegations proper in a complaint are those necessary to show facts sufficient to constitute a cause of action. Therefore, allegations inserted for the purpose of intercepting and cutting off a defense are superfluous and immaterial.¹ Facts anticipating a defense ought never to be averred. If such an averment is made in the complaint, the defendant need not traverse it. What is material in the case may be quite immaterial in the pleading. The complainant should not erect a structure, and, to show its stability, attempt, but fail, to knock it down. The plaintiff may be well aware of the defense which will be interposed, but the defendant will be quite as capable of presenting it as the plaintiff. The real effect of such pleading, if allowed, would be to put the opposite party on the stand as a witness, without being obliged to take his whole statement as true.² So allegations in a complaint as to the defendant's pretenses are improper, as they are not the facts of the plaintiff's case.³

The above is the general rule, but there are exceptions; such as where the original indebtedness is counted on, when the defense of payment may be anticipated by allegations of matters of fraud.⁴ An allegation that defendant was of full age when he executed a bond is the allegation of a fact in anticipation of a defense.⁵ A plaintiff cannot by alleging in his complaint that no payment has been made anticipate a plea of payment, and so

¹ Canfield v. Tobias, 21 Cal. 349; Gillson v. Price, 18 Nev. 117, 1 Pac. 459.

² Gould's Pl. 75; Canfield v. Tobias, 21 Cal. 349; Munson v. Bowen, 80 Cal. 572, 22 Pac. 253; Green v. Palmer, 15 Cal. 414; 76 Am. Dec. 492; Kerr v. Blodgett, 16 Abb. Pr. 137; Giles v. Betz, 15 Abb. Pr. 285; Van Demark v. Van Demark, 13 How. Pr. 372; Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111; Jaffe v. Lilienthal, 86 Cal. 91, 24 Pac. 835; Metropolitan Life Ins. Co. v. Meeker, 85 N. Y.

614; Jones v. Ewing, 22 Minn. 157; Du Pont v. Beck, 81 Ind. 271.

³ 1 Whitt. Pr. 582; Steph. Pl. 349; Green v. Palmer, 15 Cal. 414, 76 Am. Dec. 492; Van Nest v. Talmadge, 17 Abb. Pr. 99; Hotham v. East India Co., 1 Term. Rep. 638.

⁴ Bracket v. Wilkinson, 13 How. Pr. 102. See, also, Wade v. Rusher, 4 Bosw. 537; and Thompson v. Minford, 11 How. Pr. 273.

⁵ Walsingham's Case, Plow. 564; Bovy's Case, 1 Vent. 217; Stowell v. Zouch, Plow. 376.

avoid the necessity of replying to it.⁶ A complaint to rescind an unauthorized contract in writing for the sale of land is not bound to anticipate a possible defense that an oral contract was partly performed by taking possession, in connection with payments on purchase money, and need not negative the fact of such possession.⁷ In New York, it has been held that in a complaint upon a cause of action which accrued more than six years previous to the commencement of the suit, an allegation, inserted for the purpose of anticipating the defense of the statute of limitations, that "the defendants have not resided in the state at any time within six years," etc., was irrelevant, and should be stricken out.⁸

An allegation by the plaintiff that he has performed all the conditions precedent on his part is sufficient to tender the issue to the defendant.⁹

The objection that matter purely anticipatory of a possible defense is stated in a complaint may and should be made by a motion to strike out.¹⁰

⁶ *Benicia Agricultural Works v. Creighton*, 21 Or. 495, 28 Pac. 775, 30 Pac. 676.

⁷ *Salfield v. Reclamation Co.*, 94 Cal. 546, 29 Pac. 1105.

⁸ *Butler v. Mason*, 5 Abb. Pr. 40. And see *Minzesheimer v. Bruns*, 1 App. Div. 324, 37 N. Y. Supp. 261.

⁹ *Milwaukee Mechanics' Ins. Co. v. Winfield*, 6 Kan. App. 527, 51 Pac. 567.

¹⁰ *Brooks v. Bates*, 7 Colo. 576, 4 Pac. 1069; *Frick Co. v. Carson*, 3 Kan. App. 478, 43 Pac. 820; *Stone v. De Puga*, 4 Sandf. 681.

CHAPTER XIX.

THE DEMURRER.

§ 236. **Introductory.**—Of course, the aim and object of all pleading is the production of an issue. While the codes attempt to, and in a measure do, simplify the rules tending to the production of an issue, still they are based on the fundamental rules or principles of the common law. The statement of these rules by Mr. Stephen¹ shows them to be identical with the ultimate requirement of the code system, the only difference being in the use of terms. These principles he states as follows: "First, that after the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance; secondly, that upon a traverse, issue must be tendered; lastly, that the issue when well tendered must be accepted."

Under the code system, the application of the first of these rules produces either a demurrer or answer, or both, raising an issue of law, of fact, or of both law and fact.

Thus the first question which confronts the defendant is whether his defense should be presented by demurrer or by answer, and this question must be determined, of course, by the nature of the matter constituting the defense. Strictly speaking, however, matters of defense, as that term is commonly understood, should be set out in an answer, the office of a demurrer being to test the sufficiency of a pleading, and its effect being, for that purpose, to admit such facts as are issuable and well pleaded.²

§ 237. **Definition and nature of demurrer.**—A demurrer is a pleading which raises an issue of law; its office is to test the sufficiency of the pleading against which it is directed by alleging that the latter is insufficient in law to support a cause of action or to constitute a defense.³ It may be interposed to test the sufficiency of a pleading either in substance or in form,—that is, it

¹ Steph. Pl. (Tyler), 156.

² Branham v. Mayor of San Jose, 24 Cal. 602; Masterson v. Townshend, 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816; Cutler v. Wright, 22 N. Y. 472; Groesbeck v. Dunscomb, 41 How. Pr. 302; Hall v. Bartlett, 9

Barb. 297; Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Buffalo Catholic Inst. v. Bitter, 87 N. Y. 250; Bonnell v. Griswold, 68 N. Y. 294.

³ Bouvier's Law Dict.; Estee's Pl. & Pr., § 3068.

may be either that the case shown by the opposite party is essentially insufficient or on the ground that it is stated in an inartificial manner.⁴ It means, literally, that the party objecting will not proceed with his pleading as to matters of fact, because no sufficient statement has been made on the other side, but will "wait" the judgment of the court whether as a matter of law he is bound to answer.⁵ It is not the office of a demurrer to set out facts; all the facts involved in a demurrer are those set out in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of those facts to constitute a cause of action or defense.⁶

According to the old common-law writers it was not proper to designate a demurrer as a plea, because it neither alleged nor denied any fact.⁷ This, however, is not the rule to-day; almost all, if not quite all, of the codes refer to the demurrer as a pleading.⁸ But whether, technically speaking, it is a plea or not, in many instances it is the most important paper in the action, and when properly interposed it may settle all the issues of the case by determining, at the threshold of the action, questions which otherwise would only be disposed of on the hearing of the facts. The question whether the plaintiff in his complaint has stated facts sufficient to constitute a cause of action, or has stated them properly, is thus disposed of without the introduction of testimony or the form of a trial.⁹

It follows from this, then, that an objection, in order to be taken advantage of by demurrer, must be apparent on the face of the pleading. The determination of this question involves careful and analytical examination.

§ 238. Grounds for demurrer.—The statutes of the several states prescribe certain special grounds for demurrer, differing in some respects, but the general ground, that the complaint does not state facts sufficient to constitute a cause of action, can be interposed in all courts of common-law jurisdiction. The inquiries to be made by defendant when served with the complaint, if he wishes to demur to it, are, first, Has the court jurisdiction of the

⁴ Steph. Pl. (Tyler), 157.

⁵ Steph. Pl. (Tyler), 82.

⁶ Brennan v. Ford, 46 Cal. 12; Rice v. Rice, 13 Or. 337, 10 Pac. 495; Johnson v. Burnside, 3 S. Dak. 230, 52 N. W. 1057.

⁷ Chit. Pl. 678. And see Gould's Pl. 35.

⁸ Oliphant v. Whitney, 34 Cal. 25; Cashman v. Reynolds, 123 N. Y. 138, 25 N. E. 162.

⁹ Estee's Pl. & Pr., § 3068.

person of the defendant? If the answer be in the affirmative, then, second, Has the court jurisdiction of the subject of the action? For if the person or property named in the complaint is beyond the jurisdiction of the court, for any reason which appears upon the face of the complaint, then the action must fall. The second cause of demurrer under our practice is as to the capacity of plaintiff to sue; for should it appear from the face of the complaint that the plaintiff has no capacity to sue, the action likewise falls. The question of capacity to sue often arises where a married woman is plaintiff, or one of the plaintiffs, or when a minor sues, or when a person sues in a representative or official capacity. But, third, the court may have jurisdiction of the person or property of the defendant, and the plaintiff may have the legal capacity to sue, yet there may be another action pending between the same parties for the same cause; or, fourth, there may be a defect or a misjoinder of parties plaintiff or defendant. The inquiry whether there be another action pending, etc., can rarely be raised by demurrer, for, in most instances, the facts disclosing this will not appear on the face of the complaint, and hence that issue must be presented by the answer. But whether there is a misjoinder or defect of parties plaintiff or defendant is a question requiring a careful consideration. This may generally be settled by the inquiries: Has the plaintiff or defendant an interest in the event of the suit? Will his rights be adjudicated upon in the action? or, Will the rights of another person, not a party to the action, be affected in the disposition of the cause? The interest or right thus to be affected must be an actual, existing interest, an interest which any judgment of the court would nearly or remotely affect. A mere possible interest is not in general such as will require a party to be joined in the action. When, however, the title to property is sought to be determined by the judgment or decree of the court, then persons possessing very slight or remote interests should be made parties, as in actions of partition, the foreclosure of mortgages, etc.

The next objection, and the fifth ground of demurrer under the California statute, is, "that several causes of action have been improperly united." For instance, an action for damages for personal injury cannot be united with an action on account; nor can an action to quiet title, or in ejectment, or any other action affecting real property, be united with a simple *assumpsit*. In general, under the liberal provisions of this statute, different

causes of action may be united when they belong to the same class or species of injuries or wrongs, or when they arise out of the same transaction. But admitting that the action is brought in the right court, that the parties plaintiff have the right to sue, and that it is brought by the proper parties, and that no other action is pending between these parties, still the sixth ground of demurrer under the statute, and the one most often interposed, is, "that the complaint does not state facts sufficient to constitute a cause of action." Thus where the complaint shows upon its face, in an action on account, that it accrued more than four years before the commencement of the suit, or, in an action of ejectment, a seisin and ouster are alleged to have occurred more than five years before the commencement of the action, in each case the complaint would fail to state a cause of action because of the bar of the statute of limitations. The instances where a plaintiff would fail to state facts sufficient to constitute a cause of action are so numerous that examples seem unnecessary. The following inquiries, however, may be a guide to the practitioner on the subject: 1. Does the complaint show that the plaintiff has suffered an injury? 2. Is it an injury which the law recognizes as a wrong, and for which it provides a remedy? 3. Is the defendant liable for the alleged wrong done? 4. If the defendant is liable, to what extent is he liable, and what will be the legal remedy for such injury?

These questions will, in general, test the validity of the pleading. Any person may know that an answer must be made to a complaint, but it frequently requires the most careful and critical thought to tell when it may be successfully demurred to. The answer puts in issue the facts, while the demurrer puts in issue the law. The one denies the allegations of the complaint; the other admits but avoids them by affirming that no wrong was done the plaintiff by the defendant. By wrong is meant no wrong for which the law affords a remedy.

The seventh, eighth, and ninth grounds of demurrer prescribed by our statute go more to the manner than the matter of the complaint,—namely, that the complaint is ambiguous, unintelligible, or uncertain. For instance, a complainant might have a perfect cause of action, and might also state facts in his pleading "sufficient to constitute a cause of action," but he may so intermingle them with extraneous matter that the complaint would be meaningless; in other words, "the allegations of the complaint

should be so clear and pointed that defendant may know what he is charged with, and what he must admit or deny." A defendant, under the code practice, is not obliged to look through pages of meaningless sentences to ascertain the idea of the pleader.¹⁰

§ 239. Effect of a demurrer.—An order sustaining a demurrer to a complaint is not a judgment, and does not have the effect of finally dismissing the defendant from the action.¹¹ The overruling of a demurrer to a defense set up in the answer does not authorize the granting of a nonsuit, in absence of proof of the facts alleged in the answer, or an admission by plaintiff to sustain such allegations.¹²

The omission of the defendant to join in a demurrer to a plea is a waiver of that plea.¹³ If demurrers are suffered to rest for three years, the court may then overrule them in its discretion, for want of prosecution.¹⁴

A statement of facts in a demurrer is not admissible. The only office of a demurrer is to raise issues of law upon the facts stated in the pleading demurred to.¹⁵ If it requires the slightest statement of facts to make the defect in the complaint apparent, demurrer will not lie.¹⁶ The test of a demurrer is: Does it require any facts to sustain it?¹⁷ If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action.¹⁸ The objection that the complaint does not state facts sufficient to constitute a cause of action is never waived.¹⁹ A demurrer abandoned after

¹⁰ Estee's Pl. & Pr., § 3068.

¹¹ De La Beckwith v. Superior Court, 146 Cal. 496, 80 Pac. 717.

¹² Green v. Duvergey, 146 Cal. 379, 80 Pac. 234.

¹³ Morsell v. Hall, 13 How. 212, 14 L. Ed. 117.

¹⁴ Anderson v. Fisk, 36 Cal. 625.

¹⁵ Brennan v. Ford, 46 Cal. 7; Brooks v. Gibbons, 4 Paige, 374.

¹⁶ Davy v. Betts, 23 How. Pr. 396; Lillaye v. Wilson, 43 Barb. 261.

¹⁷ Struver v. Ocean Ins. Co., 16 How. Pr. 422.

¹⁸ Cal. Code Civ. Proc., § 434; Alaska Codes, pt. 4, ch. 7, § 58; Ariz. Civ. Code, § 1357; Idaho Rev. Codes, §§ 4174-4178; Mont. Rev. Codes, §§ 6554-6559; Nev. Comp. Laws, § 3135; N. Mex. Comp. Laws, § 2685, subd. 35; Or. B. & C. Codes, § 68; Wash. Bal. Codes, §§ 2907-2911; Utah Rev. Stats., § 2962; Wyo. Rev. Stats., § 3535. As to waiver of objection to the complaint on special grounds by the omission to demur, see Malone v. Stilwell, 15 Abb. Pr. 421.

¹⁹ Parker v. Bond, 5 Mont. 1, 1 Pac. 209.

service of an amended pleading is no longer a part of the record, and will be struck out of the appeal-book on motion.²⁰ In a case brought upon a writ of error, which presented the appearance of a demurrer upon the record which had not been disposed of, where there was a verdict upon a plea of the general issue, and a judgment rendered thereon, the supreme court presumed that the demurrer had been either withdrawn or overruled.²¹ Notwithstanding a defendant in chancery demurs, and the demurrer is overruled, he may afterwards insist upon the same thing by his answer. And under the civil law the party who demurred is not prevented from contesting the facts confessed in the demurrer, and compelling the opposite party to prove them.²² This is the modern practice.

§ 240. **What a demurrer admits.**—A demurrer admits the matter of fact, since it refers the law arising upon the fact to the judgment of the court; and therefore the fact is taken to be true on such demurrer, or otherwise the court has no foundation on which to make any judgment.²³ But only such facts as are issuable and well pleaded are admitted.²⁴ Allegations which are unnecessary, and are contrary to facts of which the court will take judicial notice, are a nullity, and are not admitted by demurrer.²⁵ Matters which the court is debarred from considering are not well pleaded.²⁶ A demurrer does not admit the truth of an allegation of a conclusion of law.²⁷ It was undoubtedly the rule at common law that a demurrer admitted only facts well or formally pleaded, but by statute a general demurrer confesses all matters pleaded, though informally.²⁸ But a special demurrer admits only facts well pleaded.²⁹ Irrelevant facts are not admitted.³⁰ Where the pleading demurred to contains two contradictory averments, one

²⁰ *Brown v. Saratoga R. R. Co.*, 18 N. Y. 495.

²¹ *Townsend v. Jennison*, 7 How. 706, 12 L. Ed. 880.

²² See *Crawford v. The William Penn*, 3 Wash. C. C. 484, Fed. Cas. No. 3373.

²³ *Tomlin's Law Dict.*; *Clark v. Wall*, 32 Mont. 219, 79 Pac. 1052; *Raiche v. Morrison*, 37 Mont. 244, 95 Pac. 1061.

²⁴ *Branham v. Mayor etc. of San Jose*, 24 Cal. 602.

²⁵ *French v. State Senate*, 146 Cal. 604, 80 Pac. 1031.

²⁶ *Gillette v. Peabody*, 19 Colo. App. 356, 75 Pac. 18.

²⁷ *First Nat. Bank v. Lewinson*, 12 N. Mex. 147, 76 Pac. 288; *Hester v. Thompson*, 35 Wash. 119, 76 Pac. 734; *Gill v. Manhattan Life Ins. Co. (Ariz.)*, 95 Pac. 89.

²⁸ See *Steph. Pl.* 159, 160.

²⁹ *Id.*; *People v. Goddard*, 8 Colo. 432, 7 Pac. 301; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691; *Adams v. Couch*, 1 Okla. 17, 26 Pac. 1009.

³⁰ *Hall v. Bartlett*, 9 Barb. 297.

of which the law adjudges to be a fiction, the demurrer only admits the averment which the law adjudges to be true.³¹ It admits the allegations of the bill for the purposes of a motion on the bill.³² Where the court intimates that, conceding the facts to be true, yet the plaintiff could not recover, and the defendant admits the facts could be proved, this is deciding the case as on demurrer, or as on motion for nonsuit.³³ But an admission of facts by a demurrer in one cause is not evidence of those facts in another cause, although between the same parties.³⁴ So a demurrer does not admit the truth of any new facts not appearing in the original pleading.³⁵ And it never admits the law arising on those facts.³⁶ A demurrer admits the truth of all allegations which are well pleaded, however improbable the facts alleged may be.³⁷ When, however, allegations in a pleading are admitted for the purpose of a demurrer, they are admitted for that purpose only, and should not be commented on by the court as if they were *de facto* true.³⁸

§ 241. **Amendment of demurrer.**—The statutes relating to amendment of pleadings is sufficient to authorize the court, on proper showing, to permit withdrawal of an amended cross-complaint and the filing of an amended demurrer to the complaint.³⁹

§ 242. **When a demurrer lies.**—A demurrer lies only when an entire pleading—that is, an entire cause of action—is insufficient,⁴⁰

³¹ Freeman v. Frank, 10 Abb. Pr. 370. See, generally, Commonwealth etc. v. Allegheny County Commrs., 37 Pa. St. 277; Bennion v. Davidson, 1 Horn & Hurl. 48; Cutler v. Wright, 22 N. Y. 472; Greathouse v. Dunlap, 3 McLean, 303, Fed. Cas. No. 5742; Commercial Bank of Manchester v. Buckner, 20 How. 108, 15 L. Ed. 862; Van Doren v. Tjader, 1 Nev. 380, 90 Am. Dec. 498; Griffing v. Gibb, 2 Black, 519, 17 L. Ed. 353; Foote v. Linck, 5 McLean, 616, Fed. Cas. No. 4913.

³² Bayerque v. Cohen, 1 McAll. 113, Fed. Cas. No. 1134.

³³ Snodgrass v. Ricketts, 13 Cal. 359.

³⁴ Auld v. Hepburn, 1 Cranch C. C. 122, 166, Fed. Cas. Nos. 650, 651.

³⁵ Van Doren v. Tjader, 1 Nev. 380, 90 Am. Dec. 498.

³⁶ United States v. Arnold, 1 Gall. 348, Fed. Cas. No. 14469; Hobson v. McArthur, 3 McLean, 241, Fed. Cas. No. 6554; Griggs v. City of St. Paul, 9 Minn. 246.

³⁷ Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111. And see Freeman v. Hart, 61 Iowa, 525, 16 N. W. 597; Peterson v. Roach, 32 Ohio St. 374, 30 Am. Rep. 607.

³⁸ Day v. Brownrigg, 10 Ch. Div. 294; Rice v. Rice, 13 Or. 337, 10 Pac. 495; Shafford v. Brown, 49 Wash. 307, 95 Pac. 270.

³⁹ Murphy v. Russell, 8 Idaho, 133, 67 Pac. 421; Perrin v. Mallory Commission Co., 8 Ariz. 404, 76 Pac. 476.

⁴⁰ 1 Van Santv. 184.

as a part of a cause of action cannot be demurred to.⁴¹ So if any part of a bill demurred to is good, demurrer to the whole cannot be sustained.⁴² If the complaint contains one good cause of action, a general demurrer to the whole complaint will not lie.⁴³ A demurrer must be directed to the whole of a pleading, or to a particular and separate statement of a cause of action or defense. It cannot be directed to certain lines thereof.⁴⁴ On a general demurrer (unless for misjoinder of actions) judgment must be given for the plaintiff, if there is one good count in the declaration.⁴⁵

A general demurrer to a whole complaint which contains two counts or two causes of action is properly sustained where neither of the counts states a cause of action, and it is not necessary that the demurrer in such case should refer to either of the counts separately.⁴⁶ But where a complaint contains several counts, a general demurrer thereto on

⁴¹ *State v. Portland Gen. El. Co.*, (Or.), 95 Pac. 722; *Lord v. Vreeland*, 15 Abb. Pr. 122; *Wait v. Ferguson*, 14 Abb. Pr. 379; *Mattoon v. Baker*, 24 How. Pr. 329; *Hayden v. Anderson*, 17 Iowa, 158.

⁴² *Bichel v. Oliver*, 77 Kan. 696, 95 Pac. 396; *Elgin Jewelry Co. v. Wilson*, 42 Colo. 270, 93 Pac. 1107; *Kuypers etc. v. Ministers etc. Reformed Dutch Church*, 6 Paige, 570; *Story's Eq. Pl.*, § 443; *Whiting v. Heslep*, 4 Cal. 327; *Weaver v. Conger*, 10 Cal. 233; *Martin v. Mattison*, 8 Abb. Pr. 3; *Atwill v. Ferrett*, 2 Blatchf. 39, Fed. Cas. No. 640; *Marshall v. Bouldin*, 8 Mo. 244; *Butler v. Wood*, 10 How. Pr. 222; *Cooper v. Clason*, 1 Code Rep. (N. S.) 347; *Souza v. Belcher*, 3 Edw. Ch. 117; *Livingston v. Story*, 9 Pet. 632, 9 L. Ed. 255; *Livingston v. Livingston*, 4 Johns. Ch. 294; *Higinbotham v. Burnett*, 5 Johns. Ch. 184; *Parsons v. Bowne*, 7 Paige, 354; *Griggs v. Thompson*, 1 Ga. Dec. 146; *Hollslaw v. Johnson*, 2 Ga. Dec. 146; *Jaques v. Morris*, 2 E. D. Smith, 639; *Janher v. Ingraham*, 6 Blackf. 139.

⁴³ *Griffiths v. Henderson*, 49 Cal. 566; *Fleming v. Albeck*, 67 Cal. 226, 7 Pac. 659; *McCann v. Pennie*, 100 Cal. 547, 35 Pac. 158; *E. Malley Co. v. Londoner*, 41 Colo. 436, 93 Pac.

488; *McCartney v. Glassford*, 1 Wash. 579, 20 Pac. 423; *Pinkum v. City of Eau Claire*, 81 Wis. 301, 51 N. W. 550; *Victory Webb Printing Co. v. Beecher*, 26 Hun, 48, 97 N. Y. 651.

⁴⁴ *Locke v. Peters*, 65 Cal. 161, 3 Pac. 657; *Herefort v. Cramer*, 7 Colo. 483, 4 Pac. 896; *Reed v. Drais*, 67 Cal. 491, 8 Pac. 20.

⁴⁵ 1 Bos. & Pul. (N. R.) 43; *Stoddard v. Treadwell*, 26 Cal. 294; *Snipsie Co. v. Smith*, 7 Cal. App. 150, 93 Pac. 1035; *Whitney v. Crosby*, 3 Caines, 89; *Gidney v. Blake*, 11 Johns. 54; *Martin v. Williams*, 13 Johns. 264; *Monell v. Colden*, 13 Johns. 395, 7 Am. Dec. 390; *Mumford v. Fitzhugh*, 18 Johns. 457; *People v. Bartow*, 6 Cow. 290; *Freeland v. McCullough*, 1 Denio, 414, 43 Am. Dec. 685; *Wolfe v. Luyster*, 1 Hall, 146 (161); *Ward v. Sackrider*, 3 Caines 263; *French v. Tunstall*, Hempst. 204, Fed. Cas. No. 5104a.; *McCue v. Corporation of Wash.*, 3 Cranch C. C. 639, Fed. Cas. No. 8735; *Brown v. Duchesne*, 2 Curtis, 97, Fed. Cas. No. 2003; *Vermont v. Society for Prop. of Gospel*, 2 Paine, 545, Fed. Cas. No. 16-920; *Clark v. Smith*, 66 Cal. 645, 4 Pac. 689.

⁴⁶ *Churchill v. Pac. Imp. Co.*, 96 Cal. 490, 31 Pac. 560.

the ground that it fails to state facts sufficient to constitute a cause of action should be overruled, if any of the counts are sufficient.⁴⁷ So a demurrer upon the general ground that the complaint does not state facts sufficient to constitute a cause of action is not sustainable, if the complaint states a cause of action in favor of any one of several plaintiffs.⁴⁸ And upon a general demurrer to a complaint, where the facts necessary to constitute a cause of action are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the demurrer will be overruled.⁴⁹

A demurrer should be interposed only to the counts badly pleaded; a general demurrer to the whole will be bad.⁵⁰ So in a covenant where several breaches are assigned, some of which are sufficient and others not, the defendant should only demur to such as are bad; and if he demur to the whole declaration, judgment must be given against him.⁵¹ So a demurrer to a whole complaint is bad if one of the plaintiffs may have judgment separately.⁵² Where a complaint, filed to compel a partnership account, contained sufficient to call upon defendants for an accounting as to a particular branch of their business, but was in other respects inartificially drawn and insufficient, and a demurrer was put in to the whole complaint, it was held that the demurrer must be overruled.⁵³ Where a demurrer is too general it will be overruled.⁵⁴ But in our practice this is not necessary where the demurrer is interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. If a demurrer is to the whole bill, and is good as to a part, but bad as to a part, it should be overruled.⁵⁵ For a demurrer bad in part is bad *in toto*.⁵⁶ Where the complaint counts upon two promises, the promise to

⁴⁷ Pfister v. Wade, 69 Cal. 133, 10 Pac. 369.

⁴⁸ O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269; Chevret v. Mechanics' etc. Lumber Co., 4 Wash. 721, 31 Pac. 24.

⁴⁹ Amestoy v. Electric Rapid Transit Co., 95 Cal. 311, 30 Pac. 550.

⁵⁰ Douglass v. Satterlee, 11 Johns. 16.

⁵¹ Gill v. Stebbins, 2 Paine 417, Fed. Cas. No. 5431.

⁵² Peabody v. Wash. Co. Mut. Ins. Co., 20 Barb. 339.

⁵³ Young v. Pearson, 1 Cal. 448. Where a complaint is sufficient to sus-

tain a judgment, although it may be carelessly drawn, a general demurrer is properly overruled. Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517.

⁵⁴ Young v. Pearson, 1 Cal. 448; People v. Morrill, 26 Cal. 361; Stoddard v. Treadwell, 26 Cal. 294.

⁵⁵ People v. Morrill, 26 Cal. 360.

⁵⁶ Verplank v. Caines, 1 Johns. Ch. 57; Le Fort v. Delafield, 3 Edw. Ch. 32; Thompson v. Newlin, 3 Ired. Eq. (N. C.) 338, 42 Am. Dec. 169; Russell v. Lanier, 4 Hayw. (Tenn.) 289; Kimberly v. Sells, 3 Johns. Ch. 467.

pay costs and damages, and the promise to pay the value of the use and occupation of the premises, and the objections taken by demurrer to the whole complaint were,—1. That the complaint does not state facts sufficient to constitute a cause of action; 2. That the complaint is ambiguous, unintelligible, and uncertain, and under the first cause a multitude of supposed defects were specified, and under the last none were specified, the demurrer was properly overruled.⁵⁷

§ 243. When demurrer will not lie.—The mistake of the pleader in setting forth the facts constituting a single cause of action in two separate statements, some facts in one and some in another, as constituting separate causes of action, does not render the pleading demurrable.⁵⁸ Nor will a demurrer lie to a complaint for the defect of not separately stating two or more causes of action, they being such as might be united in one complaint if properly stated;⁵⁹ but a motion is the proper method of reaching such defect,⁶⁰ or defects on account of surplusage or stating conclusions of law.⁶¹ Where the complaint in but one count states facts constituting two or more causes of action, or the relief claimed is beyond that authorized by the facts, the remedy is by motion to strike out, not by demurrer.⁶² So if some of the breaches in a count demurred to are good, a demurrer will not lie;⁶³ though separate demurrers might be interposed to the several causes of action contained in a complaint.⁶⁴

⁵⁷ *Murdock v. Brooks*, 38 Cal. 600.

⁵⁸ *Hillman v. Hillman*, 14 How. Pr. 456. See *Lackey v. Vanderbilt*, 10 How. Pr. 155.

⁵⁹ *Moore v. Smith*, 10 How. Pr. 361; *Harsen v. Bayaud*, 5 Duer, 656; *Gooding v. McAlister*, 9 How. Pr. 123; *Welles v. Webster*, 9 How. Pr. 251; *Robinson v. Judd*, 9 How. Pr. 378; *Peckham v. Smith*, 9 How. Pr. 436; *Benedict v. Seymour*, 6 How. Pr. 298; *Waller v. Raskan*, 12 How. Pr. 28; *Cheney v. Fish*, 22 How. Pr. 236; *Township of Hartford v. Bennett*, 10 Ohio St. 441; *Dorman v. Kellam*, 4 Abb. Pr. 202; *Badger v. Benedict*, 4 Abb. Pr. 176; *Bernero v. South British Ins. Co.*, 65 Cal. 386, 4 Pac. 382. Defects of form of averment or uncertainty cannot be urged upon general demurrer. *Ward v. Clay*, 82

Cal. 502, 23 Pac. 50, 227; *Carpenter v. Smith*, 20 Colo. 39, 36 Pac. 789.

⁶⁰ *San Francisco Pav. Co. v. Fairfield*, 134 Cal. 220, 66 Pac. 255; *State v. Portland Gen. El. Co. (Or.)*, 95 Pac. 722.

⁶¹ *Raiche v. Morrison*, 37 Mont. 244, 95 Pac. 1061; *Gill v. Manhattan Life Ins. Co. (Ariz.)*, 95 Pac. 89.

⁶² *Fickett v. Brice*, 22 How. Pr. 194; *Lord v. Vreeland*, 13 Abb. Pr. 195, 24 How. Pr. 316; *Sparks v. Smeltzer*, 77 Kan. 44, 93 Pac. 338.

⁶³ *Hayden v. Sample*, 10 Mo. 215; *State v. Campbell*, 10 Mo. 724; *Glover v. Tuck*, 24 Wend. 153; *Martin v. Williams*, 17 Johns. 330; *People v. Russell*, 4 Wend. 570.

⁶⁴ *Ogdensburgh Bank v. Paige*, 2 Code Rep. (N. Y.), 75.

§ 244. **The same—Motion to strike out.**—An answer is not demurrable because not verified, though it may be struck from the files on motion.⁶⁵ A motion should be used in case damages are pleaded which are barred by the statute of limitations or which have occurred since commencement of the action.⁶⁶ More particularity in pleading may be asked for by motion to make more definite and certain, and not by general demurrer,⁶⁷ or, in some places, by special demurrer.⁶⁸

§ 245. **Demurrer will not lie.**—If the facts stated in a complaint constitute a valid and sufficient cause of action, though other and unnecessary, immaterial, or redundant statements be contained in it, a demurrer will not lie.⁶⁹ Such objections are remedied by motion.⁷⁰ In New York, a demurrer will not lie for irrelevancy or redundancy.⁷¹ It will not lie for argumentativeness.⁷² A mere clerical error in a complaint, e. g. the omission in a complaint against two defendants of the letter "s" in the word "defendants," will not sustain a demurrer.⁷³ Or if the Christian name of one of the plaintiffs does not appear, it is no ground of de-

⁶⁵ *Butterfield v. Graves*, 138 Cal. 155, 71 Pac. 510; *Turner v. Hamilton*, 13 Wyo. 408, 80 Pac. 664.

⁶⁶ *Crossen v. Grandy*, 42 Or. 282, 70 Pac. 906.

⁶⁷ *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797; *Phillips v. Smith (Ariz.)*, 95 Pac. 91.

⁶⁸ *Carlson v. Barker*, 36 Mont. 486, 93 Pac. 646.

⁶⁹ *Loomis v. Youle*, 1 Minn. 177; *Bishop v. Edmiston*, 16 Abb. Pr. 466; *School District v. Pratt*, 17 Iowa, 16; *Henke v. Eureka Endowment Assoc.*, 100 Cal. 429, 34 Pac. 1089; *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 859; *Marix v. Stevens*, 10 Colo. 261, 15 Pac. 350.

⁷⁰ *Byington v. Robertson*, 17 Iowa, 562; *Morse v. Gilman*, 16 Wis. 504; *Chesbrough v. New York & Erie R. R. Co.*, 13 How. Pr. 557; *Graham v. Camman*, 13 How. Pr. 360; *People ex rel. Crane v. Ryder*, 12 N. Y. 433; *Cramer v. Oppenstein*, 16 Colo. 504, 27 Pac. 716. What a demurrer to a bill in equity is, and why it cannot be sustained where the facts, as stated on the face of the bill, entitle plaintiffs

to relief, see *Carroll v. Carroll*, 11 Barb. 293; *Otis v. Spencer*, 8 How. Pr. 177; *Union M. I. Co. v. Osgood*, 1 Duer, 707; *Watson v. Husson*, 1 Duer, 243. See *Griffing v. Gigg*, 2 Black, 519, 17 L. Ed. 353; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *White v. Lyons*, 42 Cal. 279.

⁷¹ *Consult Village of Warren v. Phelps*, 30 Barb. 646; *Watson v. Husson*, 1 Duer, 243; *Spies v. Accessory Trans. Co.*, 5 Duer, 663; *Roeder v. Ormsby*, 13 Abb. Pr. 334; *Seeley v. Engell*, 13 N. Y. 542; *Smith v. Greenin*, 2 Sandf. 702; *Richards v. Edick*, 17 Barb. 261; *Hammond v. Hudson River Iron etc. Co.*, 20 Barb. 386; *Lee Bank v. Kitching*, 11 Abb. Pr. 435. See *Anon.*, 11 Abb. Pr. 231.

⁷² *Brown v. Richardson*, 20 N. Y. 474; *Zabriskie v. Smith*, 13 N. Y. 330, 64 Am. Dec. 551; *Prindle v. Caruthers*, 15 N. Y. 431; *Judah v. Vincennes University*, 23 Ind. 273; *Miliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Marie v. Garrison*, 83 N. Y. 14.

⁷³ *Chamberlin v. Kaylor*, 2 E. D. Smith, 134.

murrer.⁷⁴ If the complaint shows damage, it is not a ground of demurrer that it does not show the amount of damages. The amount of damages is never the subject of demurrer.⁷⁵ A complaint which states a cause of action for nominal damages for breach of contract, is good on general demurrer.⁷⁶ A demurrer does not raise the objection that the complaint does not show a cause of action for so large a sum as that demanded. Though it seems the demurrer in such case is not frivolous.⁷⁷ In an action for the breach of a contract the want of any averment of special damage cannot be reached by a demurrer. Such averment is only necessary where the right of action itself depends upon the special injury received. For the breach of contract an action lies, though no actual damage be sustained.⁷⁸

The objection that a deed was not signed and acknowledged by a married woman as required by law cannot be raised by demurrer, where the complaint alleges that she signed and delivered such deed.⁷⁹ Nor that a bond signed by two has but one seal, for the party who has not actually signed and sealed the bond may specifically plead *non est factum*, under oath,⁸⁰ although such plea would not avail under the California decisions. A demurrer to evidence is not a good plea to a bill in equity on the ground of its extending beyond the allegations contained in the bill.⁸¹ So the insertion of interrogatories in a complaint, after the mode of a bill of discovery, is not a ground for demurrer.⁸² It cannot be objected on demurrer to a declaration, alleging fraudulent misrepresentations, that the representations were made as a matter of opinion.⁸³ A demurrer to a bill which contains allegations of fraud and strong circumstances of equity must be overruled. In such case the defendant must answer to the fraud.⁸⁴ Nor is the omission of pledges of prosecution in the complaint a ground for demurrer, they being mere matters of form.⁸⁵ The want of affidavit to a plea is not, in Missouri, a ground for demurrer.⁸⁶ The

⁷⁴ Nelson v. Highland, 13 Cal. 74.

⁷⁵ Pevey v. Sleight, 1 Wend. 518; Hecker v. DeGroot, 15 How. Pr. 314.

⁷⁶ Jacobs Sultan Co. v. Union Mercantile Co., 17 Mont. 61, 42 Pac. 109.

⁷⁷ Witherhead v. Allen, 28 Barb. 661.

⁷⁸ McCarty v. Beach, 10 Cal. 461;

Hewit v. Mason, 24 How. Pr. 366;

Sunnyside Land Co. v. Willamette etc.

Railway Co., 20 Or. 544, 26 Pac. 835.

⁷⁹ Kays v. Phelan, 19 Cal. 128.

⁸⁰ Smith v. Hart, 1 Mo. 273.

⁸¹ Blackburn v. Stannard, 5 L. R. 250.

⁸² Bank of British North America v. Suydam, 6 How. Pr. 379.

⁸³ Whitton v. Goddard, 36 Vt. 730.

⁸⁴ Burnley v. Town of Jeffersonville, 3 McLean, 336, Fed. Cas. No. 2181.

⁸⁵ Baker v. Philips, 4 Johns. 190.

⁸⁶ Parker v. Simpson, 1 Mo. 539.

objection to the want of verification of the complaint, where verification is required by statute, must be taken either before answer or with the answer.⁸⁷ It has been held that it should be taken by motion when the respondents appear.⁸⁸

§ 246. **Objections to prayer for relief.**—Objections to the prayer of a complaint cannot be taken by demurrer.⁸⁹ If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and even in the absence of such clause when an answer is filed. The facts in the complaint, and not the prayer, settle the relief to be granted.⁹⁰ The entire omission of any prayer would not subject the complaint or petition to demurrer.⁹¹ Nor will demurrer lie to the demand for more relief than the plaintiff is entitled to.⁹² If the complaint shows that the plaintiff has a cause of action, and that he is entitled to some relief, the question as to what kind, or how much relief should be granted to him, cannot be made on demurrer.⁹³ If the complaint state facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action.⁹⁴ And in such cases a general demurrer is of no avail.⁹⁵ But if the complaint does not state facts sufficient to enable the plaintiff to recover any part of the relief demanded, it is demurrable, though he would from the facts be entitled to other

⁸⁷ *Greenfield v. Steamer Gunnell*, 6 Cal. 67.

⁸⁸ *Woodworth v. Edwards*, 3 Woodb. & M. 120, Fed. Cas. No. 18014.

⁸⁹ *Mont. Rev. Codes*, §§ 6534-6539, 1003; *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49.

⁹⁰ *Rollins v. Forbes*, 10 Cal. 299; *People v. Morrill*, 26 Cal. 336, cited in *Althof v. Conheim*, 38 Cal. 234, 99 Am. Dec. 363; *Stewart v. Hutchinson*, 29 How. Pr. 181; *Mackey v. Auer*, 8 Hun, 180; *Walker v. Spencer*, 13 Jones & S. 71; *Garner v. Harmony Mills*, 6 Abb. N. C. 212; *Garner v. Thorn*, 56 How. Pr. 452.

⁹¹ *Fox v. Graves*, 46 Neb. 812, 65 N. W. 887.

⁹² *Rollins v. Forbes*, 10 Cal. 299; *Andrews v. Shaffer*, 12 How. Pr. 443; *Beale v. Hayes*, 5 Sandf. 640; *Emery*

v. Pease, 20 N. Y. 62; *Moran v. Anderson*, 1 Abb. Pr. 288; *Moses v. Walker*, 2 Hilt. 536; *Stuyvesant v. Mayor of New York*, 11 Paige, 415; *Woodgate v. Fleet*, 9 Abb. Pr. 222; *Hecker v. DeGroot*, 15 How. Pr. 314; *Bishop v. Edmiston*, 16 Abb. Pr. 466; *Price v. Brown*, 10 Abb. N. C. 67; *Howard v. Seattle Nat. Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100.

⁹³ *Poett v. Stearns*, 28 Cal. 226.

⁹⁴ *Marriott v. Clise*, 12 Colo. 561, 21 Pac. 909.

⁹⁵ *Donahue v. Stockton Gas & El. Co.*, 6 Cal. App. 276, 92 Pac. 196; *Warner v. Warner*, 6 Cal. App. 361, 92 Pac. 191; *Union Ice Co. v. Doyle*, 6 Cal. App. 284, 92 Pac. 112; *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49.

relief.⁹⁶ A demurrer to a complaint on the ground that it seeks a remedy at law, and also seeks for equitable relief, is bad.⁹⁷ A demurrer to a bill in equity alleging that the relief can be had at law will not lie where the bill charges fraud, and prays relief against a judgment at law and a sale under it.⁹⁸

§ 247. **General demurrer.**—In Pennsylvania it has been held that a general demurrer is only for defects of substance; a special demurrer for defects of form, which must be specially assigned.⁹⁹ Where defendant filed a general demurrer to the complaint for want of facts, he is not entitled to raise thereunder the question of plaintiff's legal capacity to sue, that being a special ground of demurrer.¹⁰⁰ A general demurrer, assigning reasons why the plaintiff should not recover, must be considered and treated as a special demurrer.¹⁰¹

Section 431 of the California Code of Civil Procedure provides that the demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken, and unless it does so it may be disregarded; but this provision, as we shall hereafter see, does not in fact change the force and effect of a general demurrer, or the mode of framing it, since, under section 434, it is provided that a failure to demur to the jurisdiction, or upon the ground that the complaint does not state facts sufficient to constitute a cause of action, does not waive either objection. This must be so, independently of this provision, since, if the court has not jurisdiction, it cannot render a valid judgment, nor could a judgment be sustained upon the record if it did not disclose facts to sustain the judgment.¹⁰² On demurrer, the court should not pay any attention to forms, if it can find in the complaint any allegations which, under any view of them, may give the plaintiff a right to recover.¹⁰³ The same distinction between insufficient facts and an insufficient statement of facts, which prevails when

⁹⁶ *Walton v. Walton*, 32 Barb. 203, 20 How. Pr. 347.

⁹⁷ *Gates v. Kieff*, 7 Cal. 125; *Rollins v. Forbes*, 10 Cal. 300.

⁹⁸ *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387.

⁹⁹ *Commonwealth v. Cross Cut R. Co.*, 53 Pa. St. 62.

¹⁰⁰ *James v. James*, 35 Wash. 655, 77 Pac. 1082.

¹⁰¹ *Tyler v. Hand*, 7 How. 573, 12 L. Ed. 824.

¹⁰² *Alaska Codes*, pt. 4, ch. 7, § 58; *Ariz. Civ. Code*, par. 1351; *Idaho Rev. Codes*, § 4194; *Mont. Rev. Codes*, § 6555; *Nev. Comp. Laws*, § 3135; *N. Mex. Comp. Laws*, § 2685, subd. 35; *Or. B. & C. Codes*, § 68; *Utah Rev. Stats.*, § 2962; *Wash. Bal. Codes*, §§ 2907, 2911; *Wyo. Rev. Stats.*, § 3535.

¹⁰³ *Wilder v. McCormick*, 2 Blatchf. 31, Fed. Cas. No. 17650; *Butterworth v. O'Brien*, 39 Barb. 192, 24 How. Pr. 438.

it is considered whether the complaint supports the judgment, should prevail upon general demurrer.¹⁰⁴ Or, if the complaint contains the elements of a cause of action, however inartificially it may be stated; and if, on analyzing the facts disclosed, the whole or any part of them can be resolved into a cause of action, the demurrer should be overruled.¹⁰⁵ If the declaration does not set forth a proper case, and in a correct form, the defendant may avail himself of these defects on demurrer; but the want of proper averments in the declaration cannot be made the ground of a nonsuit.¹⁰⁶ For defects in mere matters of form in a pleading the adverse party should interpose a special demurrer. A general demurrer will not in general reach them.¹⁰⁷ But these questions are regulated by the decisions of the courts in the several states and the statutes in force. A general demurrer to a plea of fraud in obtaining the judgment in suit is insufficient where the objection intended to be raised is that the plea does not state the particulars of the fraud relied upon; this being matter of form.¹⁰⁸ In California, it is held that an averment in a complaint that the defendant unlawfully took personal property is a mere averment of law, and an averment that he fraudulently took it, without stating the facts which constitute the fraud, is not a statement of an issuable fact.¹⁰⁹

§ 248. Special demurrer.—The phrase “special demurrer” doubtless means a demurrer which specifies the grounds upon which objections are taken.¹¹⁰ At common law and in the old equity practice a special demurrer should point out specifically by paragraph, page, or folio, or other mode of reference, the parts of the bill to which it is intended to apply.¹¹¹ It must specify the

¹⁰⁴ *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, 30 Pac. 550.

¹⁰⁵ *People v. Mayor of New York*, 28 Barb. 240, 8 Abb. Pr. 7; *Buzzard v. Knapp*, 12 How. Pr. 504; *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, 30 Pac. 550.

¹⁰⁶ *Bas v. Steel*, Pet. C. C. 406, Fed. Cas. No. 1087.

¹⁰⁷ *Childress v. Emory*, 8 Wheat. 642, 5 L. Ed. 705; *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475. Compare *Lockington v. Smith*, Pet. C. C. 466, Fed. Cas. No. 8448; *Tehama County v. Bryan*, 68 Cal. 57, 8 Pac.

673; *De Pedrorena v. Hotchkiss*, 95 Cal. 636, 30 Pac. 787; *Schmidt v. Market St. Ry. Co.*, 90 Cal. 37, 27 Pac. 61; *Kimball v. Lyon*, 19 Colo. 266, 35 Pac. 44.

¹⁰⁸ *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475.

¹⁰⁹ *Triscony v. Orr*, 49 Cal. 612; *Cosgrove v. Fisk*, 90 Cal. 75, 27 Pac. 56. And see *Selz v. Tucker*, 10 Utah, 132, 37 Pac. 249.

¹¹⁰ *Drais v. Hogan*, 50 Cal. 127.

¹¹¹ *Robinson v. Thompson*, 2 Ves. & B. 118; *Weatherhead v. Blackburn*, 2 Ves. & B. 121; *Dovensher v. Newen-*

grounds upon which any of the objections to the complaint are taken;¹¹² and if it omit such specifications it may be disregarded.¹¹³ This must be done in all cases, except—1. When objection is raised to the jurisdiction of the court; and 2. When the ground is that the complaint does not state facts sufficient to constitute a cause of action.¹¹⁴ A special demurrer is distinguished from a general demurrer by pointing out specially the causes for it.¹¹⁵ If a complaint fails to state a fact essential to the cause of action, the defendant may take advantage of the defect by a general demurrer.¹¹⁶ If, however, the complaint avers all the essential facts, but states them defectively or improperly, the defect can only be reached by a special demurrer, particularly designating the specific point at which it is aimed.¹¹⁷ The general rule is that a demurrer which does not distinctly specify the grounds of objection to the complaint will be disregarded.¹¹⁸ A demurrer to one of two counts may be sustained, and judgment be entered on the other against defendant.¹¹⁹ But a demurrer for a misjoinder of counts must be to the whole declaration,¹²⁰ and a cause of demurrer must be specially assigned.¹²¹

ham, 2 Sch. & Lef. 199; Story's Eq. Pl., § 457; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; Jarvis v. Palmer, 11 Paige, 650; Kuypers v. Reformed Dutch Church, 6 Paige, 570.

¹¹² Or. B. & C. Codes, § 67; Harper v. Chamberlain, 11 Abb. Pr. 234.

¹¹³ Cal. Code Civ. Proc., § 431; N. Y. Code, § 490.

¹¹⁴ Stephens v. Parvin, 33 Colo. 60, 78 Pac. 688; Kent v. Snyder, 30 Cal. 666. See Anibal v. Hunter, 6 How. Pr. 255; Durkee v. Saratoga R. R. Co., 4 How. Pr. 226; Hinds v. Tweddle, 7 How. Pr. 278; Haire v. Baker, 5 N. Y. 357; Johnson v. Wetmore, 12 Barb. 433; Skinner v. Stuart, 13 Abb. Pr. 457; Viburt v. Frost, 3 Abb. Pr. 120; Hobart v. Frost, 5 Duer, 672; Nash v. Smith, 6 Conn. 421.

¹¹⁵ Reveille Steamboat v. Case, 9 Mo. 498; Jackson v. Rundlet, 1 Woodb. & M. 381, Fed. Cas. No. 7145.

¹¹⁶ Dixon v. Cardozo, 106 Cal. 506, 39 Pac. 857. And see Wilkeson Coal

Co. v. Driver, 9 Wash. 177, 37 Pac. 307.

¹¹⁷ Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888; Union Ice Co. v. Doyle, 6 Cal. App. 284, 92 Pac. 112; In re Warner Estate, 6 Cal. App. 361, 92 Pac. 191; Jacobs v. Union Mercantile Co., 17 Mont. 61, 42 Pac. 109.

¹¹⁸ Henderson v. Johns, 13 Colo. 280, 22 Pac. 461; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703. As to when it lies, and its effect, see Wheteroift v. Dunlop, 1 Cranch C. C. 5, Fed. Cas. No. 17506; Vowell v. Lyles, 1 Cranch C. C. 428, Fed. Cas. No. 17021; McCue v. Corporation of Wash., 3 Cranch C. C. 639, Fed. Cas. No. 8735; Malone v. Stilwell, 15 Abb. Pr. 421; Nellis v. De Forest, 16 Barb. 65; Chandler v. Byrd, Hempst. 222, Fed. Cas. No. 2591b; Cage v. Jeffries, Hempst. 409, Fed. Cas. No. 2287.

¹¹⁹ Barber v. Cazalis, 30 Cal. 92.

¹²⁰ 1 Chit. Pl. 180; Ferriss v. North American Fire Ins. Co., 1 Hill, 71.

¹²¹ Owsley v. Montgomery etc. R. R. Co., 37 Ala. 560.

§ 249. **Joint demurrer.**—If demurrer is filed to the answer and counterclaim by two or more plaintiffs jointly, the demurrer would be overruled, if the answer states a defense or counterclaim against either of the plaintiffs.¹²²

§ 250. **Causes or grounds for demurrer.**—There are nine causes for which a demurrer may be interposed under section 430 of the California Code of Civil Procedure. Unless a ground of demurrer be included under one or more of such causes, it cannot be sustained.¹²³ A defect which will defeat the plaintiff's present right to recover, in whole or in part, is a good ground of demurrer.¹²⁴ A complaint is not demurrable on account of defective allegations in regard to immaterial matters.¹²⁵ A party relying upon technical defects must observe technical rules.¹²⁶ The demurrer is good if it assigns the grounds of objection substantially as they are defined in the statute.¹²⁷ A demurrer will lie only when one of the several grounds of demurrer is apparent on the face of the complaint,¹²⁸ and the defendant is confined to the objections specified.¹²⁹ Special matters of defense cannot be raised by demurrer.¹³⁰

¹²² *Neumann v. Moretti*, 146 Cal. 25, 79 Pac. 510.

¹²³ *Hentsch v. Porter*, 10 Cal. 555; *Harper v. Chamberlain*, 11 Abb. Pr. 234.

¹²⁴ *Hentsch v. Porter*, 10 Cal. 555.

¹²⁵ *Gardner v. California Guarantee Inv. Co.*, 137 Cal. 71, 69 Pac. 844.

¹²⁶ *Jackson v. Sumpter Valley Ry. Co.*, 50 Or. 455, 93 Pac. 356.

¹²⁷ *Lagow v. Neilson*, 10 Ind. 183; *De Witt v. Swift*, 3 How. Pr. 280. But see Cal. Code Civ. Proc., § 431; *Ellissen v. Halleck*, 6 Cal. 386; *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461.

¹²⁸ *Simpson v. Loft*, 8 How. Pr. 234; *Getty v. Hudson River R. R. Co.*,

8 How. Pr. 177; *Wilson v. Mayor of New York*, 6 Abb. Pr. 6, 4 E. D. Smith, 675, 15 How. Pr. 500; *Coe v. Beckwith*, 31 Barb. 339; *Mayberry v. Kelly*, 1 Kan. 116; *Union Mut. Ins. Co. v. Osgood*, 1 Duer, 707; *Aurora v. Cobb*, 21 Ind. 492; *Kenworthy v. Williams*, 5 Ind. 375; *Davy v. Betts*, 23 How. Pr. 396; *Dillaye v. Wilson*, 43 Barb. 261; *Bell v. Mayor of Vicksburg*, 23 How. 443, 16 L. Ed. 579; *Amory v. McGregor*, 12 Johns. 287; *Powers v. Ames*, 9 Minn. 178.

¹²⁹ *Loomis v. Tift*, 16 Barb. 541; *Lopez v. Central Arizona Min. Co.*, 1 Ariz. 464, 2 Pac. 748.

¹³⁰ *Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26.

CHAPTER XX.

FORMS OF DEMURRERS.

§ 251. **Defendant's grounds for demurrer.**—The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either—

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect or misjoinder of parties plaintiff or defendant; or,

5. That several causes of action have been improperly united, or not separately stated; or,

6. That the complaint does not state facts sufficient to constitute a cause of action; or,

7. That the complaint is ambiguous; or,

8. That the complaint is unintelligible; or,

9. That the complaint is uncertain.¹

The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the causes of action stated therein, and the defendant may demur and answer at the same time.² When any of the grounds of demurrer do not appear upon the face of the complaint, the objection may be taken by answer.³ If no such objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.⁴

¹ Cal. Code Civ. Proc., § 430, as amended 1907; Alaska Codes, pt. 4, ch. 7, § 58; Ariz. Civ. Code, par. 1351; Idaho Rev. Codes, § 4174; Mont. Rev. Codes, § 6534; Nev. Comp. Laws, § 3135; N. Mex. Comp. Laws, § 2685, subd. 35; Or. B. & C. Codes, § 68; Utah Rev. Stats., § 2962; Wash. Bal.

Codes, §§ 2907-2911; Wyo. Rev. Stats, § 3535.

² Cal. Code Civ. Proc., § 431, as amended 1907.

³ Cal. Code Civ. Proc., § 433.

⁴ Cal. Code Civ. Proc., § 434. These provisions of the California code are found in substance in all the codes.

§ 252. **Several causes of action.**—If a complaint containing several causes of action is demurred to on the ground that the several counts do not state facts sufficient to constitute a cause of action, the demurrer must be overruled, unless all the statements are insufficient.⁵ The fact that two causes are set out in one statement instead of in separate counts will not deprive defendant of his right to demur.⁶ If there are several causes of action in the complaint, and a demurrer is interposed to one or more, but not to each, the defendant should take care to avoid a default as to the causes of action not demurred to. In such case he may stipulate for time to answer such causes of action until the demurrer is disposed of to the other causes of action, or he may answer them at the same time that he files his demurrer. If there is ground of demurrer to the whole complaint, and a demurrer is interposed thereto, as there may be, notwithstanding there is one good cause of action, that would, of course, save any default being taken.

§ 253. **Time for plaintiff to demur.**—The plaintiff may within ten days after the service of the answer demur thereto, or to one or more of the several defenses or counterclaims set up therein.⁷

§ 254. **Plaintiff's grounds for demurrer.**—Demurrer may be taken upon one or more of the following grounds: 1. That several causes of counterclaim have been improperly joined or not separately stated; 2. That the answer does not state facts sufficient to constitute a defense or counterclaim; 3. That the answer is ambiguous; 4. That the answer is unintelligible; or 5. That the answer is uncertain.⁸

§ 255. **Want of jurisdiction—Demurrer for.**—The meaning of the clause, "that the court has no jurisdiction of the person," is that the person is not subject to the jurisdiction of the court, and not that the suit has not been regularly commenced. If the suit has not been regularly commenced, the remedy of the defendant

⁵ *Martin v. Mattison*, 8 Abb. Pr. 3; *Butler v. Wood*, 10 How. Pr. 222; *Newbery v. Garland*, 31 Barb. 121; *Jaques v. Morris*, 2 E. D. Smith, 639; *Cooper v. Clason*, 1 Code Rep. (N. S.) 347; *Townsend v. Jennison*, 7 How. 706, 12 L. Ed. 880; *Clark v. Smith*, 66 Cal. 645, 4 Pac. 689; *Barbre v.*

Goodale, 28 Or. 465, 38 Pac. 67, 43 Pac. 378.

⁶ *Benson v. Battey*, 70 Kan. 288, 78 Pac. 844.

⁷ Cal. Code Civ. Proc., § 443, as amended 1907.

⁸ Cal. Code Civ. Proc., § 444, as amended 1907.

is by motion against the irregularity.⁹ Jurisdiction is the power to hear and determine the controversy brought before the court.¹⁰ It is a misnomer to classify the objection that a complaint does not state facts sufficient to constitute a cause of action as an objection against the jurisdiction of the court.¹¹ Jurisdiction is the power to hear and determine, or to hear without determining, or to determine without hearing.¹² In a California case,^{12a} it was held that "a demurrer to the jurisdiction of the court only lies where the want of such jurisdiction appears affirmatively upon the face of the complaint. In a court of limited and special jurisdiction the rule is otherwise."¹³ A justice's court is an inferior court, and its jurisdiction must be shown affirmatively by a party relying upon or claiming any right under its judgments.¹⁴ Where an inferior tribunal, as the board of land commissioners, has once acquired jurisdiction of a matter, its subsequent proceedings cannot be collaterally questioned for mere error or irregularity.¹⁵ There are two modes of acquiring jurisdiction of the person: 1. By personal service of the summons, and copy of complaint; and 2. By constructive service, or by what is commonly called publication of summons.¹⁶ Where S. and B. admitted "due service" in an action against them and others, the court thereby acquires jurisdiction of them.¹⁷ The court whose jurisdiction is impeached has power to determine the question whether it possesses it or not.¹⁸ Under the laws of Washington,^{18a} jurisdiction could be obtained of the person of a defendant by the service upon him of the summons prescribed in the act, and without the service of the complaint in the action, its filing with the clerk of the court being sufficient.¹⁹

§ 256. **The same—Several causes of action.**—Where there are several causes of action, but of one of them the court has no jurisdiction, the demurrer must be to that one, and

⁹ *Nones v. Hope Mut. Life Ins. Co.*, 8 Barb. 541.

¹⁰ *Central Pacific R. R. Co. v. Board etc. of Placer County*, 43 Cal. 365.

¹¹ *Toothaker v. City of Boulder*, 13 Colo. 219, 22 Pac. 468.

¹² *Ex parte Bennett*, 44 Cal. 85.

^{12a} *Doll v. Feller*, 16 Cal. 432.

¹³ See *Wilson v. Mayor of New York*, 6 Abb. Pr. 6, 15 How. Pr. 500; *Koenig v. Nott*, 8 Abb. Pr. 384.

¹⁴ *Jolley v. Foltz*, 34 Cal. 321; *Winter v. Fitzpatrick*, 35 Cal. 269.

¹⁵ *Bernal v. Lynch*, 36 Cal. 135.

¹⁶ *Hahn v. Kelley*, 34 Cal. 391, 94 Am. Dec. 742.

¹⁷ *Sharp v. Brunnings*, 35 Cal. 528.

¹⁸ *King v. Poole*, 36 Barb. 242.

^{18a} *Laws of 1887-1888*, p. 24.

¹⁹ *Baldwin v. Baer*, 10 Wash. 414, 39 Pac. 117.

in this form, and not to the whole complaint, as for a misjoinder of actions.²⁰ A demurrer on the ground "that the court has no jurisdiction either of the person of the defendants or of the subject of the action," and "that the complaint does not state facts sufficient to constitute a cause of action," is sufficiently explicit under the rule of construction adopted by the courts of California.²¹ In New York, objection to the jurisdiction may be raised whenever the parties are before the court, either at special term, or by motion on the trial, or by motion in arrest after verdict.²² An objection to the jurisdiction may be made at any time.²³ When different counts in a complaint are attacked by separate demurrer, each cause must be considered by itself, and inconsistency in the causes of action cannot be reached by demurrer.²⁴

§ 257. Legal capacity—Company—Membership.—The failure to aver membership in a company in the body of the complaint is a ground for demurrer.²⁵

§ 258. The same.—A county has legal capacity to sue.²⁶ The statute provides that no person shall sue a county, unless the claim has been first presented to the board of supervisors and been by them rejected; this fact must appear in the complaint, or it is demurrable.²⁷

§ 259. The same—Corporation.—The omission of a corporation plaintiff to show its incorporation cannot be reached by a general demurrer based upon the ground that the complaint does not state facts sufficient to constitute a cause of action. That the plaintiff has not legal capacity to sue is made a ground for special demurrer, and must, therefore, be specially assigned.²⁸

²⁰ Cook v. Chase, 3 Duer, 643.

²¹ Ellissen v. Halleck, 6 Cal. 386; Willis v. Farley, 24 Cal. 491; Kent v. Snyder, 30 Cal. 666. And see Cal. Code Civ. Proc., § 434.

²² Burnham v. De Bevoise, 8 How. Pr. 160. See, also, Higgins v. Rockwell, 2 Duer, 653; Blacksmith v. Fellows, 7 N. Y. 404; Gould v. Glass, 19 Barb. 186.

²³ Durant v. Comegys, 2 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755.

²⁴ Equitable Security Co. v. Montrose & D. Canal Co., 20 Colo. App. 465, 79 Pac. 747.

²⁵ Tolmie v. Dean, 1 Wash. T. 46.

²⁶ Placer County v. Astin, 8 Cal. 305.

²⁷ McCann v. Sierra County, 7 Cal. 123.

²⁸ Los Angeles Ry. Co. v. Davis, 146 Cal. 179, 79 Pac. 865; Valley Lumber Co. v. Nickerson, 13 Idaho, 682, 93 Pac. 24; Bank of Lowville v. Edwards, 11 How. Pr. 216. See Harmon v. Vanderbilt Hotel Co., 79 Hun, 392, 29 N. Y. Supp. 783; Fox v. Erie Preserving Co., 93 N. Y. 54.

Where a corporation sues, it must show how it was created; without this there is a fatal omission of one of the material elements of a good cause of action.²⁹

§ 260. The same—Defect apparent.—Ground of demurrer for want of capacity to sue must appear from allegation as made, not from want of allegation.³⁰

§ 261. The same—Foreign state.—Demurrer is proper to a bill by the "United States of America," on the ground that a foreign state is not allowed to sue in a court of equity without putting forward some public officer on whom process may be served, and who can be called upon to give discovery on a cross-bill.³¹

§ 262. The same—Guardian.—A complaint omitting to allege the appointment of a guardian for an infant plaintiff is impeachable under this subdivision.³² The objection that one has no legal capacity to sue goes to his right to maintain a suit at all, and does not include the objection that suit is not prosecuted in the name of the real party in interest.³³

§ 263. The same—Trustee.—A plaintiff has no legal capacity to sue in an action on a promissory note when it appears on the face of the complaint that plaintiff holds the note as collateral security for a debt, under a trust to sell it, but with no power to sue.³⁴

§ 264. Objection waived.—The objection that plaintiff has no legal capacity to sue is waived if not taken by demurrer or answer.³⁵ So held when the objection was that plaintiff was a married woman, suing without a next friend, before the act

²⁹ *Johnson v. Kemp*, 11 How. Pr. 186.

³⁰ *Phoenix Bank of New York v. Donnell*, 41 Barb. 571; affirmed, 40 N. Y. 419; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675; *Herbst v. Hogan*, 16 Mont. 384, 41 Pac. 135. And see *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Swing v. White River Lumber Co.*, 91 Wis. 517, 65 N. W. 174.

³¹ *United States v. Wagner*, L. R., 3 Eq. 724.

³² *Grantman v. Thrall*, 44 Barb. 173.

³³ *Boyce v. Augusta Camp*, M. W. A., 14 Okla. 642, 78 Pac. 322.

³⁴ *Nelson v. Eaton*, 7 Abb. Pr. 305; reversing 15 How. Pr. 305.

³⁵ *Palmer v. Davis*, 28 N. Y. 242; *Hastings v. McKinley*, 1 E. D. Smith, 273.

of 1857.³⁶ So held when the objection was that plaintiff was a foreign executor.³⁷ So held in an action brought by a husband and wife to recover possession of land, when plaintiffs claimed as owners in right of the wife, and on the trial the defendants relied on an appointment by the husband and wife, under an antenuptial agreement between them, of a trustee for the property and effects of the wife.³⁸

§ 265. **Receiver.**—A demurrer on the ground that it does not appear that plaintiff had any title to the note sued on, is insufficient to raise the question as to his right to sue as receiver.³⁹ Where a complaint by a receiver alleges that he was duly appointed receiver, but does not state facts from which the court can see that he was so appointed, the proper remedy is by motion to make more definite and certain.⁴⁰

§ 265a. **Special administrator.**—It is not good ground for demurrer that it does not sufficiently appear upon the face of the complaint that the plaintiff has the legal capacity to sue as special administrator; that omission can only be taken advantage of by answer, if the complaint does not show on its face that the special administrator had not the legal capacity to sue.⁴¹

§ 266. **Capacity to sue.**—Where the demurrer specified as the ground of the demurrer that the complaint did not state facts sufficient to show a cause of action, among other things that it did not show plaintiff's capacity to sue, it was held a sufficient demurrer to that point.⁴² The facts showing the capacity of the plaintiffs to sue are not facts constituting the cause of action.⁴³ In an action for death caused by negligence, brought by the mother, brothers, and sisters of the deceased, a demurrer on the ground that the plaintiffs had not legal capacity to sue is too broad, and should be overruled, it appearing that the mother had the right to sue as sole heir of the deceased.⁴⁴

³⁶ *Palmer v. Davis*, 28 N. Y. 242.

³⁷ *Robbins v. Wells*, 26 How. Pr. 15.

³⁸ *Van Amringe v. Barnett*, 8 Bosw. 357.

³⁹ *White v. Low*, 7 Barb. 204.

⁴⁰ *Cheney v. Fish*, 22 How. Pr. 236.

⁴¹ *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195.

⁴² *Connecticut Bank v. Smith*, 9 Abb. Pr. 168; 17 How. Pr. 487.

⁴³ *Bank of Lowville v. Edwards*, 11 How. Pr. 216; *Viburt v. Frost*, 3 Abb. Pr. 120; *Myers v. Machado*, 6 Abb. Pr. 198; *Hobart v. Frost*, 5 Duer, 672.

⁴⁴ *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

Want of capacity to sue means, as a general rule, a want of capacity to appear in court and maintain an action, regardless in whom is vested the right of action.⁴⁵

§ 267. **Other action pending.**—The fact must appear on the face of the complaint, for even if there is another action pending between the same parties, for the same thing, and the fact does not appear on the face of the complaint, the remedy is by answer, and not by demurrer.⁴⁶ For a demurrer to lie under this subdivision, it must appear that both actions are for the identical cause of action.⁴⁷ But the pendency of an action for divorce is no cause for demurrer to another for subsequent offenses.⁴⁸

§ 268. **The same—Foreclosure.**—In Nevada, where the complaint against the estate of a deceased person shows the fact that the claim had been allowed by the administrator, it is demurrable under this subdivision, as if it alleged a former suit and judgment upon the same claim.⁴⁹

§ 269. **Former adjudication.**—Where a bill disclosed that the subject-matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was held bad on demurrer, and was ordered to be dismissed.⁵⁰ Where the complaint shows there is another action pending before the supreme court still undetermined, it is subject to demurrer.⁵¹ The fact that a vessel, lost while being towed out to sea, is insured does not divest the owner of the right of action against the steam-tug towing her for her loss, and his recovery will bar another action for the same cause, and therefore the defendant cannot raise the objection that the action is not brought by the real party in interest.⁵²

⁴⁵ Hunt v. Monroe, 32 Utah, 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249.

⁴⁶ Burrows v. Miller, 5 How. Pr. 51; Hornfager v. Hornfager, 1 Code Rep. (N. S.) 412; Lowman v. West, 8 Wash. 355, 36 Pac. 258; Jackson v. McAuley, 13 Wash. 298, 43 Pac. 41.

⁴⁷ Paige v. Wilson, 8 Bosw. 294; Kelsey v. Ward, 16 Abb. Pr. 98.

⁴⁸ Cordier v. Cordier, 26 How. Pr. 187.

⁴⁹ Corbett v. Rice, 2 Nev. 330.

⁵⁰ Barnett v. Kilbourne, 3 Cal. 327.

⁵¹ Wetzstein v. Boston & M. etc. Min. Co., 28 Mont. 451, 72 Pac. 865.

⁵² White v. Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

§ 270. **Other action pending—Quieting title.**—In an action to quiet plaintiff's title, clouded by defendants giving out that the title is in themselves and not in plaintiff, an action of ejectment pending, in which the defendant does not ask for affirmative relief, is not available as a defense.⁵³

§ 271. **The same—Judgment.**—A judgment in favor of a receiver is a bar to a subsequent action in the same cause by the party for whom he was appointed, and a demurrer lies on this subdivision.⁵⁴

§ 272. **The same—Ground.**—A demurrer lies under this subdivision when there is an action between the same parties in any proceeding in which the rights of the plaintiff in the last suit would be fully protected, whether strictly an action, attachment, citation before the surrogate, or a proceeding in court founded on a petition.⁵⁵ So the pendency of another action brought by a defendant in partition would come under the rule.⁵⁶ But the general rule is that the plaintiff in the latter action must be the plaintiff in the former, in order to sustain this plea.⁵⁷ Nor can it be sustained if the other action is for relief, which could not be granted in the action in which the demurrer is interposed.⁵⁸ Nor is it sustained where the other action is in a court of another state or a court of the United States.⁵⁹ This objection must be raised under subdivision 3. It cannot be raised under subdivision 6, assigning for cause the want of sufficient facts.⁶⁰

§ 273. **Defect of parties.**—A defect of parties plaintiff is a good cause of demurrer by all the defendants.⁶¹ But the fact that the party whose nonjoinder is alleged as ground of demurrer is living must appear affirmatively on the face of the complaint.⁶²

⁵³ Ayres v. Bensley, 32 Cal. 620.

⁵⁴ Tinkham v. Borst, 24 How. Pr. 246.

⁵⁵ Groshon v. Lyon, 16 Barb. 461.

⁵⁶ Hornfager v. Hornfager, 6 How. Pr. 279.

⁵⁷ Walsworth v. Johnson, 41 Cal. 63; O'Connor v. Blake, 29 Cal. 312; Certain Logs of Mahogany, 2 Sumn. 593, Fed. Cas. No. 2559; Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17031.

⁵⁸ Haire v. Baker, 5 N. Y. 357.

⁵⁹ Burrows v. Miller, 5 How. Pr. 51; Cook v. Litchfield, 5 Sandf. 330.

⁶⁰ Aiken v. Bruen, 21 Ind. 137.

⁶¹ Brownson v. Gifford, 8 How. Pr. 392; Walrath v. Handy, 24 How. Pr. 353.

⁶² Taylor v. Richards, 9 Bosw. 679; Burfess v. Abbott, 6 Hill, 135, 141; affirming 1 Hill, 476; State of Indiana v. Worum, 6 Hill, 33, 40 Am. Dec. 378; Scofield v. Van Syckle, 23 How. Pr. 97.

If the fact does not appear affirmatively, the objection must be taken by answer.⁶³ It seems that section 122 of the New York code (to which section 389 of the California Code of Civil Procedure corresponds) is to control in determining whether a demurrer for defect of parties is well taken.⁶⁴ This phrase does not include the joinder of an improper party.⁶⁵ Defect means too few, not too many.⁶⁶ When it appears upon the face of the complaint that the presence of other parties is necessary to a complete determination of the controversy, a demurrer will lie for a defect of parties plaintiff or defendant.⁶⁷ It is not within the office of a demurrer to state objections not apparent upon the face of the complaint, e. g. to name parties who should have been joined, and no conclusion is to be drawn from such statements adverse to the plaintiff.⁶⁸ Unless objection be taken by demurrer the defect is waived. Thus where some of the part owners of a vessel sued to recover freight, and the complaint showed that the plaintiffs owned three eighths of the vessel only, and claimed to recover only their proportion of the freight money averred to be due, it was held that although all the owners should have joined in the action, yet the defendant had waived the objection by omitting to demur to the complaint.⁶⁹ Where there is a defect of parties, it must appear that the party demurring has an interest in having such other party made a defendant,⁷⁰ or that he is prejudiced by the nonjoinder,⁷¹ and where several parties are joined as plaintiffs, and the issues tendered are simple, a demurrer for multifariousness will not be sustained.⁷²

§ 274. Nonjoinder of parties.—Under the New York Code of Civil Procedure the objection that necessary parties are not joined can only be taken by answer or demurrer.⁷³ The same is true

⁶³ Brainard v. Jones, 11 How. Pr. 569; Scofield v. Van Syckle, 23 How. Pr. 97.

⁶⁴ Wallace v. Eaton, 5 How. Pr. 99.

⁶⁵ Great Western Comp. Co. v. Ætna Ins. Co., 40 Wis. 373.

⁶⁶ Bennett v. Preston, 17 Ind. 291.

⁶⁷ Cohen v. Ottenheimer, 13 Or. 220, 10 Pac. 20.

⁶⁸ Coe v. Beckwith, 10 Abb. Pr. 296.

⁶⁹ Merritt v. Walsh, 32 N. Y. 685, followed in Donnell v. Walsh, 33 N. Y.

43, 88 Am. Dec. 361; Learned v. Castle (Cal), 4 Pac. 191, 3 West Coast Rep. 154, 67 Cal. 41, 7 Pac. 34, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

⁷⁰ Hillman v. Hillman, 14 How. Pr. 460; Newbould v. Warrin, 14 Abb. Pr. 80; Wooster v. Chamberlin, 28 Barb. 602.

⁷¹ Stockwell v. Wager, 30 How. Pr. 271.

⁷² People v. Morrill, 26 Cal. 336.

⁷³ N. Y. Code Civ. Proc., 1877, § 499. So in Colorado. Fitzgerald v.

under the California Code of Civil Procedure;⁷⁴ for example, the nonjoinder of a copartner as plaintiff which is not apparent upon the face of the complaint can only be taken by answer. And if not thus interposed, it is waived.⁷⁵ It cannot be raised by demurrer to the evidence,⁷⁶ nor by objection to the introduction of testimony.⁷⁷ Demurrer for nonjoinder of state in action against town commissioners will be sustained.⁷⁸ So also for nonjoinder of corporation in suit against directors for embezzlement of its assets.⁷⁹ If the corporation is not made a defendant to a creditor's bill to collect unpaid subscriptions, and the objection is not set up by demurrer or answer, it is waived.⁸⁰

§ 275. **The same—Objection, how and when taken.**—Although a demurrer to the answer reaches back to the complaint, a defect of parties cannot be taken advantage of in that way. A demurrer to the complaint must be filed.⁸¹ An allegation in an answer that the debt sued for, if due at all, is due to plaintiff and another as partners, cannot be treated as a demurrer.⁸² The objection to a defect of parties in the complaint, if apparent upon its face, should be taken advantage of by demurrer, or it must be deemed to have been waived at the trial.⁸³ Also, an answer on the merits waives the question of misjoinder, though the same has been raised by demurrer and overruled, and is again pleaded in the answer.⁸⁴ The court may sustain defendant's objection to the introduction of testimony upon a certain point, though it previously overruled

Burke, 14 Colo. 559, 23 Pac. 993. By demurrer or motion, in South Dakota. Sykes v. First Nat. Bank, 2 S. Dak. 242, 49 N. W. 1058.

⁷⁴ Cal. Code Civ. Proc., § 434; Rowe v. Bacigalluppi, 21 Cal. 633; Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. 673; Hosley v. Black, 28 N. Y. 438, 26 How. Pr. 97; Creed v. Hartmann, 29 N. Y. 591, 86 Am. Dec. 341; Lee v. Wilkes, 27 How. Pr. 336, 19 Abb. Pr. 355.

⁷⁵ Conklin v. Barton, 43 Barb. 435.

⁷⁶ Groenmiller v. Kaub, 67 Kan. 844, 73 Pac. 100.

⁷⁷ Dickerson v. City of Spokane, 26 Wash. 292, 66 Pac. 381.

⁷⁸ Plumbtree v. Dratt, 41 Barb. 333.

⁷⁹ Gardiner v. Pollard, 10 Bosw. 674.

⁸⁰ Henderson v. Turngren, 9 Utah, 432, 35 Pac. 495.

⁸¹ McEwen v. Hussey, 23 Ind. 395.

⁸² Andrews v. Mokelumne Hill Co., 7 Cal. 330.

⁸³ Dunn v. Tozer, 10 Cal. 170; Burroughs v. Lott, 19 Cal. 125; Barber v. Reynolds, 33 Cal. 497; Robinson v. Smith, 3 Paige, 222, 24 Am. Dec. 212; Higgins v. Freeman, 2 Duer, 650; Dillaye v. Parks, 31 Barb. 132; Wright v. Storrs, 6 Bosw. 600; Palmer v. Davis, 28 N. Y. 242; Tremper v. Conklin, 44 Barb. 456; Soeding v. Bartlett, 35 Mo. 90.

⁸⁴ Diamond Rubber Co. v. Harryman, 41 Colo. 415, 92 Pac. 922, 15 L. R. A. (N. S.) 775; Sams Automatic Car Coupler Co. v. League, 25 Colo. 129, 54 Pac. 642.

a demurrer upon the same point of law.⁸⁵ Thus in an action for the distribution of a fund by a trustee, the absence of necessary parties plaintiff, though demurrable at the time, is a defect cured by failure to respond.⁸⁶

§ 276. **The same—Statement.**—A demurrer under this subdivision following the words of the code, that there is a defect of parties defendant, is insufficient for not specifying the particular defect.⁸⁷ It must show who are the proper parties from the facts stated in the bill; not indeed by name, for that might be impossible; but in such a manner as to point out to the plaintiff the objection to his bill, and to enable him to amend by making proper parties.⁸⁸

§ 277. **Misjoinder of executor.**—The executor of an indorser of a promissory note, who as such executor is sued together with the maker, cannot demur to the complaint in such action for a misjoinder of defendants, if the complaint states facts sufficient to constitute a cause of action against him in his representative character.⁸⁹

§ 278. **Misjoinder—Form of demurrer.**—A demurrer on the ground "that the complaint does not state facts sufficient to constitute a cause of action,"⁹⁰ and which then specifies that the complaint shows no joint cause of action in the plaintiff, and that it prays for a judgment in favor of three plaintiffs for an injury done to one, is a good demurrer for misjoinder of parties.⁹¹

§ 279. **Ground for demurrer.**—A misjoinder of parties plaintiff is a ground for demurrer. It is not a ground for nonsuiting such plaintiffs as are entitled to recover.⁹² Misjoinder of parties plaintiff or defendant is not ground for demurrer under the code of Oklahoma.⁹³ And misjoinder of parties plaintiff is not ground

⁸⁵ O'Day v. Amtaum, 47 Wash. 684, 92 Pac. 421, 15 L. R. A. (N. S.) 484, Wash. Bal. Codes, § 4911.

⁸⁶ General Mutual Ins. Co. v. Benson, 5 Duer, 168.

⁸⁷ Skinner v. Stuart, 13 Abb. Pr. 442.

⁸⁸ Story's Eq. Pl. 501, § 543; Dias v. Bouchaud, 10 Paige, 445; Robinson v. Smith, 3 Paige, 222; 24 Am. Dec. 212.

⁸⁹ Churchill v. Trapp, 3 Abb. Pr. 306.

⁹⁰ Mann v. Marsh, 35 Barb. 68, 21 How. Pr. 372; Walrath v. Handy, 24 How. Pr. 353.

⁹¹ Summers v. Farish, 10 Cal. 347; Cohen v. Ottenheimer, 13 Or. 220, 10 Pac. 20.

⁹² Rowe v. Bacigalluppi, 21 Cal. 633; White v. Delschneider, 1 Or. 254; Learned v. Castle (Cal.), 4 Pac. 191, 3 West Coast Rep. 154.

⁹³ Stiles v. City of Guthrie, 3 Okla. 26, 41 Pac. 383.

for demurrer in Kansas.⁹⁴ The misjoinder of husband and wife must be taken advantage of on demurrer.⁹⁵

§ 280. **Too many plaintiffs.**—The ground of demurrer allowed by the code, “that there is a defect of parties plaintiff or defendant,” does not reach a case where there are too many plaintiffs or too many defendants, but only cases where parties are omitted. It is the same as nonjoinder at law, and the omission of a necessary party in equity.⁹⁶ Where too many parties are brought in, a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action, in favor of or against the improper parties, would be the proper remedy.⁹⁷ So held in the case of a misjoinder of defendants.⁹⁸ So held in case of a misjoinder of plaintiffs.⁹⁹ By the practice in California it is well settled that the objection that too many parties are joined as plaintiffs must be taken advantage of by demurrer, if it appear on the face of the complaint, and by answer, if it does not so appear; otherwise the objection is waived.¹⁰⁰ Denial does not raise issue of misjoinder of plaintiffs. Where two are joined as plaintiffs in an action for the recovery of possession of land, a denial in the answer that the plaintiffs were in possession of the land does not present the issue of a misjoinder of either of the plaintiffs.¹⁰¹ Nor can the question of a misjoinder of the parties be raised under a demurrer interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action.¹⁰² Where a co-defendant claimed that he was an unnecessary party to a suit, he should have demurred to the petition, and could not, in the course of the trial, demand that his name be stricken out.¹⁰³ Where nothing appears on the face of the complaint to indicate a misjoinder of defend-

⁹⁴ *Atchison etc. R. R. Co. v. Huitt*, 1 Kan. App. 788, 41 Pac. 1051.

⁹⁵ *Tissot v. Throckmorton*, 6 Cal. 471; *Dunderdale v. Grymes*, 16 How. Pr. 195; *Avogadro v. Bull*, 4 E. D. Smith, 384; *Bartow v. Draper*, 5 Duer, 130.

⁹⁶ *Palmer v. Davis*, 28 N. Y. 242; *Kolls v. De Leyer*, 17 Abb. Pr. 312, 41 Barb. 208, 26 How. Pr. 468; *Dean v. English*, 18 B. Mon. 132; *Gilman v. Rives*, 10 Pet. 298, 9 L. Ed. 432.

⁹⁷ *Cohen v. Ottenheimer*, 13 Or. 220, 10 Pac. 20.

⁹⁸ *New York etc. R. R. Co. v. Schuyler*, 7 Abb. Pr. 41; *Manning v.*

State of Nicaragua etc. Co., 14 How. Pr. 517.

⁹⁹ *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. 339, followed by *Gregory v. Oaksmith*, 12 How. Pr. 134; *People v. Mayor of New York*, 28 Barb. 240, 8 Abb. Pr. 7. But the contrary to the general proposition of this rule was held in *Leavitt v. Fisher*, 4 Duer, 1, and *Walrath v. Handy*, 24 How. Pr. 353.

¹⁰⁰ *Gillam v. Sigman*, 29 Cal. 637.

¹⁰¹ *Id.*

¹⁰² *Tennant v. Pfister*, 51 Cal. 511.

¹⁰³ *Soeding v. Bartlett*, 35 Mo. 90.

ants a demurrer does not lie for such cause.¹⁰⁴ Where plaintiffs offer to strike out such parties demurred to, and defendant successfully resists, such action on the part of defendants is a waiver of misjoinder.¹⁰⁵

§ 281. **Actions improperly united.**—At common law, legal and equitable causes of action could not be joined. It is otherwise in California and all the Pacific states and territories, as well as in New York, Ohio, Iowa, and other states which have adopted codes of procedure. Claims to recover real or personal property may be joined with action for damages for withholding thereof; claims against a trustee legal or equitable may be joined, and any claims arising out of the same transactions connected with the same subject-matter may be joined.¹⁰⁶ The causes of action should be separately stated.¹⁰⁷

§ 282. **Actions not separately stated.**—It seems that in many of the states a demurrer does not lie to a complaint under this subdivision, for the defect of not separately stating two or more causes of action, they being such as might be united in one complaint if properly stated. In New York, the remedy in such case is by motion.¹⁰⁸ Where two causes of action are not separately stated, the objection cannot be raised by a demurrer upon the ground that several causes of action are improperly united, but the remedy is by a motion to make the pleading more definite and certain by separating and distinctly stating the different causes of action.¹⁰⁹

§ 283. **The same—Conversion.**—Where the complaint alleged that defendant had become possessed of a chattel, the property of plaintiff, and wrongfully converted it to his (defendant's) use,

¹⁰⁴ *Pierson v. Fuhrmann*, 1 Colo. App. 187, 27 Pac. 1615. And see *Preshaw v. Dee*, 6 Utah, 360, 23 Pac. 763.

¹⁰⁵ *Summers v. Farish*, 10 Cal. 347.

¹⁰⁶ See Cal. Code Civ. Proc., §§ 307, 427, as amended 1907.

¹⁰⁷ *Boles v. Cohen*, 15 Cal. 150; *Natoma Water etc. Co. v. Clarkin*, 14 Cal. 547.

¹⁰⁸ See the following authorities: *Badger v. Benedict*, 4 Abb. Pr. 176, 1 Hilt. 415; *Lattin v. McCarty*, 17 How. Pr. 239; *Fickett v. Brice*, 22 How. Pr. P. P. F. Vol. I—13

195; *Harsen v. Bayaud*, 5 Duer, 656; *Cheney v. Fisk*, 22 How. Pr. 236; *State v. Davis*, 35 Mo. 406; *Township of Hartford v. Bennett*, 10 Ohio St. 441. But that a demurrer may be interposed for this cause in California, see *Buckingham v. Waters*, 14 Cal. 146; *Early v. Mannix*, 15 Cal. 150. But see, *contra*, *Bernero v. South Boston etc. Ins. Cos.*, 65 Cal. 386, 4 Pac. 382.

¹⁰⁹ *Fraser v. Oakdale Lumber Co.*, 73 Cal. 187, 190, 14 Pac. 829; *City Carpet etc. Works v. Jones*, 102 Cal. 506, 38

and then demanded damages for such taking and detention, and a restitution of the chattel, it was held demurrable for improper joinder of causes of action.¹¹⁰ The objection must be specially assigned as the cause of demurrer.¹¹¹ In an action to recover damages for the conversion of certain personal property, an objection to the complaint that it does not describe the property alleged to have been converted with sufficient particularity must be taken by special demurrer.¹¹²

§ 284. The same—When demurrer lies.—Demurrer may also be interposed when it appears on the face of the complaint “that several causes of action have been improperly united.” It is one of the leading and distinguishing principles of our statute that litigation must not be conducted by piecemeal, and whenever the differences between the parties arise out of—1. The same transaction; 2. Out of many transactions of like character; 3. When but one kind of relief is prayed for; so that one writ will afford the remedy, a demurrer will not be sustained under this subdivision. By one kind of relief is meant ultimate relief. A remedy at law and equitable relief may be asked for in the same complaint. Thus, A. may sue B. for trespass, and in the same complaint show that the acts of trespass are irreparable, and ask for an injunction.¹¹³ The writ of injunction is not in such a case asked for as the ultimate writ in the case, nor for the reason that it will afford the whole of the remedy, but as a protection to the subject-matter of the action pending the litigation. So allegations of fraud in support of the cause of action, and not as constituting a separate cause, do not make improper joinder of actions.¹¹⁴ If, in fact, the complaint contains but a single cause of action, although a part of the facts constituting it are set forth, some in one count, as constituting one cause of action, and some in another, as constituting a separate cause of action, the defendant cannot

Pac. 841; *Jacobs v. Lorenz*, 98 Cal. 332, 33 Pac. 119. And that it formerly could in New York, see *Acome v. American Min. Co.*, 11 How. Pr. 27; *Strauss v. Parker*, 9 How. Pr. 342; *Van Namee v. People*, 9 How. Pr. 198.

¹¹⁰ *Maxwell v. Farnam*, 7 How. Pr. 236.

¹¹¹ *Washington v. Eames*, 6 Allen, 417.

¹¹² *Kelly v. Murphy*, 70 Cal. 560, 12 Pac. 467.

¹¹³ *Gates v. Kieff*, 7 Cal. 124.

¹¹⁴ *Campbell v. Wright*, 21 How. Pr. 9; *Meyer v. Van Collem*, 7 Abb. Pr. 222, 28 Barb. 230. As to manner of objection to misjoinder of cause of action, see *Smith v. Orser*, 43 Barb. 187; *Malone v. Stillwell*, 15 Abb. Pr. 421.

successfully demur on the ground that the causes of action are improperly united.¹¹⁵

§ 285. **The same—Continued.**—Where it appears from the face of the complaint that there is a misjoinder of causes of action, the objection must be taken by demurrer, and cannot be raised for the first time on appeal.¹¹⁶ Such misjoinder cannot be remedied by a motion to strike out part of the pleading.¹¹⁷ A general demurrer to a whole complaint which contains two counts or two causes of action is properly sustained, where neither of the counts states a cause of action, and it is unnecessary that the demurrer in such case should refer to either of the counts separately.¹¹⁸ A cause of action for costs incurred in having to bring suit against the defendant for specific performance of an agreement to reconvey certain premises, a cause of action based upon alleged fraud, malice, and oppression of the defendant, and a cause of action arising from the breach of the defendant's written covenant of warranty of property conveyed to the plaintiff, cannot be united. And a complaint which unites and mingles together such causes of action is demurrable, on the ground that several causes of action are improperly united.¹¹⁹ But in a suit in equity to set aside a money judgment, the complaint stated a variety of circumstances differing in their nature, but connected with and tending to establish the alleged fraud, and it was held that the complaint was not demurrable for a misjoinder of causes of action.¹²⁰

§ 286. **The same—Waiver of objections.**—Objections on the ground that several causes of action have been improperly united, as well as on the ground of misjoinder of parties, must be taken by demurrer or otherwise in the trial court, or they are to be deemed waived. And this rule applies as well to actions for forcible entry and detainer as to other civil actions.¹²¹ A de-

¹¹⁵ *Hillman v. Hillman*, 14 How. Pr. 456.

¹¹⁶ *Roberts v. Eldred*, 73 Cal. 394, 15 Pac. 16; *Keys v. Morrison*, 3 Colo. App. 441, 34 Pac. 259; *Moore v. Vickers*, 3 Colo. App. 443, 34 Pac. 257; *Brahoney v. Denver etc. Railroad Co.*, 14 Colo. 27, 23 Pac. 172.

¹¹⁷ *Eversdon v. Mayhew*, 85 Cal 1, 21 Pac. 431, 24 Pac. 382.

¹¹⁸ *Churchill v. Pacific Imp. Co.*, 96 Cal. 490, 31 Pac. 560.

¹¹⁹ *Cosgrove v. Fisk*, 90 Cal. 75, 27 Pac. 56.

¹²⁰ *Raynor v. Mintzer*, 67 Cal. 159, 7 Pac. 431.

¹²¹ *Farncomb v. Stern*, 18 Colo. 279, 32 Pac. 612.

murrer on the ground of misjoinder of causes of action is waived by pleading over.¹²² But usually, under the statutes, an answer may be filed with a demurrer without waiving the demurrer.¹²³ Error in overruling a demurrer for misjoinder of causes of action is immaterial if no injury resulted therefrom.¹²⁴ Where two causes of action are improperly joined, failure of the court to pass upon a demurrer on that ground is not cured by sustaining a demurrer to one of the paragraphs for want of sufficient facts to state a cause of action.¹²⁵

§ 287. **Fraudulent conveyance.**—The plaintiff having a claim against A., brought suit against him to enforce the claim, and, in the same action, sought to set aside a conveyance of real estate from A. to B., on the ground that it was executed in fraud of the creditors of A., and made B. a party to the suit; it was held, there having been no objection taken either by demurrer or answer, on the ground of an improper joinder of several causes of action, that the plaintiff was entitled to contest the validity of the conveyance from A. to B.¹²⁶ The demurrer must be entirely sustained, or fail to the whole extent to which it is applied.¹²⁷

§ 287a. **Mandamus and injunction.**—Although the complaint in an action may be an attempt to improperly join a cause of action for *mandamus* and one for injunction, yet a demurrer for misjoinder will not lie, provided the complaint, which is not separated into separate counts or causes of action, but is a continuous statement of facts, states a good cause of action for the injunction and shows no ground for relief by *mandamus*.¹²⁸

§ 288. **Husband and wife.**—There is no misjoinder of actions in an action against husband and wife to foreclose a mortgage executed by husband and wife to secure a note given by the husband alone, where the prayer of the complaint was for judgment against the husband, and a decree against the husband and wife for a sale of premises.¹²⁹

¹²² Schoelkopf v. Leonard, 8 Colo. 159, 6 Pac. 209.

¹²³ State v. Edwards, 33 Utah, 243, 93 Pac. 720.

¹²⁴ Angell v. Hopkins, 79 Cal. 181, 21 Pac. 729.

¹²⁵ Penter v. Staight, 1 Wash. 365, 25 Pac. 469.

¹²⁶ Macondray v. Simmons, 1 Cal. 393.

¹²⁷ Peabody v. Mutual Ins. Co., 20 Barb. 342; People v. Mayor of New York, 17 How. Pr. 57; Wait v. Ferguson, 14 Abb. Pr. 379; Cook v. Chase, 3 Duer, 643.

¹²⁸ Times Publishing Co. v. Everett, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695.

¹²⁹ Rollins v. Forbes, 10 Cal. 299.

§ 289. **Injuries to person and property.**—Injuries to person, resulting from injuries to property, if joined with the latter, is not a misjoinder of causes of action in New York.¹³⁰ But the practice differs in California, where such would be a misjoinder and would be demurrable. Especially is this the case unless it arises out of the same transaction.¹³¹ Damages for a personal tort cannot be united with claim for equitable relief.¹³² So a claim for possession of real property and damages for its detention cannot be united with a claim for consequential damages.¹³³ So a claim for damages resulting from a *trespass quare clausum fregit* cannot be joined with ejectment. So where several matters are united against one defendant, perfectly distinct and unconnected, or where relief is demanded against several defendants of matters of a distinct and independent nature.¹³⁴

§ 290. **Joint demurrer.**—If the complaint state a cause of action against one or some of several defendants, a joint demurrer cannot be sustained.¹³⁵ But where the complaint disclosed a separate cause of action against each defendant, a joint demurrer for misjoinder was sustained.¹³⁶

§ 291. **Misjoinder — Objections when taken.**—Objections to the misjoinder of causes of action should be taken by demurrer or answer, or they are deemed waived.¹³⁷ Misjoinder of actions cannot be taken advantage of on general demurrer.¹³⁸ A misjoinder of causes of action in a complaint cannot be taken advantage of, unless especially assigned by a demurrer.¹³⁹ Objections to a complaint which are grounds of special demurrer are waived where the demurrer is general and no special grounds are specified therein.¹⁴⁰ Where a plaintiff brought eleven *qui tam*

¹³⁰ Grogan v. Lindeman, 1 Code Rep. (N. S.) 287.

¹³¹ McCarty v. Fremont, 23 Cal. 197.

¹³² Mayo v. Madden, 4 Cal. 27.

¹³³ Bowles v. Sacramento Turnpike Co., 5 Cal. 224.

¹³⁴ Wilson v. Castro, 31 Cal. 420.

¹³⁵ People v. Mayor of New York, 28 Barb. 240; Eldridge v. Bell, 12 How. Pr. 549; Phillips v. Hagadon, 12 How. Pr. 17; Woodbury v. Sack-rider, 2 Abb. Pr. 402; Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; Rogers v. Schulenburg, 111 Cal. 281, 43 Pac. 899.

¹³⁶ Hess v. Buffalo etc. R. R. Co., 29 Barb. 391.

¹³⁷ Jacks v. Cooke, 6 Cal. 164; Marius v. Bicknell, 10 Cal. 217; Cal. Code Civ. Proc., § 434; Jones v. Hughes, 16 Wis. 683; Barlow v. Leavitt, 12 Cush. 483; Youngs v. Seely, 12 How. Pr. 395; White v. Delschneider, 1 Or. 254.

¹³⁸ Ruhling v. Hackett, 1 Nev. 360.

¹³⁹ Haverstick v. Trudel, 51 Cal. 431.

¹⁴⁰ Daggett v. Gray, 110 Cal. 169, 42 Pac. 568.

actions for penalties against the same defendant, who demurred especially to each declaration, and the plaintiff joined in demurrer, a motion that one demurrer be argued, and that proceedings in the other cases be stayed to abide the event of the one argued, was denied. A party bringing a multiplicity of suits must take the responsibility of meeting them in the usual way.¹⁴¹ If two causes of action have been improperly joined without properly stating them, the objection must be taken by demurrer, or it is considered waived.¹⁴² Where distinct causes of action, upon a charge of slander, are not separately stated, or not stated with sufficient certainty, these defects are waived by a general demurrer.¹⁴³ Where there is a misjoinder of causes of action, any defendant may demur; but where there is a joinder of improper parties as defendants, the defendant or defendants improperly joined alone can demur.¹⁴⁴ Where the parties joined as plaintiffs are all interested in the principal question raised in the bill, and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will not be sustained.¹⁴⁵

§ 292. **Penalties.**—The plaintiff cannot unite in his complaint two or more causes of action for penalties incurred by a toll-gatherer for demanding and receiving too much toll, even if they are separately stated.¹⁴⁶

§ 293. **Recognizance.**—Suit was brought on a recognizance given before a justice for the appearance of defendant S. to answer a criminal charge. The complaint, after setting out the cause of action on the recognizance, avers that S., to secure his sureties, executed a deed of trust to T. of certain warrants and money. This deed provides that in case the recognizance be forfeited and the sureties become liable thereon, the trustee is to apply the property to the payment, so far as it will go, of the recognizance. The complaint asks to have this property so applied. It was held that a demurrer for misjoinder of causes of action lies; that the trust-deed has nothing to do with the liability of the sureties.¹⁴⁷

§ 294. **Sheriff, action against.**—Where in an action against a sheriff the plaintiff's declaration contained one count in case

¹⁴¹ *Ferrett v. Atwill*, 1 Blatchf. 151, Fed. Cas. No. 4747.

¹⁴² *Fuhn v. Weber*, 38 Cal. 636.

¹⁴³ *Clugston v. Garretson*, 103 Cal. 441, 37 Pac. 469.

¹⁴⁴ *Ashby v. Winston*, 26 Mo. 210.

¹⁴⁵ *People v. Morrill*, 26 Cal. 360; *Garner v. Wright*, 28 How. Pr. 92.

¹⁴⁶ *Brown v. Rice*, 51 Cal. 489.

¹⁴⁷ *People v. Skidmore*, 17 Cal. 260.

against him as sheriff, for so negligently executing the writ as to cause plaintiff to lose his debt, and another in trover and conversion, against him individually for the value of the goods, such joinder is not error, for they are both actions on the case, the plea and judgment being the same in each; and the demurrer of the defendant to the declaration, on the ground of misjoinder, was properly overruled.¹⁴⁸ But where a complaint against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, the complaint is demurrable.¹⁴⁹

§ 295. **Trespass.**—In an action for trespass, where the value of the property and damages were claimed, it was held that demurrer would not lie for misjoinder of actions.¹⁵⁰

§ 296. **Insufficient facts.**—Where the action was premature, defendant may demur for insufficient facts.¹⁵¹ The court will not presume, in support of the demurrer, that the debt was not due when action was commenced.¹⁵² Greater latitude of presumption may be indulged to sustain a complaint when the objection that it does not state a cause of action is taken for the first time at the trial, after an issue of fact has been taken upon it by answer, than when the same objection is taken by demurrer.¹⁵³ In an action on a bond dated May 10, 1853, conditioned for the payment of a sum "in two years from the first day of April last, with annual interest," a demurrer, on the ground that no cause of action was stated, was tried in June, 1854. It was held that as interest was due before the time of trial, the plaintiff was entitled to judgment upon the demurrer. A demurrer is not the mode under the New York code, of raising the objection that the cause of action had not accrued when the action was commenced.¹⁵⁴

§ 297. **The same—Attachment.**—A writ contained a command to attach the property of the defendant, and for want thereof to take the body; *quare*, whether demurrer is a proper mode of

¹⁴⁸ Patterson v. Anderson, 40 Pa. St. 359, 80 Am. Dec. 579.

¹⁴⁹ Ghirardelli v. Bourland, 32 Cal. 585.

¹⁵⁰ Tendersen v. Marshall, 3 Cal. 440. See Dunton v. Niles, 95 Cal. 494, 30 Pac. 762.

¹⁵¹ Harvey v. Chilton, 11 Cal. 114;

Hicks v. Branton, 21 Ark. 186. See Selz v. Tucker, 10 Utah, 132, 37 Pac. 249.

¹⁵² Maynard v. Talcott, 11 Barb. 569.

¹⁵³ Johnson v. Burnside, 3 S. Dak. 230, 52 N. W. 1057.

¹⁵⁴ Smith v. Holmes, 19 N. Y. 271.

taking advantage of the error.¹⁵⁵ Where the defendant, as sheriff, collects money on an attachment more than sufficient to satisfy the attaching creditor, and after the expiration of his term of office another attaching creditor attaches the surplus and seeks to make the ex-sheriff liable therefor on his official bond, it was held that the demurrer to the complaint was properly sustained, as there is no relation between the defendant and plaintiff to render the defendant officially liable.¹⁵⁶

§ 298. **Bill of exchange.**—It seems that in an action against the drawer and acceptor of a bill the complaint cannot be held bad on a joint demurrer by both defendants, put upon the ground that it does not state facts sufficient to constitute a cause of action, if it states a cause of action against either defendant.¹⁵⁷ An omission to aver delivery in suit on a bond must be taken advantage of on demurrer.¹⁵⁸

§ 299. **Cloud on title.**—The objection that the complaint does not present a case for the exercise of the court to remove a cloud on title may be demurred to, under this cause of demurrer.¹⁵⁹

§ 300. **Date illegal.**—Where the day of making the contract is immaterial, that the day laid in the declaration would be illegal is not a ground of demurrer.¹⁶⁰

§ 301. **Insufficient facts.**—It is not good ground for demurrer that an amended petition departs from the cause of action set out in the original petition.¹⁶¹ Both at common law and under the code a departure in pleading can only be taken advantage of before trial by demurrer or otherwise.¹⁶²

§ 302. **The same—Defective complaint.**—If a complaint, though defective, states facts sufficient to constitute a cause of action, the

¹⁵⁵ *Clement v. Clement*, 18 N. H. 611.

¹⁵⁶ *Graham v. Endicott*, 7 Cal. 144.

¹⁵⁷ *Woodbury v. Sackrider*, 2 Abb. Pr. 402. Compare *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. 339.

¹⁵⁸ *Garcia v. Satrustegui*, 4 Cal. 244.

¹⁵⁹ *Hotchkiss v. Elting*, 36 Barb. 39. See *Irvine v. Davy*, 88 Cal. 495, 26 Pac. 506.

¹⁶⁰ *Amory v. McGregor*, 12 Johns. 287.

¹⁶¹ *Hord v. Chandler*, 13 B. Mo. (Ky.) 403.

¹⁶² *Kannauh v. Quartette Mining Co.*, 16 Colo. 341, 27 Pac. 245.

objection to it should be taken by special demurrer,¹⁶⁵ as the want of profert of letters of administration in New York.¹⁶⁶ The complaint must be construed most strongly against the plaintiff.¹⁶⁷ So for a duplicity in the allegations of the complaint.¹⁶⁸ A demurrer for duplicity must point it out specifically.¹⁶⁹ In Alabama, a demurrer will not lie for this ground.¹⁷⁰ Nor will it lie for a variance between judgment and execution, in an action for an escape.¹⁷¹ In New York, a demurrer on the ground of want of facts can only be sustained where the complaint presents defects so substantial in their nature, and so fatal in their character, as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action whatever.¹⁷² For a substantial and radical defect in the complaint, the proper ground for demurrer is that the complaint does not state facts sufficient to constitute a cause of action.¹⁷³ Under section 60 of the Colorado Civil Code the objection that a complaint does not state facts sufficient to constitute a cause of action may be raised by demurrer or motion at any stage of the proceedings.¹⁷⁴

§ 303. **Defect of parties.**—A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action does not raise the question of a defect of parties defendant.¹⁷⁵ When it appears upon the face of the complaint that the presence of other parties is necessary to a complete determination of the controversy, a demurrer will lie for a defect of parties plaintiff or defendant.¹⁷⁶ In a Wisconsin case the lower court having sustained such a demurrer, *pro forma*, with a view to a more speedy decision by the supreme court of the question involved, and the question of a defect of parties having been discussed by counsel

¹⁶⁵ Greenfield v. Steamer Gunnell, 6 Cal. 67; Lafleur v. Douglass, 1 Wash. T. 185; Union Ice Co. v. Doyle, 6 Cal. App. 284, 92 Pac. 112; Warner v. Warner, 6 Cal. App. 361, 92 Pac. 191.

¹⁶⁶ Allison v. Wilkin, 1 Wend. 153.

¹⁶⁷ Fishburn v. Londershausen, 50 Or. 363, 92 Pac. 1060, 14 L. R. A. (N. S.) 1234.

¹⁶⁸ Bradner v. Demick, 20 Johns. 404; Winterson v. Eighth Ave. R. R. Co., 2 Hilt. 389; Wolfe v. Luyster, 1 Hall, 146 (161).

¹⁶⁹ Currie v. Henry, 2 Johns. 433. See, also, Gooding v. McAlister, 9 How. Pr. 123.

¹⁷⁰ Wynne v. Whisenant, 37 Ala. 46.

¹⁷¹ Dakin v. Hudson, 6 Cow. 221.

¹⁷² Richards v. Edick, 17 Barb. 260; Graham v. Camman, 5 Duer, 697; De Witt v. Swift, 3 How. Pr. 280.

¹⁷³ White v. Brown, 14 How. Pr. 282; Haire v. Baker, 5 N. Y. 359; Spear v. Downing, 12 Abb. Pr. 437, S. C., 34 Barb. 523.

¹⁷⁴ Marriott v. Clise, 12 Colo. 561, 21 Pac. 909.

¹⁷⁵ Tennant v. Pfeister, 51 Cal. 511.

¹⁷⁶ Cohen v. Ottenheimer, 13 Or. 220, 10 Pac. 20.

on both sides, as though it were raised by the demurrer, the order sustaining the demurrer was reversed, without prejudice to the right of the respondent to object to the want of proper parties.¹⁷⁷

§ 304. **Definition of terms.**—The words, “the complaint does not state a sufficient cause of action,” held equivalent to the language of the code.¹⁷⁸ But when certain deficiencies are specified, all other grounds for objection are excluded.¹⁷⁹ A complaint for money had and received, which fails to allege a demand, is bad on demurrer.¹⁸⁰

§ 305. **Insufficient facts—Demurrer, how taken.**—In the sixth subdivision, a demurrer to a complaint will be sustained “when the complaint does not state facts sufficient to constitute a cause of action.” It applies only to such defects as would render the count bad on general demurrer at law, or bad for want of equity in chancery. The complaint, therefore, to be overthrown by such a demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. Where the demurrer admits facts enough to constitute a cause of action, the complaint will be sustained; and if the defendant required a greater degree of certainty than is found in the complaint, he must seek his relief by a motion that the pleading be made more certain and definite.¹⁸¹ Where a complaint fails to state a cause of action, and the defendant at the trial objects on that ground to the introduction of any evidence, such objection is equivalent to a general demurrer, and a judgment for the plaintiff must be reversed.¹⁸² Demurrer under this subdivision may be taken at any stage of the case.¹⁸³ Nor is the

¹⁷⁷ *Burhop v. City of Milwaukee*, 18 Wis. 431.

¹⁷⁸ *De Witt v. Swift*, 3 How. Pr. 280.

¹⁷⁹ *Nellis v. De Forest*, 16 Barb. 61.

¹⁸⁰ *Reina v. Cross*, 6 Cal. 31.

¹⁸¹ *Summers v. Farish*, 10 Cal. 347; *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542; *Richards v. Beavis*, 28 Eng. L. & Eq. 157; *People v. Mayor of New York*, 8 Abb. Pr. 7; *Sinclair v. Fitch*, 3 E. D. Smith, 677; *Thomson v. O'Sullivan*, 6 Allen, 303.

¹⁸² *Hays v. Lewis*, 17 Wis. 210.

¹⁸³ *Gould v. Glass*, 19 Barb. 186; *Higgins v. Freeman*, 2 Duer, 650; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 464; *Hays v. Lewis*, 17 Wis. 210; *People v. Booth*, 32 N. Y. 397; *Stevenson v. Lord*, 15 Colo. 131, 25 Pac. 313; *Farris v. Henderson*, 1 Okla. 384, 33 Pac. 380; *Johnson v. Burnside*, 3 S. Dak. 230, 52 N. W. 1057; *Lyen v. Bond*, 3 Wash. T. 407, 19 Pac. 35.

failure to demur upon this ground a waiver of the objection.¹⁸⁴ But under this subdivision defendant cannot bring objections to the form of the action;¹⁸⁵ nor that the court has no jurisdiction;¹⁸⁶ nor that there is an improper joinder of parties;¹⁸⁷ nor that the plaintiff has no legal capacity to sue;¹⁸⁸ nor that the right to sue is in a third person not a party to the action;¹⁸⁹ nor that complaint does not show authority to sue.¹⁹⁰ The practice of pleading to the merits, and then raising at the trial an objection in the nature of a demurrer to the sufficiency of the pleading, is one which the courts should discourage.¹⁹¹ The objection that money sued for, if due at all, is due to plaintiff and another as partners, is not a demurrer.¹⁹² So, when the bill alleges a parol trust, a general demurrer will not lie.¹⁹³

§ 306. Uncertainty—Divorce.—An objection that a complaint for divorce, stating the existence of common property, is uncertain and defective in not stating the facts showing the property to be common, must be raised by demurrer, or it will be deemed waived.¹⁹⁴

§ 307. The same—Effect.—A demurrer on this subdivision puts in issue the validity of the entire complaint.¹⁹⁵ And if it specifies certain allegations deemed essential, it excludes all other grounds of objections than those which are particularly set forth.¹⁹⁶ And the statement that certain parts of the complaint are immaterial and redundant does not vitiate the demurrer.¹⁹⁷ But defendants cannot by demurrer refuse to grant a compensation which the demurrer admits the right of.¹⁹⁸

¹⁸⁴ Cal. Code Civ. Proc., § 434; *Andrews v. Lynch*, 27 Mo. 167; *Ludington v. Taft*, 10 Barb. 447.

¹⁸⁵ *Richards v. Edick*, 17 Barb. 260; *Graham v. Camman*, 5 Duer, 697; *Loomis v. Tift*, 16 Barb. 541.

¹⁸⁶ *Wilson v. Mayor of New York*, 6 Abb. Pr. 6, 15 How. Pr. 500, 4 E. D. Smith, 706, note.

¹⁸⁷ *Eldridge v. Bell*, 12 How. Pr. 547.

¹⁸⁸ *Viburt v. Frost*, 3 Abb. Pr. 120; *Hobart v. Frost*, 5 Duer, 672.

¹⁸⁹ *Myers v. Machado*, 6 Abb. Pr. 198. But see *Palmer v. Smedley*, 6 Abb. Pr. 205; *De Witt v. Chandler*, 11 Abb. Pr. 459.

¹⁹⁰ *Bank of Lowville v. Edwards*, 11

How. Pr. 216; *Bank of Havana v. Wickman*, 7 Abb. Pr. 134.

¹⁹¹ *Barton v. Gray*, 48 Mich. 166, 12 N. W. 30; *Bauman v. Bean*, 57 Mich. 1, 23 N. W. 451; *Jenkinson v. City of Vermilion*, 3 S. Dak. 238, 52 N. W. 1066.

¹⁹² *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330.

¹⁹³ *Peralta v. Castro*, 6 Cal. 354.

¹⁹⁴ *Gimmy v. Gimmy*, 22 Cal. 633.

¹⁹⁵ *White v. Brown*, 14 How. Pr. 282; *Spear v. Downing*, 12 Abb. Pr. 442, 34 Barb. 523.

¹⁹⁶ *Nellis v. De Forest*, 16 Barb. 61.

¹⁹⁷ *Smith v. Brown*, 6 How. Pr. 382.

¹⁹⁸ *Selkirk v. Board of Supervisors Sacramento Co.*, 3 Cal. 323.

§ 308. **The same—Laches.**—When the bill shows that the complainant, who seeks to enforce a judgment at law, is chargeable with laches, the defendant may take advantage of it by demurrer.¹⁹⁹

§ 309. **The same—Exhibits.**—Matters which are necessary to be alleged in a complaint, cannot be left out, and the defect supplied by reference to an exhibit attached to and made part of the complaint.²⁰⁰ An objection to a complaint that a specific allegation contained therein is contradicted by an exhibit to which reference is made cannot be taken advantage of by general demurrer.²⁰¹

§ 310. **Guaranty.**—A complaint alleging that the defendants sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a warranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same, and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty.²⁰²

§ 311. **Inferential statement.**—If a material fact is only stated inferentially in a complaint, and the pleading is not demurred to specially for this reason, it is good after judgment.²⁰³

§ 312. **Liens.**—An objection to a lien for want of dates may be made on demurrer or on a motion to strike out, but after pleading to the *scire facias*, it must be considered as waived.²⁰⁴

§ 313. **Performance.**—Where a complaint states a condition precedent, but fails to aver performance, defendant may demur.²⁰⁵ A complaint which does not allege performance of one of the essential conditions imposed upon the plaintiffs by the terms of the contract, fails to state a cause of action.²⁰⁶ So in case of a promissory note.²⁰⁷ A demurrer for the cause that complaint

¹⁹⁹ Maxwell v. Kennedy, 8 How. 210, 12 L. Ed. 1051.

²⁰⁰ City of Los Angeles v. Signoret, 50 Cal. 298.

²⁰¹ Blasingame v. Home Ins. Co., 75 Cal. 633, 17 Pac. 925.

²⁰² Dabovich v. Emeric, 7 Cal. 209.

²⁰³ Hill v. Haskin, 51 Cal. 175.

²⁰⁴ Howell v. City of Philadelphia, 38 Pa. St. 471.

²⁰⁵ Happe v. Stout, 2 Cal. 460.

²⁰⁶ Jones v. Perot, 19 Colo. 141, 34 Pac. 728.

²⁰⁷ Rogers v. Cody, 8 Cal. 324.

does not state facts sufficient to constitute a cause of action may be disregarded, if defendant choose to answer instead of standing on the demurrer.²⁰⁸

§ 314. **Presentation of claim.**—Where, in an action of foreclosure, the complaint fails to state the presentation to and rejection by the administrator of the claim against the estate, defendant may demur on the ground of insufficient facts.²⁰⁹

§ 315. **Quo warranto.**—In *quo warranto* for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp, and enjoy the office without a license; and also certain allegations as to the right of relator to the office; it was held that these allegations as to the relator's right cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office.²¹⁰

§ 316. **Res adjudicata.**—Demurrer will not lie to a bill on the ground of *res adjudicata*, unless it avers that everything in controversy, as the foundation of the suit, was in controversy in the former suit.²¹¹ The judgment of a court of competent jurisdiction upon a material matter put directly in issue by the pleading is *res adjudicata* as to that issue, and the parties are estopped by the judgment from litigating it again.²¹² A general demurrer does not raise the question whether a judgment pleaded as an estoppel does estop the defendants.²¹³

§ 317. **Securities.**—The objection that securities sued on are not promissory notes must be made on demurrer.²¹⁴

²⁰⁸ Levey v. Fargo, 1 Nev. 415. But see Cal. Code Civ. Proc., § 431.

²⁰⁹ Ellissen v. Halleck, 6 Cal. 386; Falkner v. Folsom, 6 Cal. 412; Hentsch v. Porter, 10 Cal. 558. These cases are overruled by Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140; and the correctness of the latter decision is doubted by the case of Ellis v. Polhemus, 27 Cal. 354. The case of Ellissen v. Halleck, 6 Cal. 393, is either

discussed or referred to in the following cases: Falkner v. Folsom's Exrs., 6 Cal. 412; Gates v. Kieff, 7 Cal. 124; Williamson v. Blattan, 9 Cal. 501; Willis v. Farley, 24 Cal. 498.

²¹⁰ People v. Abbott, 16 Cal. 358.

²¹¹ Moss v. Anglo-Egyptian Nav. Co., L. R., 1 Ch. 108; Smith v. Halifax Banking Co., 1 N. B. Eq. 17.

²¹² Jackson v. Lodge, 36 Cal. 28.

²¹³ Spanagel v. Reay, 47 Cal. 608.

²¹⁴ Powell v. Ross, 4 Cal. 197.

§ 318. **Services of physician.**—In a suit by a physician against a county on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless the demurrer distinctly presents the objection.²¹⁵

§ 319. **Specific relief.**—To entitle the plaintiff to subject the assets of an absent debtor to the payment of his claim, he must show that he is without a remedy at law, and if the bill discloses such remedy at law it will be dismissed upon demurrer.²¹⁶

§ 320. **Stamp on note.**—A demurrer will not lie to a complaint on a promissory note which fails to aver or show that the note was duly stamped.²¹⁷

§ 321. **Statement of grounds.**—The demurrer is sufficient without a specification of the reason why the facts stated are not sufficient.²¹⁸ It is sufficient under this subdivision to state that the complaint does not state facts sufficient to constitute a cause of action.²¹⁹

§ 322. **Statute of frauds.**—The statute of frauds may be taken advantage of on demurrer to a bill which on its face states a case covered by the statute.²²⁰ But where the contract declared upon is void if not in writing, the court will assume, for the purposes of the demurrer, that it is in writing, though not so alleged.²²¹

§ 323. **Statute of limitations.**—If it appear on the face of the complaint that the demand is barred by the statute of limitations, demurrer will be sustained. But the bar of the statute must clearly appear on the face of the complaint,²²² and the court cannot refer to the process, return of service, or other parts of the record not part of the pleadings, to ascertain when the action was

²¹⁵ *McDaniel v. Yuba County*, 14 Cal. 444.

²¹⁶ *Lupton v. Lupton*, 3 Cal. 120.

²¹⁷ *Hallock v. Jaudin*, 34 Cal. 167.

²¹⁸ *Kent v. Snyder*, 30 Cal. 666.

²¹⁹ *Haire v. Baker*, 5 N. Y. 357; *Paine v. Smith*, 2 Duer, 298; *Johnson v. Wetmore*, 12 Barb. 433.

²²⁰ *Randall v. Howard*, 2 Black, 585, 17 L. Ed. 269; *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46,

5 South 572; *Dicken v. McKinley*, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134.

²²¹ *Miles v. Thorne*, 38 Cal. 337, 99 Am. Dec. 384.

²²² *Smith v. Hall*, 19 Cal. 85; *Smith v. Richmond*, 19 Cal. 476; *Ord v. De La Guerra*, 18 Cal. 67; *Kraner v. Halsey*, 82 Cal. 209, 22 Pac. 1137; *Meyer v. Saul*, 82 Md. 459, 33 Atl. 539; *Fulton v. Northern Illinois College*, 158

commenced.²²³ The defense of laches appearing upon the face of a bill in equity, which fails to set forth facts excusing the delay, may be set up by demurrer, either general or special.²²⁴ If the complaint fails to show whether the contract was verbal or in writing, it will be presumed to be in writing for the purposes of the demurrer.²²⁵ It should be distinctly stated in the demurrer.²²⁶ It is a personal privilege which must be set up or be deemed waived.²²⁷ Under the California system the rule is the same in law and equity; and if it appear upon the face of the complaint that the action is barred, and no facts are alleged taking the demand from the operation of the statute, the complaint is defective, and demurrer lies.²²⁸ If the demand be in truth barred, but the fact does not appear upon the face of the complaint, the defense must be made by answer. Where a bill in equity states a case to which the act of limitations applies, without bringing it within some of the savings, the defendant may take advantage of the bar by demurrer.²²⁹ Where the statute creates an absolute bar by mere lapse of time without exception, the defense may be made by demurrer, if the necessary facts appear in the complaint.²³⁰ But the demurrer should be resorted to only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had.²³¹ By the practice in New York and Montana, it appears that the defense of the statute of limitations can only be taken by answer.²³² An allegation in a demurrer, "that it appears by the complaint that the cause of action is barred by the statute of

Ill. 333, 42 N. E. 138. See *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804.

²²³ *Columbia Sav. & Loan Assoc. v. Clause*, 13 Wyo. 166, 78 Pac. 708.

²²⁴ *Keerfoot v. Billings*, 160 Ill. 563, 43 N. E. 804. See, on this point, *Sands v. St. John*, 36 Barb. 628, 23 How. Pr. 140.

²²⁵ *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384.

²²⁶ *Brown v. Martin*, 25 Cal. 89; *Farwell v. Jackson*, 28 Cal. 106; *Trubody v. Trubody*, 137 Cal. 172, 69 Pac. 968.

²²⁷ *Grattan v. Wiggins*, 23 Cal. 16; *Motes v. Gila etc. Ry. Co.*, 8 Ariz. 50, 68 Pac. 532.

²²⁸ *Smith v. Richmond*, 19 Cal. 476; *Maxwell v. Kennedy*, 8 How. 210, 12 L. Ed. 1051; *Arkins v. Arkins*, 20 Colo. App. 123, 77 Pac. 256; *Chemung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226.

²²⁹ *Wisner v. Barnett*, 4 Wash. C. C. 631, Fed. Cas. No. 17914. Compare *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208; *Hawkins v. Donnerberg*, 40 Or. 97, 66 Pac. 691, 908.

²³⁰ *State v. Bird*, 22 Mo. 470.

²³¹ *McNair v. Lott*, 25 Mo. 182.

²³² New York Code, 1877, § 413; *Sands v. St. John*, 36 Barb. 628, 23 How. Pr. 140, Mont. Rev. Codes, § 6475; *Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211.

limitations," is sufficient in form to raise the question of law as to whether the alleged cause of action is barred by the statute,²³³ but generally the section of the code relied on should be stated.²³⁴

§ 324. **Statutory penalty.**—In an action to recover damage by the owner of a licensed ferry against a party alleged to have run a ferry within the limits prohibited by law it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran for other than his own personal use, or that of his family; and the omission of those allegations was fatal.²³⁵

§ 325. **Undertaking on attachment.**—In an action on an undertaking, executed to release property from attachment, the complaint should allege that the property attached was released upon the delivery of the undertaking.²³⁶ A failure to do so is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.²³⁷

§ 326. **Admissions by demurrer.**—In an action by the postmaster-general against a deputy postmaster and his sureties, on the bond executed by them, the sureties pleaded that plaintiff did not, as he was bound by law to do, call upon his deputy to settle his accounts, or cause suits to be brought against him for not so doing; nor did he give notice to the sureties of the defaults; but fraudulently, and in violation of his duty to the United States and to the sureties, neglected to bring such actions, and to give notice. It was held that the demurrer having admitted the fraud stated in the plea, the plaintiff could not recover.²³⁸

§ 327. **What it admits.**—Demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action admits the validity of the statute authorizing plaintiff to sue.²³⁹

²³³ *Brennan v. Lord*, 46 Cal. 7.

²³⁴ *Nelden-Judson Drug Co. v. Com. Nat. Bank*, 27 Utah, 59, 74 Pac. 195; *Trubody v. Trubody*, 137 Cal. 172, 69 Pac. 968.

²³⁵ *Hanson v. Webb*, 3 Cal. 237.

²³⁶ *Williamson v. Blattan*, 9 Cal. 500.

²³⁷ *Williamson v. Blattan*, 9 Cal. 500. See *Selz v. Tucker*, 10 Utah, 132, 37 Pac. 249.

²³⁸ *Postmaster-General v. Ustick*, 4 Wash. C. C. 347, Fed. Cas. No. 11315; *United States v. Sawyer*, 1 Gall. 86, Fed. Cas. No. 16227; *Greathouse v. Dunlap*, 3 McLean, 303, Fed. Cas. No. 5742; *McCue v. Corporation of Washington*, 3 Cranch C. C. 639, Fed. Cas. No. 8735.

²³⁹ *Litchfield v. McComber*, 42 Barb 288.

§ 328. **Written instrument.**—An objection to the pleading of a written instrument, by stating its legal effect, instead of setting forth its contents, can be taken only by demurrer.²⁴⁰

§ 329. **Foreclosure of mechanic's lien—Conclusion of law.**—An objection to the complaint in an action to foreclose a lien for materials furnished a contractor, on the ground that it states merely a conclusion of law as to the amount due and owing from the owner to the contractors, and that it contains no specific averment as to what was the contract price between them, or that there was any express agreement to pay anything, or what was the reasonable value of the work to be done, can only be raised by demurrer, and cannot be urged for the first time on appeal.²⁴¹

§ 330. **Trespass—Unavailing demurrer.**—Failure on the part of the owner of land upon which alleged trespass was committed, to comply with certain statutory requirements in connection with his land, conceding it to be a defense to an action for the trespass, cannot be taken advantage of by demurrer to a complaint in which no such fact is alleged.²⁴²

§ 331. **Action commenced in wrong county.**—That an action was commenced in the wrong county is not a ground of demurrer. The defendant's remedy, in such a case, lies in an application to the court, on cause exhibited, to change the place of trial to the proper county.²⁴³ Under Oregon procedure, when a defendant wishes to challenge the authority of a court to try an action in replevin in the county in which such action is brought, unless it was alleged in the complaint that the property was taken in such county, he should distinctly specify that objection in his demurrer, and thereby call the attention of the court to the point he asked to have decided.²⁴⁴

§ 332. **Ambiguity.**—This cause of demurrer may be interposed when the complaint is "ambiguous, unintelligible, or uncertain." Under this subdivision it is necessary for the pleader to point out

²⁴⁰ Kellogg v. Baker, 15 Abb. Pr. 286.

²⁴¹ Russ Lumber etc. Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747.

²⁴² Triscony v. Brandenstein, 66 Cal. 514, 6 Pac. 384.

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²⁴³ Wasson v. Hoffman, 4 Colo. App. 491, 36 Pac. 445.

²⁴⁴ McCarty v. Wintler, 17 Or. 393, 21 Pac. 195.

wherein the complaint is ambiguous, unintelligible, or uncertain, or it will be disregarded.²⁴⁵ The defendant is entitled to a distinct averment in the complaint of the facts which the plaintiff claims to exist, and if the averments are in the alternative, the complaint is ambiguous, even if either averment states a cause of action.²⁴⁶ Mere indefiniteness and uncertainty are not enough to sustain a demurrer in the state of New York.²⁴⁷ In Ohio, demurrer will not lie for indefiniteness or uncertainty. So a demurrer will not lie for uncertainty in New York. The omission to state the time and place of slander is not a ground for demurrer; the remedy is by motion.²⁴⁸ If the pleadings are not full and accurate, the remedy is by motion to cure the defect.²⁴⁹ So where an executor united notes payable to his testator.²⁵⁰ But a demurrer will lie for uncertainty in California.²⁵¹ A demurrer on the ground of ambiguity should be overruled if enough appears to render the pleading demurred to easy of comprehension and free from reasonable doubt.²⁵² The question of ambiguity is not raised on demurrer for want of facts.²⁵³ That a complaint sets forth the facts more particularly than is absolutely necessary is no ground for demurrer.²⁵⁴ In California, if there are any valid objections to a complaint on the ground of ambiguity or uncertainty, such objections can only be taken by special demurrer.²⁵⁵ And a special demurrer to a complaint, assigning as a ground that it is ambiguous, unintelligible, and uncertain, is properly overruled if the complaint is not subject to each of the objections assigned.²⁵⁶

²⁴⁵ *Blanc v. Klumpke*, 29 Cal. 156; *Yolo County v. Sacramento*, 36 Cal. 193; *Lorenzana v. Camarillo*, 45 Cal. 125; *Jacobs v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109.

²⁴⁶ *Jamison v. King*, 50 Cal. 132. For a special case of ambiguity, see *Tomlinson v. Monroe*, 41 Cal. 94; *Hollister v. State*, 9 Idaho, 651, 77 Pac. 339.

²⁴⁷ *Chesbrough v. New York etc. R. R. Co.*, 13 How. Pr. 557; *People v. Ryder*, 12 N. Y. 433; *Roeder v. Ormsby*, 13 Abb. Pr. 334.

²⁴⁸ *Finnerty v. Barker*, 7 N. Y. Leg. Obs. 316.

²⁴⁹ *Puget Sound Iron Co. v. Worthington*, 2 Wash. T. 472, 7 Pac. 882, 886; *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847; *Freeksen v. Turner*, 19 Or. 106, 23 Pac. 857.

²⁵⁰ *Welles v. Webster*, 9 How. Pr. 251.

²⁵¹ Cal. Code Civ. Proc., § 430, subd. 9, as amended 1907.

²⁵² *Salmon v. Wilson*, 41 Cal. 595.

²⁵³ *Slattery v. Hall*, 43 Cal. 191. Time to object for ambiguity. See *Spencer v. Montana Railway Co.* 11 Mont. 164, 27 Pac. 681.

²⁵⁴ *Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105, 236.

²⁵⁵ *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; *Kirsch v. Derby*, 96 Cal. 602, 31 Pac. 567.

²⁵⁶ *Spargur v. Heard*, 90 Cal. 221, 27 Pac. 198. See *White v. Allatt*, 87 Cal. 245, 25 Pac. 420; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675.

But it is held that a conjunctive demurrer on the general grounds of ambiguity, unintelligibility, and uncertainty will be regarded only as a demurrer for uncertainty, where the only specifications made are on the ground of uncertainty.²⁵⁷ Defects in pleadings which make them uncertain are special grounds of demurrer under the code of Idaho, and cannot be taken advantage of on general demurrer.²⁵⁸ A demurrer alleging that the complaint is "multifarious and improperly confounds two distinct causes of action not belonging to the same class," and "that the complaint is ambiguous, unintelligible, and uncertain," is held not to be sufficiently definite.²⁵⁹ The objection that the averments of a complaint are contradictory must be taken by special demurrer.²⁶⁰ And a complaint is demurrable for ambiguity and uncertainty if its allegations are inconsistent with an exhibit thereto attached.²⁶¹ The rule that error which does not affect substantial rights is to be disregarded is applied to a demurrer for ambiguity.²⁶²

§ 333. Ejectment.—In ejectment, where the complaint avers that "the plaintiff on a day named was, and ever since has been, and still is, the owner in fee simple, seised and possessed," etc.; "that, on a day thereafter named, and while the plaintiff was so the owner in fee simple, seised and possessed, defendants entered and ousted him, and from thence hitherto have and still do withhold the same," etc., the complaint may be demurred to for ambiguity.²⁶³ A complaint averring that defendant "unlawfully entered on the said land, and then and there turned this plaintiff out of the possession thereof . . . and ever since . . . said defendant has held and still holds possession thereof," is not demurrable as alleging unlawful entry and forcible detainer in one count.²⁶⁴ Also, an allegation that defendant is unlawfully withholding possession by menace and threats of violence, and still unlawfully withholds possession of the property from plain-

²⁵⁷ *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323. Compare *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957; *Ryan v. Jacques*, 103 Cal. 280, 37 Pac. 186.

²⁵⁸ *Palmer v. Utah etc. R. R. Co.*, 2 Idaho, 315, 13 Pac. 425.

²⁵⁹ *Owen v. Oviatt*, 4 Utah, 95, 6 Pac. 527.

²⁶⁰ *Heeser v. Miller*, 77 Cal. 192, 19 Pac. 375.

²⁶¹ *Palmer v. Lavigne*, 104 Cal. 30, 37 Pac. 775.

²⁶² *Gassen v. Bower*, 72 Cal. 555, 14 Pac. 206. Compare *Alexander v. Central Lumber etc. Co.*, 104 Cal. 532, 38 Pac. 410; *Consolidated Nat. Bank v. Pacific Coast etc. Co.*, 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96.

²⁶³ *Brown v. Martin*, 25 Cal. 82.

²⁶⁴ *Kerr v. O'Keefe*, 138 Cal. 415, 71 Pac. 447.

tiff, is a sufficient allegation of such facts.²⁶⁵ But averment of ownership in plaintiff is unnecessary.²⁶⁶

§ 334. **Official bond.**—In an action on an official bond, if the complaint alleges the execution of the bond, and a copy of the bond annexed should not contain the signature of the principal, defendant may demur for ambiguity.²⁶⁷ A complaint in an action on the bond given by a tax-collector is not ambiguous and uncertain because it does not aver that any of the money sued for was collected on account of foreign miners' licenses.²⁶⁸

§ 335. **Uncertainty of description—Conjunctive demurrer.**—A demurrer to a complaint upon the ground that it is ambiguous, unintelligible, and uncertain, for the reason that it does not contain a sufficient description of the property sued for, if in fact the complaint is not ambiguous nor unintelligible, does not raise the question of uncertainty as to the description.²⁶⁹

§ 336. **The same—Agency.**—A declaration setting forth that plaintiff had purchased a quantity of goods from W. and P., "then and there acting as agent of the defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer.²⁷⁰

§ 337. **Defect must be apparent.**—A pleading should not be demurred to—1. Unless it is clearly demurrable; and, 2. Except for cause which clearly appears upon the face of the complaint.²⁷¹ The fact that the statute gives several instances wherein a demurrer may be made affords no excuse for exhausting the list on every complaint demurred to, although several causes of demurrer may be assigned. A complaint which entirely fails to state a breach of the contract sued upon, or to allege the non-payment of money sought to be recovered, states no cause of action, and may be assailed by general demurrer. But if there

²⁶⁵ Kennedy v. Dickie, 27 Mont. 70, 69 Pac. 672.

²⁶⁶ McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100.

²⁶⁷ Mendocino Co. v. Morris, 32 Cal. 145.

²⁶⁸ People v. Love, 25 Cal. 520.

²⁶⁹ Greenebaum v. Taylor, 102 Cal. 624, 36 Pac. 957.

²⁷⁰ Cochran v. Goodman, 3 Cal. 245.

²⁷¹ Davy v. Betts, 23 How. Pr. 395; Dillaye v. Wilson, 43 Barb. 261.

is not an entire failure to state the fact of breach or non-payment, and the averment is simply uncertain and defective, the defect can only be reached by special demurrer particularly designating the specific point at which it is aimed.²⁷² In an action to recover money upon a contract, the failure to pay constitutes the breach, and must be alleged. And an allegation that a specified amount is "now due and owing" to the plaintiff is a mere conclusion of law, and is insufficient as an averment of the fact of non-payment.²⁷³

§ 338. Waiver of objections—Failure to demur.—When a cause is tried without objection to the complaint by demurrer, either general or special, as if the complaint were in all respects sufficient, no error or defect therein which does not affect the substantial rights of the parties will be ground for reversal of the judgment.²⁷⁴ So objections to a complaint which are grounds of special demurrer are waived where the demurrer is general and no special grounds are specified therein.²⁷⁵ Moreover, in aid of the judgment, the complaint must receive as favorable an interpretation as its general scope will warrant.²⁷⁶ Where no demurrer is interposed to the complaint, all merely technical objections thereto are waived.²⁷⁷ But the ground of a general demurrer is neither waived by failure to demur nor by consent that the demurrer be overruled.²⁷⁸ The submission of a demurrer without argument is not a waiver of any objection raised thereby.²⁷⁹ Nor is the right to demur waived by calling for a bill of particulars.²⁸⁰ The objection to misjoinder of parties appearing upon the face of the complaint or petition is waived by failure to specify it properly as a ground of demurrer, and cannot be thereafter urged.²⁸¹ When defendants

²⁷² *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094.

²⁷³ *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891; *Richards v. Land Co.*, 115 Cal. 642, 47 Pac. 683.

²⁷⁴ *People v. Reis*, 76 Cal. 269, 18 Pac. 309; *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

²⁷⁵ *Daggett v. Gray*, 110 Cal. 169, 42 Pac. 568.

²⁷⁶ *Fudickar v. Irrigation District*, 109 Cal. 29, 41 Pac. 1024. See, also, *Glide v. Dwyer*, 83 Cal. 477, 23 Pac. 706.

²⁷⁷ *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61.

²⁷⁸ *Evans v. Gerken*, 105 Cal. 311, 38 Pac. 725; *Porter v. Booth*, 1 S. Dak. 558, 47 N. W. 960.

²⁷⁹ *Richards v. Travellers' Ins. Co.*, 80 Cal. 505, 22 Pac. 939.

²⁸⁰ *Mulvey v. Staab*, 4 N. Mex. 50, 12 Pac. 699.

²⁸¹ *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269. See, also, *People v. District Court*, 18 Colo. 293, 32 Pac. 819; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.

enter upon and proceed to trial upon the merits without demanding a ruling upon a demurrer they waive the demurrer.²⁸² If the defendant demurs and afterwards answers, but before trial withdraws the answer and allows judgment to be entered, it will be presumed that he waived the demurrer, where the record discloses nothing to the contrary.²⁸³ But a demurrer is not waived by the filing of an answer upon leave given by the court after the demurrer is overruled,²⁸⁴ nor by filing an answer with the demurrer, if the statutes of the state permit it.²⁸⁵ Under the Utah Code of Civil Procedure a party does not waive his demurrer by filing an answer at the same time or after the demurrer or by going to trial upon his answer, but it is questioned whether this applies to a demurrer that is special for ambiguity and uncertainty.²⁸⁶ Objections against a complaint which should have been made by demurrer on the ground of uncertainty cannot be urged upon appeal, where no demurrer has been filed in the trial court.²⁸⁷ A defective statement of facts in a pleading is waived by joining issue upon them.²⁸⁸ Where no misjoinder of parties is specially pleaded in a joint action against two defendants it is waived.²⁸⁹

§ 339. Complaint and demurrer thereto — Miscellaneous cases.—If the facts stated in a complaint entitle the plaintiff to any relief, a demurrer for want of sufficient facts should be overruled.²⁹⁰ And a demurrer by all of several defendants reciting that they demur jointly as well as separately and severally to the "first, second, and third paragraphs of the complaint,"

²⁸² *Danielson v. Gude*, 11 Colo. 87, 17 Pac. 283. See, to same effect, *Hockaday v. Commissioners*, 1 Colo. App. 362, 29 Pac. 287; *Guthrie v. Phelan*, 2 Idaho, 95, 6 Pac. 107; *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637; *Wright v. Sherman*, 3 S. Dak. 290, 52 N. W. 1093, 17 L. R. A. 792; *Olds v. Cary*, 13 Or. 362, 10 Pac. 786; *Fillmore v. Wells*, 10 Colo. 228, 3 Am. St. Rep. 567, 15 Pac. 343; *Spanish Fork City v. Hopper*, 7 Utah, 235, 26 Pac. 293.

²⁸³ *Evans v. Jones*, 10 Utah, 182, 37 Pac. 262; *Brooks v. Douglass*, 32 Cal. 209.

²⁸⁴ *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379.

²⁸⁵ *State v. Edwards*, 33 Utah, 243, 93 Pac. 720.

²⁸⁶ *Henderson v. Turngren*, 9 Utah, 432, 35 Pac. 495.

²⁸⁷ *Seligman v. Armando*, 94 Cal. 314, 29 Pac. 710.

²⁸⁸ *Davis v. Wait*, 12 Or. 425, 8 Pac. 356.

²⁸⁹ *Gruhn v. Stanley*, 92 Cal. 86, 28 Pac. 56.

²⁹⁰ *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.), 976; *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480, 8 N. E. 269; *United States Sav. Fund etc. Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451. See *Aldrich v. Boice*, 56 Kan. 170, 42 Pac. 695.

will be treated as a general demurrer by all the defendants, and is bad if the complaint is good against any of them.²⁹¹ Under Florida procedure, the failure of the plaintiff to attach a copy of his cause of action to his declaration cannot be taken advantage of by demurrer, and the defendant's proper remedy is to refuse to plead until such cause of action is filed.²⁹² The proper remedy, under Maryland practice, where the paragraphs of a bill in equity are wrongly numbered and more than one subject-matter is embraced in a single paragraph, is by motion in the nature of a *ne recipiatur*, and not by demurrer.²⁹³ A complaint setting up two causes of action for breach of contract is not rendered demurrable because they are not separately stated and numbered.²⁹⁴ In an action upon a contract, which recognizes the right of the parties to make assignments, a complaint setting up the contract is not demurrable because the action is by and against different parties than those named in the contract, when the complaint shows their interest through assignment.²⁹⁵ The objection that the averments of a complaint are made on information and belief is not a ground of demurrer, either general or special.²⁹⁶ Error in sustaining a demurrer to a complaint on the ground of the misjoinder of several causes of action is held to be waived, if the plaintiff subsequently files an amended complaint, in which he unites and pleads anew in one count all the causes of action which had been pleaded in the original complaint.²⁹⁷ A stipulation that a demurrer to the complaint may be overruled, and the defendant allowed to answer within a certain time, does not estop the defendant from relying at any future stage of the case on the alleged failure of the complaint to state sufficient facts to constitute a cause of action.²⁹⁸

²⁹¹ *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540. See *Rogers v. Schubenburg*, 111 Cal. 281, 43 Pac. 899.

²⁹² *Martyn v. Arnold*, 36 Fla. 446, 18 South. 791.

²⁹³ *Chew v. Glenn*, 82 Md. 370, 33 Atl. 722.

²⁹⁴ *Zrskowski v. Mach*, 36 N. Y. Supp. 421, 15 Misc. 234; *Nichols v. Drew*, 94 N. Y. 22.

²⁹⁵ *Van Horne v. Watrous*, 10 Wash. 525, 39 Pac. 136. Bill in equity by stockholders of corporation

held good against a general demurrer. See *Moyle v. Landers*, 83 Cal. 579, 23 Pac. 798.

²⁹⁶ *Carpenter v. Smith*, 20 Colo. 39, 36 Pac. 789; *Jones v. Mining Co.*, 20 Colo. 417; *Marie v. Garrison*, 83 N. Y. 23.

²⁹⁷ *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616. Compare *Wood v. Mastick*, 2 Wash. T. 64, 3 Pac. 612; *Mutual etc. Loan Association v. Bradbury*, 53 N. J. Eq. 643, 33 Atl. 960.

²⁹⁸ *Hitchcock v. Caruthers*, 82 Cal. 523, 23 Pac. 48.

§ 340. Demurrer — Miscellaneous decisions pertaining to.— The sufficiency of a pleading is properly tested by demurrer.²⁹⁹ On demurrer, only the pleadings can be considered.³⁰⁰ The sufficiency of the facts in a pleading on a demurrer thereto cannot be strengthened or weakened, added to or diminished by facts stated in other pleadings subsequently filed, or by the facts proven on the trial.³⁰¹ When a demurrer is interposed, the sufficiency of any antecedent pleading to which the pleading demurred to relates may be called in question.³⁰² A demurrer searches the entire record, and judgment should go against the party whose pleading was first defective in substance.³⁰³ Although a party may be required, on motion, to conform his statements in pleadings to the rules of good pleading, yet, as against a demurrer, evidentiary facts, and even inferences from averments amounting to mere conclusions of law, will be considered in his favor.³⁰⁴ Where a demurrer has been sustained to one of the counts in a declaration, it is error to permit such count to be read to the jury, or to receive evidence thereupon.³⁰⁵ The trial judge can pass on the sufficiency of an amended complaint at the time of trial, as to whether it states facts sufficient to constitute a cause of action, even though a demurrer thereto on the same grounds had been overruled by another judge of the same court.³⁰⁶ A patent manifestly invalid upon its face may be so declared on demurrer to the bill.³⁰⁷ But this power should be exercised with the utmost caution and only in the plainest cases, and if there is any doubt it should be resolved in favor of the patent.³⁰⁸ The question of the propriety of issuing a writ of *ne exeat* cannot be raised by demurrer.³⁰⁹

²⁹⁹ The Victorian, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040.

³⁰⁰ Madgeburg v. Uihlein, 53 Wis. 165, 10 N. W. 363; Northwestern Iron Co. v. Central Trust Co., 90 Wis. 570, 580, 63 N. W. 752, 64 N. W. 323.

³⁰¹ Cole v. Gray, 139 Ind. 396, 399, 38 N. E. 856; Elwood etc. Oil Co. v. Baker, 13 Ind. App. 576, 41 N. E. 1063.

³⁰² Knight v. Lawrence, 19 Colo. 425, 36 Pac. 242.

³⁰³ Hawthorne v. State, 45 Neb. 871, 64 N. W. 359; Oakley v. Valley County, 40 Neb. 900, 59 N. W. 368.

³⁰⁴ Chambers v. Hoover, 3 Wash. T. 107, 13 Pac. 466. See Santa Barbara v. Eldred, 108 Cal. 294, 41 Pac. 410.

³⁰⁵ Luna v. Mohr, 3 N. Mex. 56, 1 Pac. 860.

³⁰⁶ McConaghy v. Clark, 35 Wash. 689, 77 Pac. 1084.

³⁰⁷ Heaton-Peninsula Button Fastener Co. v. Schlochtmeier, 69 Fed. 592.

³⁰⁸ Davock v. Chicago etc. R. R. Co., 69 Fed. 468; Covert v. Travers. 70 Fed. 788; New York etc. Packing Co. v. New Jersey etc. Rubber Co., 137 U. S. 445, 11 Sup. Ct. Rep. 193, 34 L. Ed. 741.

³⁰⁹ Shainwald v. Lewis, 69 Fed. 487.

§ 341. Sufficiency of complaint — Miscellaneous decisions.— In determining the sufficiency of a complaint the averments therein can alone be considered. And the rule in some jurisdictions is that a complaint which does not state a cause of action by its averments, without reference to exhibits, is bad on demurrer.³¹⁰ The claim after judgment that a complaint is insufficient can only be sustained on the ground that the facts contained therein, even if well stated, constitute no cause of action.³¹¹ The objection that the *allegata* and *probata* do not agree cannot be urged after verdict rendered, if the complaint is sufficient to support the judgment.³¹²

§ 342. The same — Alleging unilateral contract.— A complaint in an action by a vendor against a vendee of goods for refusal to accept and pay therefor, which alleges that the plaintiff entered into a contract with the defendant to furnish, sell, and deliver to the defendant certain specified goods at a stipulated price named, but nowhere alleges that the defendant bought, purchased, or agreed to accept or pay therefor, or any part thereof, states a unilateral contract, and is obnoxious to a general demurrer.³¹³

§ 343. The same — Action for recovery of personal property.— Under the code of South Dakota, the action to recover personal property takes the place of, and is substitute for, both the former actions of replevin and detinue. The unlawful detention is the gist of the action, and it is immaterial how the defendant acquired the possession, so far as the action to recover the property is concerned. The principal issues in the action are the plaintiff's right to possession, the defendant's unlawful detention, the value of the property, and damages for its detention.³¹⁴

³¹⁰ Aultman etc. Co. v. Siglinger, 2 S. Dak. 442, 50 N. W. 911; Bowling v. McFarland, 38 Mo. 465; Larimore v. Wells, 29 Ohio St. 13. But see Taylor v. MacLea, 11 N. Y. Supp. 640.

³¹¹ Rhodes v. Hutchins, 10 Colo. 253, 15 Pac. 329; Buenz v. Cook, 15 Colo. 38, 24 Pac. 679; Bethel v. Woodworth, 11 Ohio St. 396. This objection may be taken at any time.

Holly v. Heiskell, 112 Cal. 174, 44 Pac. 466.

³¹² Horn v. Hamilton, 89 Cal. 276, 26 Pac. 833. See, also, United States v. Small, 3 Wash. T. 478, 17 Pac. 739.

³¹³ Robinson etc Min. Co. v. Johnson, 13 Colo. 258, 22 Pac. 459, 6 L. R. A. 769.

³¹⁴ Willis v. DeWitt, 3 S. Dak. 281, 52 N. W. 1090.

§ 344. **The same—Failure to aver demand.**—When the time has come for the doing of an act which it is the duty of the defendant to do unconditionally, no demand other than the suit itself is necessary. Nor is a demand before suit required where it appears that it would have been unavailing, and would not have changed the right and relations of the parties, or where the answer denies the relation on which the action is founded, although a demand and refusal would otherwise be a condition precedent to the right of the plaintiff to maintain the action.³¹⁵ Stockholders may maintain a suit in equity against the corporation and its board of directors whenever it appears that otherwise there will be a failure of justice.³¹⁶ And where it is apparent that a demand upon the managing body of the corporation would be unavailing, an action by the stockholders may be maintained without alleging or proving any notice, request, demand, or express refusal.³¹⁷

§ 345. **The same—Action for removing fixtures.**—An action for damages will lie in favor of a mortgagee whose security is impaired by the removal of fixtures permanently attached to the realty, against the person or persons removing them. And a complaint against the mortgagor and another defendant claiming to be a purchaser of the fixtures, alleging that they removed such fixtures, well knowing that they would thereby impair and render insufficient the plaintiff's security, and that it was thereby rendered insufficient; that the mortgagor is insolvent, and that after foreclosure of the mortgage an unsatisfied personal judgment remains for a deficiency, sufficiently states a cause of action.³¹⁸

§ 346. **The same—Allegation of damages.**—In an action by a married woman for personal injuries, she is entitled to recover damages for any impairment of her capacity, as a previously healthy woman, to earn money, and, when so injured as to cause great pain and suffering in and about the womb and back, the damages thereby resulting through impairment of her

³¹⁵ Cox v. Delmas, 99 Cal. 104, 33 Pac. 836.

³¹⁶ Miller v. Murray, 17 Colo. 408, 30 Pac. 46; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827.

³¹⁷ Jones v. Pearl Min. Co., 20 Colo. 417, 38 Pac. 700; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024.

³¹⁸ Lavenson v. Standard Soap Co., 80 Cal. 245, 13 Am. St. Rep. 147, 22 Pac. 184.

capacity to work need not be specially pleaded, but may be recovered under a general averment.³¹⁹

§ 347. The same — Alleging mutual mistake.—In an action to reform an agreement for the sale of land, an averment in the complaint, to the effect that by mistake a description of the land different from that intended by the parties to the agreement was inserted therein, is, in the absence of a demurrer, a sufficient allegation that the mistake was a mutual mistake of the parties to the agreement, and a finding in the language of the complaint is sufficient to support the judgment.³²⁰

§ 348. The same — Pre-emption claim — Conclusion of law.—Where, in an action against a pre-emption claimant, the plaintiff claims priority of right over the defendant to become the purchaser from the government, and to receive a patent for the land in controversy, under a pre-emption claim, it is not enough to allege he had or has such right, as that allegation is a mere conclusion of law, but the plaintiff must show the state of facts conferring such right, and also that he took the legal steps to avail himself thereof.³²¹

§ 349. The same—Action to determine right to patent.—In an action under section 2326 of the United States Revised Statutes, to determine the right to a patent to mineral land, each party is held to be an actor, and each must establish his claim against the government, as well as against his adversary. Each party must allege, in his pleading, all the facts essential to the validity of his claim, as, for example, the citizenship of the locators, the steps necessary to constitute and maintain the location, etc.³²²

§ 350. The same—Action to annul homestead.—A complaint in an action to annul an order setting apart a homestead to the widow of a deceased person out of his estate, which alleges that the property set apart was the separate property of the deceased, and that the widow, defendant in the action,

³¹⁹ *Hamilton v. Great Falls etc. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

³²⁰ *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429.

³²¹ *Aurrecoechea v. Sinclair*, 60 Cal. 532; *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132.

³²² *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419. Compare *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894.

knowing that fact, and for the purpose of deceiving the court, falsely alleged and falsely swore that the property was community property, whereby the court was misled and deceived, and induced to make the order, does not state facts sufficient to constitute a cause of action.³²³

§ 351. The same — Action against garnishee.—Allegations in a complaint against a garnishee, in an action by a judgment creditor, authorized in proceedings supplementary to execution against the judgment debtor, that the assignor of the plaintiff "recovered a judgment" in the superior court, "which judgment was duly entered," etc., and that the order authorizing the suit was "duly made," are sufficient as against a general demurrer.³²⁴

§ 352. The same—Specific performance.—The absence of a certificate of acknowledgment upon a copy of a contract for the conveyance of land, attached to a complaint for the specific performance thereof as an exhibit, is not sufficient to show that the contract was not executed and acknowledged according to law, and where the complaint alleges that the plaintiff entered into a contract with the defendant, whereby he agreed to sell to the defendant, who agreed to purchase the land, such allegations will control, and imply the execution and acknowledgment of the contract according to law, for the purpose of supporting a judgment for specific performance of the contract.³²⁵

§ 353. The same — Averments, probate of will, ownership.—An averment in a pleading that a will was "probated by the superior court" is equivalent to an averment that the will was admitted to probate by the judgment of the superior court. And an averment that a given person was "during his lifetime" the owner of a piece of land is equivalent to an averment that he was the owner continuously throughout his lifetime.³²⁶

³²³ Fealey v. Fealey, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49. Compare Dunlap v. Steere, 92 Cal. 344, 27 Am. St. Rep. 143, 23 Pac. 563, 16 L. R. A. 361.

³²⁴ High v. Bank of Commerce, 95

Cal. 386, 29 Am. St. Rep. 121, 30 Pac. 556.

³²⁵ Banbury v. Arnold, 91 Cal. 606, 27 Pac. 934.

³²⁶ Riddell v. Harrell, 71 Cal. 254, 12 Pac. 67.

§ 354. **The same — Dismissal for want of parties.**—Under Oregon procedure, if it appears from the record that the real merits of the suit cannot be determined without essentially affecting the rights of persons in the subject-matter, who are not parties, and whose names nowhere appear in the record, the appellate court will refuse to examine the facts, but will dismiss the complaint for want of parties.³²⁷

§ 355. **The same — Allegation negating presumption of payment.**—In an action by a devisee to vacate a judgment for costs rendered against his testator, and an execution sale thereunder, an allegation of the complaint that neither the plaintiff nor his testator had any knowledge, notice, information, or belief that any judgment for costs had been entered, or that any cost-bill had been filed, or that any execution had been issued, or of any sale thereunder, or of any certificate or deed by the sheriff, is sufficient to negative any presumption that the sheriff had paid or tendered to the plaintiff's testator the excess of the proceeds arising from the execution sale.³²⁸ A judgment upon which no execution has been issued for twenty years, in the absence of explanatory facts or evidence, is presumed to be paid. And in order to avoid objection by demurrer, the plaintiff must allege in his complaint the facts and circumstances on which he relies to rebut such presumption.³²⁹

§ 356. **The same — Mining-claim contest.**—An allegation of citizenship, or its equivalent, is necessary to constitute a good complaint in a proceeding to determine adverse mining claims preliminary to the issuance of a patent therefor.³³⁰ But, in an ordinary civil action for injuries to a mining claim, the plaintiff need not in the first instance allege his citizenship and compliance with the act of Congress for acquiring title to such claim, but he may make general averment of his title or possession, which is sufficient in an action against a wrongdoer

³²⁷ *Beasley v. Shively*, 20 Or. 508, 26 Pac. 846.

³²⁸ *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67. Insufficient complaint in action to set aside judicial sale. See *Russell v. Pew*, 12 Mont. 509, 31 Pac. 75; *Hudepohl v. Liberty Hill etc. Min. Co.*, 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025.

³²⁹ *Beekman v. Hamlin*, 20 Or. 353, 25 Pac. 672.

³³⁰ *Keeler v. Trueman*, 15 Colo. 143, 25 Pac. 311; *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. 1019; *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. Ed. 669, 6 Sup. Ct. 421.

without right or title.³³¹ Where, in a suit for the possession of a mining claim, the petition alleges that the plaintiff is the owner and in possession of the property, claiming the right thereto, and the defendant's answer denies the same, any insufficiency of the allegations as to possession is waived.³³²

§ 357. **The same—Action to contest right to purchase state lands.**—A complaint in this action must allege the facts, so that the court may see whether the application was made in due form. Each party is an actor, and must allege and prove all the facts upon which he relies as showing his right to become a purchaser, and the steps he has taken to avail himself of and secure his right to make the purchase.³³³ But this does not change the rule of code pleading that material allegations which are not denied must be taken as true.³³⁴ An allegation that the plaintiff filed his "affidavit and application in due form" is the statement of a mere conclusion, and is insufficient.³³⁵ The plaintiff in such action, not having shown a right to purchase in himself, is not entitled to recover because of the insufficiency of the allegations or proof of the defendant.³³⁶ The burden rests upon either party to establish his own right.³³⁷

§ 358. **The same—Injunction—Interference with franchise.**—The owner of an incorporeal hereditament, although he may have no estate in the land, nevertheless shows a sufficient case in equity to sustain an injunction, if his complaint avers possession and a right to the possession of a tollroad for the purpose of collecting tolls thereon, and that the county through its board of supervisors interferes with and obstructs the free use and enjoyment of his property by depriving him of his tolls.³³⁸

³³¹ *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076.

³³² *Bushnell v. Croke etc. Smelting Co.*, 12 Colo. 247, 21 Pac. 931.

³³³ *Cushing v. Keslar*, 68 Cal. 473, 9 Pac. 659.

³³⁴ *Prentice v. Miller*, 82 Cal. 570, 23 Pac. 189.

³³⁵ *McEntee v. Cook*, 76 Cal. 187, 18 Pac. 258.

³³⁶ *Manley v. Cunningham*, 72 Cal. 236, 13 Pac. 622.

³³⁷ *Lane v. Pferner*, 56 Cal. 122. See further, as to sufficiency of complaint in this action, *McKenzie v. Brandon*, 71 Cal. 209, 12 Pac. 428; *Garfield v. Wilson*, 74 Cal. 175, 15 Pac. 620; *Reese v. Thorburn*, 78 Cal. 116, 20 Pac. 131; *Jacobs v. Walker*, 76 Cal. 175, 18 Pac. 129; *McFaul v. Pfankuch*, 98 Cal. 400, 33 Pac. 397; *Riddell v. Mullan*, 77 Cal. 577, 20 Pac. 91.

³³⁸ *Welch v. County of Plumas*, 90 Cal. 338, 22 Pac. 254.

§ 359. **The same — Will contest.**—In a contest arising upon the probate of a will, the contestants are plaintiffs in the matter, and it devolves upon them to allege all facts necessary to sustain a claim that the will was not properly signed and witnessed, and a statement in the language of the statute, or of the evidence of the facts, is not sufficient.³³⁹ An allegation that the mind of the decedent was weak, debilitated, and deranged to such an extent as to incapacitate him from making or undertaking a will or codicil tenders an issue as to “the competency of the decedent to make a last will and testament.”³⁴⁰ But when the grounds of contest embrace conclusions of law, as menace, duress, or the like, the facts relied upon to show such conclusions must be pleaded.³⁴¹ It is not essential that the petition for the probate of a will should state whether it is a holographic or other species of will, nor does any defect of form in the statement of the jurisdictional facts actually existing, invalidate the probate.³⁴² A petition for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testator must specifically state the facts and circumstances constituting the fraud.³⁴³ An allegation in a petition to establish and prove a lost will, stating that “said deceased, at the time of his death, left a will which your petitioner alleges to be the last will and testament of said deceased,” is equivalent to alleging that the will was in existence at the time of the death of the testator, as the statute in such cases requires.³⁴⁴

§ 360. **The same — Pertaining to trusts.**—The rule is well settled that, in order to enforce a constructive or resulting trust, the facts from which such trust is claimed to arise must be clearly alleged, and proved with certainty.³⁴⁵ Where, in pursuance of an agreement to locate and develop a mining claim for the joint benefit of the parties, one of the parties locates

³³⁹ Estate of Burrell, 77 Cal. 479, 19 Pac. 880; Estate of Dalrymple, 67 Cal. 444, 7 Pac. 906.

³⁴⁰ Estate of Kohler, 79 Cal. 313, 21 Pac. 758.

³⁴¹ Estate of Gharky, 57 Cal. 274.

³⁴² Estate of Learned, 70 Cal. 140, 11 Pac. 587.

³⁴³ Estate of Kidder, 66 Cal. 487, 6 Pac. 326.

³⁴⁴ In re Harris' Estate, 10 Wash. 555, 39 Pac. 148.

³⁴⁵ First Nat. Bank v. Campbell, 2 Colo. App. 271, 30 Pac. 357; Woodside v. Hewel, 109 Cal. 481, 42 Pac. 152; McClure v. Board of Commrs. of La Plata County, 19 Colo. 122, 34 Pac. 763; Phillips v. Overfield, 100 Mo. 466, 13 S. W. 705. Complaint stating facts held to be sufficient to create a resulting trust. See Muller v. Buyck, 12 Mont. 354, 30 Pac. 386.

the claim in his own name, he holds the legal title to the interest of the other in trust for him.³⁴⁶ And in an action to enforce such trust, and to compel a conveyance of his interest in the claim, the plaintiff need not allege citizenship in his complaint; and an allegation that "the plaintiff has performed all and singular his agreements and covenants with the defendant," is sufficient as an averment of the performance of the conditions on his part to be performed.³⁴⁷ If a patent to state lands is void, no constructive trust can be enforced therein by a third person alleging himself to have been entitled thereto. And if the patent is valid, no constructive trust can be enforced for fraud in procuring the patent, unless the claimant affirmatively alleges and proves that he possessed the necessary qualifications entitling him to a patent.³⁴⁸ An administrator has no capacity to bring an action to enforce a trust in lands conveyed by the decedent in his lifetime, and to compel a conveyance of the legal title.³⁴⁹

§ 361. Defects in complaint cured by answer.—A pleading defective by reason of the omission of some material allegation may be aided by the pleading of the adverse party. The rule is that, if the omitted allegation be supplied by the adverse pleading, it is the same as if it were inserted in the party's own pleading.³⁵⁰ Thus, if a complaint fails to set forth material facts so that no cause of action is stated, but the answer avers such facts, the omission in the complaint becomes immaterial, and the defect therein is cured by the answer.³⁵¹ So the omission of a material fact in a complaint is cured by its averment

³⁴⁶ *Settembre v. Putnam*, 30 Cal. 490; *Welland v. Huber*, 8 Nev. 203.

³⁴⁷ *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803. See *Hanson v. Fricker*, 79 Cal. 283, 21 Pac. 751. Complaint in an action to enforce a trust against the holder of a legal title under a confirmed and patented Mexican grant. See *De Toro v. Robinson*, 91 Cal. 371, 27 Pac. 671.

³⁴⁸ *Peabody v. Prince*, 78 Cal. 511, 21 Pac. 123.

³⁴⁹ *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323. Requisites of a bill to impeach a conveyance by a trustee. See *De Mares v. Gilpin*, 15 Colo. 76, 24 Pac. 568.

³⁵⁰ *Ferrera v. Parke*, 19 Or. 141, 23 Pac. 883.

³⁵¹ *Shively v. Semi-Tropic etc. Water Co.*, 99 Cal. 259, 33 Pac. 848; *Burns v. Cushing*, 96 Cal. 669, 31 Pac. 1124; *Schenck v. Hartford Fire Ins. Co.*, 71 Cal. 28, 11 Pac. 807; *Moffat v. Greenwalt*, 90 Cal. 368, 27 Pac. 296; *Robinson etc. Co. v. Johnson*, 13 Colo. 258, 22 Pac. 459, 5 L. R. A. 769; *Limberg v. Higenbotham*, 11 Colo. 156, 17 Pac. 481; *Drake v. Sworts*, 24 Or. 198, 33 Pac. 563; *Hamilton v. Great Falls etc. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

in a cross-complaint of the defendant, and the admission of the averment in the answer to the cross-complaint. And the fact that there is a demurrer to the complaint does not take the case out of the rule of express aider.³⁵² So, also, the defect in an affirmative defense is cured by the introduction without objection of testimony in support thereof.³⁵³ But admissions made in the statement of a separate affirmative defense are not to be taken as facts upon a controverted question otherwise at issue in the pleadings by appropriate allegation and denial.³⁵⁴

§ 362. **Standing on demurrer.**—Where a demurrer to an answer is sustained, and defendant stands on his exception thereto, judgment being rendered against him, he cannot after the term of court have the judgment set aside on motion and get permission to amend his answer.³⁵⁵

FORMS OF DEMURRERS.

§ 363. **Demurrer to some of several causes of action, and to the whole complaint.**

Form No. 66.

[TITLE.]

I. The defendant demurs to the first cause of action stated in the complaint in this cause upon the following grounds:

1. That said first alleged cause of action does not state facts sufficient to constitute a cause of action.

2. That said first alleged cause of action is ambiguous in this [state particularly wherein it is ambiguous].

II. The defendant also demurs to the third cause of action in said complaint contained, upon the ground that [state any ground of demurrer applicable to the cause of action, or as many grounds as there may be].

III. The defendant also demurs to the whole complaint in this cause upon the grounds following:

³⁵² *Cohen v. Knox*, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711. Compare *Robinson etc. Co. v. Johnson*, 13 Colo. 258, 22 Pac. 459, 5 L. R. A. 769.

³⁵³ *Reynolds v. Dickson*, 48 Wash. 407, 93 Pac. 910.

³⁵⁴ *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352.

³⁵⁵ *Davidson v. Hughes*, 79 Kan. 247, 91 Pac. 913.

1. That several causes of action have been improperly united therein. [State wherein the joinder is improper.]

2. [State any other ground of demurrer applicable to the whole complaint.]

§ 364. Demurrer based on statute of limitations.

Form No. 67.

[TITLE.]

The defendant [or if only part of the defendants demur: the defendants, naming the demurrants, demur] demurs to the complaint herein [or, to the first, or second, or other, cause of action stated in the complaint herein] on the ground that it appears upon the face of said complaint that the action was not commenced within the time limited by law, to-wit, within the time limited by section . . . of the Code of Civil Procedure.

§ 365. On the ground of want of jurisdiction.

Form No. 68.

[TITLE.]

The defendant demurs to the complaint filed herein, and for cause of demurrer alleges:

I. That the court has no jurisdiction of the person of the defendant [or of the subject-matter of the action—state why].

§ 366. On the ground of want of capacity to sue.

Form No. 69.

[TITLE.]

The defendant demurs to the complaint filed herein, and for cause of demurrer alleges:

That the plaintiff has not legal capacity to sue [state reason why].

§ 367. On the ground of another action pending.

Form No. 70.

[TITLE.]

The defendant demurs to the complaint filed in this action, and for ground of demurrer alleges:

That it appears upon the face of said complaint that there is another action pending between the same parties for the same cause.

§ 368. On ground of defect of parties.

Form No. 71.

[TITLE.]

The defendant demurs to the complaint and for cause of demurrer alleges:

I. That G. H. should be made a plaintiff in this action [or that L. M. should be made defendant in this action—state why].

§ 369. On ground of misjoinder of parties.

Form No. 72.

[TITLE.]

The defendant demurs to the complaint and for cause of demurrer alleges:

I. That I. K. is improperly made plaintiff in said action [or that N. O. is improperly made a defendant in said action—state why].

§ 370. On ground of misjoinder of causes of action.

Form No. 73.

[TITLE.]

The defendant demurs to the complaint, and for cause of demurrer alleges:

That several causes of action have been improperly united [state how].

§ 371. On the ground that the complaint does not state sufficient facts to constitute a cause of action.

Form No. 74.

[TITLE.]

The defendant demurs to the complaint filed in this action, and for cause of demurrer alleges:

That the complaint does not state facts sufficient to constitute a cause of action.

§ 372. On the ground of ambiguity.

Form No. 75.

[TITLE.]

The defendant demurs to the complaint, and for cause of demurrer alleges:

That the complaint is ambiguous. [Point out specially in what the ambiguity consists.]

§ 373. Several grounds of demurrer.

Form No. 76.

[TITLE.]

The defendant demurs to plaintiff's complaint on the following grounds:

I. That the court has no jurisdiction of the person of the defendant [or, as the case may be of the subject of the action].

II. That plaintiff has not legal capacity to sue [state why].

III. That there is another action pending between the same parties, for the same cause of action.

IV. That there is a defect [or misjoinder] of parties plaintiff [or defendant]. [State in what the defect or misjoinder consists.]

V. That several causes of action have been improperly united in this [state how improperly united].

VI. That the complaint does not state facts sufficient to constitute a cause of action. [No reasons need be assigned under this subdivision.]

VII. That the complaint is uncertain [point out specially in what the uncertainty consists].

§ 374. Demurrer to counterclaim or set-off.

Form No. 77.

[TITLE.]

The plaintiff herein demurs to the first counterclaim or set-off in the answer herein [or when there are separate answers: in the answer of the defendant C. D. herein], on the ground that upon the face thereof said counterclaim does not state facts sufficient to constitute a counterclaim [because the court has no jurisdiction thereof].

Or: because said defendant has not legal capacity to maintain the same.

Or: because there is another action pending between the same parties for the same cause.

Or: because there is a defect of parties, in this, to-wit, that [here state what the defect is and whether in parties plaintiff or defendant, and what additional party, naming him, should be present].

Or: because the said counterclaim does not state facts sufficient to constitute a cause of action.

E. F., Plaintiff's Attorney.

§ 375. Demurrer to defendant's plea.

Form No. 78.

[TITLE.]

Now comes the attorney-general of said state and demurs to the said defendant's plea to the information herein, and says that said plea is not sufficient in law to bar the state from having and maintaining its said information against the said A. B. or to excuse the said A. B. from the usurpation and unlawful exercise of office charged in said information, and that said attorney-general is not bound to answer said plea, all of which he, the said attorney-general, is ready to verify.

Wherefore said attorney-general prays judgment that said defendant be excluded from said office of . . .

M. N., Attorney-General.

§ 376. Demurrer to defense in answer.

Form No. 79.

[TITLE.]

The plaintiff demurs to the answer herein [or to the first count of the answer herein] on the ground that it appears on the face of said answer [or count].

I. That the facts stated therein are not sufficient to constitute a defense in this [here state specifically the defects claimed].

E. F., Plaintiff's Attorney.

§ 377. General demurrer to petition in equity.

Form No. 80.

[TITLE.]

The defendant demurs [or, the defendants C. D. and E. F., naming the demurrants, demur] to the petition herein [or, to the first, or the second count of the petition herein] on the ground that it appears on the face of said petition [or count]:

That the facts stated in said petition do not entitle the plaintiff to the relief demanded.

§ 378. Demurrer to reply.

Form No. 81.

[TITLE.]

The defendant demurs to the reply herein on the ground that the facts stated in said reply do not amount to a sufficient defense, in this [here state specifically the defects claimed].

E. F., Defendant's Attorney.

§ 379. Demurrer to return to alternative writ of mandamus.

Form No. 82.

[TITLE.]

The relator herein demurs to the return of L. M. to the alternative writ of *mandamus* issued in this cause, on the ground that it appears upon the face thereof that the same does not state facts sufficient to constitute a defense, nor show any cause for not obeying said writ.

G. H., Attorney for Relator.

§ 380. Order sustaining demurrer.

Form No. 83.

[TITLE.]

This action having been brought to trial on the issue of law joined herein, after hearing G. H. in support of the demurrer and J. K. [or no one appearing] in opposition:

Ordered, that said demurrer be sustained, and that defendant [or plaintiff] have judgment thereon; but with leave to the plaintiff [or defendant] to amend the complaint [or answer, or reply] within twenty days, on payment of . . . dollars costs.

By the Court:

O. P., Judge.

§ 381. Order overruling demurrer.

Form No. 84.

[TITLE.]

This action having been brought to trial on the issue of law joined herein, after hearing G. H. in support of the demurrer, and J. K. [or, no one appearing] in opposition:

Ordered, that said demurrer be overruled, and that plaintiff [or defendant] have judgment thereon; but with leave to the defendant [or plaintiff] to withdraw his demurrer [and file an answer, or a reply] within twenty days.

By the Court:

O. P., Judge.

§ 382. Judgment for plaintiff after order overruling demurrer.

Form No. 85.

[TITLE.]

The order of the court overruling the demurrer to the complaint herein and ordering judgment in favor of the plaintiff in this cause upon the said demurrer, with the usual leave to

defendant to answer, having been served on the defendant's attorney on the . . . day of . . . , 19.., and the defendant not having elected to answer; and the plaintiff's damages having been ascertained by reference [or, having been assessed by a jury under the direction of the court, or by the court, assessment by jury having been waived];

Now on motion of G. H., attorney for the plaintiff,

It is adjudged, that the plaintiff recover of the defendant . . . dollars, with . . . dollars costs of the action, making together . . . dollars [or state special relief].

By the Court:

O. P., Judge.

§ 383. Order sustaining demurrer in part, and overruling it in part.

Form No. 86.

[TITLE.]

This action having been brought to trial on the issue of law joined herein, after hearing G. H. in support of the demurrer, and J. K. [or, no one appearing] in opposition:

Ordered, that said demurrer to the first cause of action set forth in the complaint be sustained; and that the defendant have judgment thereon; and that the demurrer to the second cause of action be overruled; and that the plaintiff have judgment thereon, but with leave to the plaintiff to serve an amended complaint within . . . days, and to the defendant to withdraw his demurrer to the second cause of action, and to answer the same.

By the Court:

O. P., Judge.

§ 384. Judgment for defendant, after order sustaining demurrer.

Form No. 87.

[TITLE.]

An order having been entered in this action, on the . . . day of . . . , 19.., sustaining the demurrer to the complaint herein and giving the said plaintiffs leave to amend their complaint herein within twenty days after service of such order upon their attorneys, and giving the said defendants twenty days after such service of such amended complaint upon their attorneys, to demur or answer to said amended complaint, and

directing that if the said plaintiffs should fail, within that time, to amend their said complaint, that the same be dismissed, and judgment entered herein in favor of the defendants herein; and a copy of said order having been served on said attorneys, on the . . . day of . . ., 19.., and more than twenty days having elapsed since such service, and the said plaintiffs having failed to amend their said complaint, as by said order allowed;

Now, on motion of J. K., attorney for the said defendants,

It is ordered and adjudged, that the complaint herein be, and the same is hereby dismissed, and that the defendants have and recover their costs of the said plaintiffs taxed at . . . dollars.

By the Court:

O. P., Judge.

CHAPTER XXI.

DEFENSES—ANSWERS IN GENERAL.

§ 385. **General nature of.**—If the defendant does not demur, or, having demurred, the plaintiff having thereafter filed and served a proper complaint, his only alternative method of defense is to answer the complaint by matter of fact. In the ordinary sense, an answer means a reply. In pleading it may be a reply which either admits or denies the facts alleged in the complaint, or it may admit, and then avoid the effect of the admission by making a counter statement. In either case the object of an answer is to make an issue. Without an issue no trial can be had, because there is no question of difference between the plaintiff and defendant—in other words, plaintiff asks for nothing which defendant refuses to grant him. Burrill, in his Law Dictionary, defines an answer to be any pleading except a demurrer, framed to meet a previous pleading. The object of an answer is to plainly notify the court and the opposite party of the facts relied upon as a defense, so that the plaintiff may be prepared to meet them if he can. The testimony must then be confined to the allegations.¹ A defense not pleaded cannot be considered, although shown by the evidence.² And where a party to a suit has an opportunity to present his defense and neglects to do so, the decree against him is binding in a collateral proceeding.³ So, a defense should be so pleaded, that, being admitted as pleaded, judgment must go for the defendant, and this rule is especially rigid in pleading fraud or a forfeiture.⁴ Each defense must be complete in itself.⁵

Under the California practice, where the complaint is sworn to, the defendant must deny specifically each allegation in the complaint.⁶ But by each allegation is meant each material allegation; for if plaintiff makes averments in his complaint not

¹ Knahtla v. Oregon etc. R. R. Co., 21 Or. 142, 27 Pac. 91; Troy Laundry Co. v. Henry, 23 Or. 232, 31 Pac. 484.

² Wilson v. White, 84 Cal. 239, 24 Pac. 114.

³ Morrill v. Morrill, 20 Or. 96, 23

Am. St. Rep. 95, 25 Pac. 362, 11 L. R. A. 155

⁴ Greiss v. State Investment etc. Co., 98 Cal. 241, 33 Pac. 195.

⁵ Weston v. Estey, 22 Colo. 334, 45 Pac. 367.

⁶ Cal. Code Civ. Proc. § 437.

necessary or material to present his cause of action, or if he avers conclusions of law, or sets out evidence, these need not be traversed, for they are not issuable facts, or, if issuable, they are not pertinent to the case. Because plaintiff makes a history of his complaint, there is no reason, necessity, or excuse for the defendant to deny the truth of that history. Matters of inducement in a pleading are immaterial and need not be denied.⁷ An affirmative plea seeking to raise a question which has already been put in issue by the complaint and denial thereto, is demurrable.⁸ Nor is it proper to seek out the very words of the complaint, and then negative each and every one of them. An issue is not as well or as clearly made by negating the language of the complaint in terms as by denying the facts expressed by such language.

§ 386. Answer under the codes.—There is a practical uniformity in the code provisions as to the contents of the defendant's answer. The requirements are: 1. A general or specific denial of the material allegations of the complaint controverted by the defendant; 2. A statement of any new matter constituting a defense or counterclaim.⁹ In all of the codes it will be observed that the distinction between denials and new matter is preserved. The subjects of counterclaims, and cross-complaints will be treated under separate heads.¹⁰

The defendant, when about to make answer to the complaint, inquires: 1. Has any wrong been alleged in the complaint? 2. Does the complaint charge the defendant with the commission of the wrong? 3. Is the defendant liable to the extent alleged in the complaint? 4. Has the defendant a counterclaim? 5. Is the cause of action alleged within the statute of limitations? 6. Did the defendant do the wrong? These inquiries will suggest to the pleader what answer will raise an issue.¹¹

An answer may be a reply which either admits or denies the facts alleged in the complaint, or it may admit, and then avoid the effect of the admission by making a counter-statement. Its object is to raise an issue of fact—to plainly notify the court

⁷ *Fleishman v. Meyer*, 46 Or. 267, 80 Pac. 209.

⁸ *Hastings v. Anacortes Packing Co.*, 29 Wash. 224, 69 Pac. 776.

⁹ Cal. Code Civ. Proc., § 437; N. Dak. (Levisee's) Rev. Code, § 118; S.

Dak. (Levisee's) Rev. Code, § 118; Wash. B. & C. Codes, § 379; Idaho Rev. Codes, § 4183; Utah Code Civ. Proc., § 300.

¹⁰ Chs. XXV., XXVI., post.

¹¹ *Estee's Pl. & Pr.*, § 3166.

and the opposite party of the facts relied upon as a defense, so that the plaintiff may be prepared to meet them.¹² Each defense must be complete in itself.¹³ And a defense not pleaded cannot be considered, although shown by the evidence.¹⁴ So, also, where a party to a suit has an opportunity to present his defense and neglects to do so, the decree against him is binding in a collateral proceeding.¹⁵ Although the mere fact that a defendant has not averred a defense will not deprive him of it if the defense is made good by the plaintiff's proofs.¹⁶ A defense should be so pleaded that, being admitted as pleaded, judgment must be given for the defendant.¹⁷ An answer not traversing in material allegation nor confessing and avoiding, but only setting up matter admitted by the complaint is bad.¹⁸

§ 387. Objections not appearing on face of complaint.—

When any of the matters enumerated in the codes as ground for demurrer¹⁹ do not appear upon the face of the complaint, the objection may be taken by answer; and the demurrer to the complaint having been disposed of, the defendant may make his answer, filing the original with the clerk of the court in which the action is brought, and serving a copy upon the adverse party or his attorney.²⁰ The time within which the defendant must answer is regulated by the codes, and differs in the several states.²¹ But the time to answer may be extended by the court or judge.²²

§ 388. Time to answer.—The time to answer in the several states is fixed by the statute of such states, and the practice of the courts in many of them differs from the practice in California. In New York, defendant must answer within the statutory time or such further time as he may obtain by order.²³ In

¹² *Knahtla v. Oregon etc. R. R. Co.*, 21 Or. 142, 27 Pac. 91; *Troy Laundry Co. v. Henry*, 23 Or. 232, 31 Pac. 484.

¹³ *Weston v. Estey*, 22 Colo. 334, 45 Pac. 367.

¹⁴ *Wilson v. White*, 84 Cal. 239, 24 Pac. 114.

¹⁵ *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95, 25 Pac. 362, 11 L. R. A. 155.

¹⁶ *Salisbury v. Ellison*, 7 Colo. 167, 303, 2 Pac. 906, 3 Pac. 485, 49 Am. Rep. 347.

¹⁷ *Greiss v. State Investment etc. Co.*, 98 Cal. 241, 33 Pac. 195.

¹⁸ *Cassady v. Clarke*, 7 Ark. 123.

¹⁹ Cal. Code Civ. Proc., § 430; N. Y. Code, § 448.

²⁰ Cal. Code Civ. Proc., § 465; *Oliphant v. Whitney*, 34 Cal. 25.

²¹ See Cal. Code Civ. Proc., § 407, subd. 3.

²² Cal. Code Civ. Proc., §§ 473, 1054, as amended 1895.

²³ See N. Y. Code Civ. Proc., §§ 520, 781, 782.

Montana, an answer filed after defendant's default for failure to answer has been taken will be stricken from the files, the proper method for defendant being to move to set aside the default, tendering the answer with the motion.²⁴ In California, an answer filed without leave of court, after the time for answering has expired, but before default has been entered, is not a nullity, but at most an irregularity. The court in its discretion may strike it out or retain it, or permit another to be filed; but plaintiff cannot, as of right, have such answer stricken out. For these purposes defendant is not in default until his default has been actually entered in accordance with the statute.²⁵ If the defendant demurs only, and the demurrer is overruled, the court may allow him to answer, imposing terms in its discretion.²⁶

In reference to the time in which the answer must be filed, courts will take judicial notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, and of the local divisions of the country into states, counties, cities, towns, etc.²⁷ When a demurrer is interposed and overruled, the question of time to answer and terms are chiefly regulated by the rules and discretion of the court in which the cause is pending.²⁸ For if the demurrer is deemed frivolous, terms will be imposed before answer is allowed. Such a rule is required to prevent demurrer from becoming a means of delay only, and if the court does not fix the time within which answer in such case must be filed, the defendant should answer within the same time as in case of service of copy of the original complaint.²⁹ When the defendant, on motion being decided in his favor, is allowed time to answer until the plaintiff elects on which count of the complaint he will go to trial, the plaintiff should serve a copy of the complaint with the notice of his election.³⁰ And if an answer has been already filed, it may be allowed by order of the court to stand as the answer to such amended complaint, and it shall be treated as if filed when the order is made.³¹ If the defendant should fail to answer in the time specified in the summons, it is not an unsound exercise of

²⁴ *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591.

²⁵ Cal. Code Civ. Proc., § 437; *Bowers v. Dickerson*, 18 Cal. 420.

²⁶ See Cal. Code Civ. Proc., §§ 432, 472, 473; *Maumus v. Hamblon*, 38 Cal. 539.

²⁷ *People v. Smith*, 1 Cal. 9.

²⁸ *Thornton v. Borland*, 12 Cal. 438; Cal. Code Civ. Proc., §§ 472, 473, 1054; *People v. Rains*, 23 Cal. 128.

²⁹ *People v. Rains*, 23 Cal. 128.

³⁰ *Willson v. Cleaveland*, 30 Cal. 192.

³¹ *Mulford v. Estudillo*, 32 Cal. 131.

discretion in the court to refuse him leave to file an answer which does not show a meritorious defense.³² Under the California practice, the defendant may file an appearance, and answer immediately after suit brought, and without service, if he so desires, thus joining issue at once.

A stipulation extending the time within which to answer to and including a specified day which falls on Sunday entitles the defendant to answer at any time during the succeeding Monday.³³ So the fact that an answer is not filed until after the expiration of the time for answering does not render the filing a nullity, and where the answer seeks affirmative relief, a judgment of dismissal of the action by the plaintiff is void.³⁴ In Oregon, when an answer is not filed within the time limited, the proper practice is to apply to the trial court for a default or judgment for want of an answer.³⁵ The Washington statute^{35a} fixes the time for answer in response to summons as twenty days in all cases.³⁶

§ 389. Mode of pleading defense.—The defendant may set forth by answer as many defenses and counterclaims as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue.³⁷

The code permits the defendant to set up as many defenses as he may have, whether they are such as were formerly designated legal or equitable, and whether or not they are consistent or inconsistent with each other.³⁸

The defendant should set forth the true nature of the defense in his answer,³⁹ as the proofs for the defense must be limited to the averments in the answer.⁴⁰

³² *Hallowell v. Page*, 24 Mo. 590;
Page v. Page, 24 Mo. 595.

³³ *Blackwood v. Cutting Packing Co.*, 71 Cal. 461, 12 Pac. 493.

³⁴ *Accock v. Halsey*, 90 Cal. 215, 27 Pac. 193.

³⁵ *Gaines v. Cyrus*, 23 Or. 403, 31 Pac. 833.

^{35a} *Laws 1893*, p. 407.

³⁶ *McMaster v. Thrasher Co.*, 10 Wash. 147, 38 Pac. 760.

³⁷ *Cal. Code Civ. Proc.*, § 441.

³⁸ *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *Banta v. Siller*, 121 Cal. 412, 53 Pac. 935; *Baylies' Code Pl.*, p. 221; *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613.

³⁹ *Walton v. Minturn*, 1 Cal. 362; *Piercy v. Sabin*, 10 Cal. 30, 70 Am. Dec. 697; *Prall v. Peters*, 32 Neb. 834, 49 N. W. 767.

⁴⁰ *Turner v. "Black Warrior,"* 1 McAll. 181, Fed. Cas. No. 14253.

The codes prescribe no form for denial; the defendant may use any words which fairly import a denial of the averments of the complaint,⁴¹ and he may make use of any form of words to introduce his denial.⁴² The denial, however, should be explicit and not burdened with explanations.⁴³

The defense may be addressed to part of the complaint, but it must be so stated.⁴⁴

Equitable defenses may be set up in an action of a legal nature;⁴⁵ but an issue of law and fact should not be mixed in an answer.⁴⁶ Whether an answer states a legal defense, or an equitable defense in addition to the legal defense, must be determined by the answer itself, and not from the findings of the court.⁴⁷ Ordinarily, the court will first try and decide upon the equitable defense before proceeding with the action at law.⁴⁸ Although two defenses separately pleaded may be inconsistent, the plaintiff cannot disregard them, or either of them, at the trial; and in this respect there is no distinction between verified and unverified pleadings,⁴⁹ and a court is never justified in requiring the defendant to stand upon one alone of two inconsistent defenses.⁵⁰ In harmony with this rule, it has even been held that a denial of possession in one defense is not waived by the setting up of affirmative matter admitting possession in another defense, and that the admission made in the affirmative defense cannot relieve the plaintiff from proving the matters denied.⁵¹

If a complaint contains two counts, and the answer takes issue on the allegation of one only, the plaintiff is entitled to

⁴¹ *Morrison v. O'Reilly*, 2 Utah, 165.

⁴² *Espinosa v. Gregory*, 40 Cal. 58; *Town of Denver v. City*, 7 Wash. 226, 34 Pac. 926.

⁴³ *Creighton v. Kellerman*, 1 Disn. 548.

⁴⁴ *Nichols v. Dusenbury*, 2 N. Y. 283; *Foster v. Hazen*, 12 Barb. 547; *Kneedler v. Sternbergh*, 10 How. Pr. 67.

⁴⁵ *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Crary v. Goodman*, 12 N. Y. 266, 64 Am. Dec. 506.

⁴⁶ *Brooks v. Douglass*, 32 Cal. 208; *Guthrie v. Phelan*, 2 Idaho, 95, 6 Pac. 107; *Evans v. Jones*, 10 Utah, 183, 37 Pac. 262.

⁴⁷ *Bodley v. Ferguson*, 30 Cal. 511.

⁴⁸ *Martin v. Zellerbach*, 38 Cal. 300,

99 Am. Dec. 365; *Schieffery v. Tapia*, 68 Cal. 188, 8 Pac. 878.

⁴⁹ *Buhne v. Corbett*, 43 Cal. 264; *Billings v. Drew*, 52 Cal. 568; *Miles v. Woodward*, 115 Cal. 316, 46 Pac. 1076; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *People v. Lothrop*, 3 Colo. 428; *Stebbins v. Lardener*, 2 S. Dak. 140, 48 N. W. 847; *Lawrence v. Peck*, 3 S. Dak. 648, 54 N. W. 808; *Browder v. Phinney*, 37 Wash. 70, 79 Pac. 598.

⁵⁰ *Lawrence v. Peck*, 3 S. Dak. 648, 54 N. W. 808; *Lake Shore etc. Ry. Co. v. Warren*, 3 Wyo. 137, 6 Pac. 724.

⁵¹ *Buhne v. Corbett*, 43 Cal. 267; *Miles v. Woodward*, 115 Cal. 316, 46 Pac. 1076.

judgment on the other.⁵² The answer must contain one good defense to all that it proposes to answer, and an answer to two counts must contain one good defense to the charge as set out in both counts.⁵³ So an answer to a complaint in two counts professing to be an answer to the whole complaint, but, in fact, comprehending only one count is bad.⁵⁴ Also, where a complaint contains several causes of action, each defense pleaded in the answer should refer to the cause of action to which it is intended to answer.⁵⁵ Nor can several facts be pleaded in one answer, unless they are all conducive to the single point upon which the defendant means to rest his defense,⁵⁶ and a defendant cannot in different counts deny the same facts in different language, or make only a partial defense to a whole cause of action, or set out matter in avoidance without confessing that which he attempts to avoid.⁵⁷

The answer should be direct in stating with sufficient precision the matter of defense, and not leave it to be found out by inference, however strong the inference may be;⁵⁸ but material facts, inferentially stated, are good after judgment, if no demurrer has been interposed especially for that reason.⁵⁹ Matters of inducement in an answer should be in reply to the opposite party's allegations. The traverse is but an inference from the inducement.⁶⁰ An answer which might be objectionable on the ground of want of sufficient certainty cannot be treated as a nullity unless its sufficiency is excepted to,⁶¹ and if the allegations of a defense are pertinent to the controversy their sufficiency can only be tested by demurrer or at the trial.⁶² Where a party sets up matter in his answer not recognized by law as a defense to the action, while the objection may be taken by demurrer, it is not waived by failure to demur, but may be taken advantage of at any time.⁶³ The defense that the de-

⁵² *Leffingwell v. Griffing*, 31 Cal. 231.

⁵³ *Cook v. Tribune Assoc.*, 5 Blatchf. 352, Fed. Cas. No. 3165.

⁵⁴ *Wallace v. Bear River Water etc. Co.*, 18 Cal. 461. See, also, *Norris v. Glenn*, 1 Idaho, 191.

⁵⁵ *Hindman v. Edgar*, 24 Or. 581, 17 Pac. 862; *Fitzsimmons v. City Fire Ins. Co.*, 18 Wis. 234, 86 Am. Dec. 761.

⁵⁶ *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. Ed. 423.

⁵⁷ *Martin v. Swearingen*, 17 Iowa, 346.

⁵⁸ *Brooks v. Byam*, 1 Story, 296, Fed. Cas. No. 1947; *Savary v. Goe*, 3 Wash. C. C. 140, Fed. Cas. No. 12388.

⁵⁹ *Hill v. Haskin*, 51 Cal. 175.

⁶⁰ *Egberts v. Dibble*, 3 McLean, 86, Fed. Cas. No. 4307.

⁶¹ *Cunningham v. Wheatley*, 21 Tex. 184.

⁶² *Carpenter v. Bell*, 19 Abb. Pr. 258.

⁶³ *McDougall v. MacGuire*, 35 Cal. 274, 95 Am. Dec. 98. See, also, *Mar-*

fendant acted by advice of counsel must show that such advice was given upon the full and fair statement of the facts.⁶⁴

§ 390. **Denials in general.**—As already stated, an answer must contain either,—1. A general or specific denial of the complaint controverted by the defendant; or, 2. A statement of any new matter constituting a defense. A denial may be general or specific at the option of the pleader; but in either case it must be direct and unequivocal. Thus an averment that “this defendant says he denies” is sufficient;⁶⁵ but such an introduction is not to be commended.⁶⁶ To deny the allegations of the complaint “in manner and form as therein alleged” is insufficient,⁶⁷ and a general denial of a verified complaint with a qualification of “except as hereinafter admitted” is insufficient to put in issue any of its allegations.⁶⁸ Such a denial will be restricted to matters that expressly refer to or attempt to be covered by the specific allegations of the answer.⁶⁹ If no issue is raised by the defendant a closing denial stating “the defendant denying each and every allegation set forth in the plaintiff’s complaint not consistent with the foregoing answer” fails to raise an issue.⁷⁰ But an averment in the answer to the contrary of what is alleged in the complaint is equivalent to a denial; and even where the averment is not of the direct contrary of the allegations, but is inconsistent with the truth, it may, under certain circumstances, be held to raise an issue.⁷¹ And imperfect and defective denials, if acted upon as sufficient at the trial, are never in any sense to be deemed admissions of the allegations of a pleading which are attempted to be denied.⁷²

The plaintiff is entitled to an explicit denial of the material allegations of the complaint or an admission of their truth,

riott v. Clise, 12 Colo. 564, 21 Pac. 909.

⁶⁴ *Bliss v. Wyman*, 7 Cal. 257.

⁶⁵ *Espinosa v. Gregory*, 40 Cal. 58; *Munn v. Taulman*, 1 Kan. 254, 81 Am. Dec. 508; *Jones v. Ludlum*, 74 N. Y. 62.

⁶⁶ *Moen v. Eldred*, 22 Minn. 539.

⁶⁷ *Clark v. Gramling*, 54 Ark. 525, 16 S. W. 475.

⁶⁸ *Hensley v. Tartar*, 14 Cal. 508; *Levinson v. Schwartz*, 22 Cal. 229. But see *Hardy v. Purington*, 6 S. Dak. 382, 61 N. W. 158.

⁶⁹ *Althouse v. Jamestown*, 91 Wis. 46, 64 N. W. 423; *Starbuck v. Dunklee*, 10 Minn. 168, 88 Am. Dec. 68.

⁷⁰ *Richardson v. Smith*, 29 Cal. 529.

⁷¹ *Perkins v. Brock*, 80 Cal. 320, 22 Pac. 194; *Churchill v. Bauman*, 95 Cal. 541, 30 Pac. 770. See *Burris v. People’s Ditch Co.*, 104 Cal. 248, 37 Pac. 922; *Stetson v. Briggs*, 114 Cal. 511, 46 Pac. 603.

⁷² *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064; *Hunt v. Davis*, 135 Cal. 31, 66 Pac. 957.

either by direct statement or by silence.⁷³ The answer must respond to the complaint as filed.⁷⁴ As already pointed out, the material allegations are such as the plaintiff must prove at the trial in order to maintain his action, and a denial of such allegations only is sufficient.⁷⁵ As a denial, whether general or specific, only puts in issue the allegations of the complaint, the difference between a general and specific denial is only in the extent to which the allegations are denied.⁷⁶ The material allegations of a complaint must always be denied, either positively or upon information and belief;⁷⁷ the failure to deny a material allegation is an admission of the facts contained in such allegation, and such admission is conclusive against the pleader.⁷⁸ A denial in the precise language of the complaint is not a good denial.⁷⁹ So a denial of the exact value alleged in the complaint of the property sued for is an admission of any lesser amount;⁸⁰ in fact, such a denial is evasive.⁸¹ But where the defendant instead of denying that the property alleged to have been destroyed was of the value of twenty-five thousand dollars, or any other sum greater than the sum of twenty-five hundred dollars, he avers that the plaintiff has not sustained damage to exceed the latter sum; it puts in issue the value of the property or the amount of the damages, so far as they are laid, at more than the latter sum.⁸² Such a denial should cover the whole ground, either of the complaint itself or of that portion of it to which it is entitled to apply, and present a clear and complete issue in substance as well as in form.⁸³

A hypothetical denial is not good pleading,⁸⁴ although sometimes allowable.⁸⁵ But a denial may always be coupled with averments in explanation,⁸⁶ and an answer which denies the

⁷³ *De Racouillat v. Rene*, 32 Cal. 450; *Gay v. Winter*, 34 Cal. 153.

⁷⁴ *Chamberlain v. Loewenthal*, 133 Cal. 47, 70 Pac. 932.

⁷⁵ Cal. Code Civ. Proc., § 437.

⁷⁶ *Coles v. Soulsby*, 21 Cal. 47.

⁷⁷ *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Mulcahy v. Buckley*, 100 Cal. 489, 35 Pac. 144.

⁷⁸ *Burke v. Table Mountain Water Co.*, 12 Cal. 403; *Blankman v. Vallejo*, 15 Cal. 638; *Patterson v. Ely*, 19 Cal. 28; *Larney v. Mooney*, 50 Cal. 610.

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⁷⁹ *Larney v. Mooney*, 50 Cal. 610; *Smith v. Smith*, 19 Neb. 714, 28 N. W. 296.

⁸⁰ *Towdy v. Ellis*, 22 Cal. 650.

⁸¹ *Marsters v. Lash*, 61 Cal. 622.

⁸² *Hill v. Smith*, 27 Cal. 476; *Nunan v. San Francisco*, 38 Cal. 689.

⁸³ *Dimon v. Dunn*, 15 N. Y. 498.

⁸⁴ *Wies v. Fanning*, 9 How. Pr. 543.

⁸⁵ *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613.

⁸⁶ *Gee v. Culver*, 12 Or. 223, 6 Pac. 775.

performance of a contract by the plaintiff may also specifically enumerate several particulars in which the failure to perform consists.⁸⁷ The failure of a defendant to deny the charges in a complaint, making out a *prima facie* case for the plaintiff, will throw the *onus* on the defendant to prove his affirmative allegations,⁸⁸ and where the answer fails to deny in such form as to put in issue any of the material allegations of the complaint, the plaintiff is entitled to judgment according to his prayer.⁸⁹

§ 391. Statute or writing.—In pleading an ordinance or enactment founded upon a statute, in an action on contract which is in violation of said ordinance, it is not necessary to plead the statute specially.⁹⁰ In Indiana, where an answer is founded on a written instrument, a copy of the instrument must be annexed.⁹¹ In California, when a written instrument is so pleaded the genuineness and due execution of such instrument shall be deemed admitted unless plaintiff file with the clerk, five days before the commencement of the term at which the action is to be tried, an affidavit denying the same;⁹² but not by a failure to controvert the same on oath, as prescribed in this and section 447, unless the party controverting the same is, upon demand, permitted to inspect the original before filing such affidavit. The execution of the writing sued upon is put in issue by the plea of the general issue.⁹³ It has been held in some of the states that if a defendant sets up a contract which is required to be in writing he must so state it, or his answer is insufficient.⁹⁴

§ 392. Defense of insurance company.—If defendant insurance company claims exemption from liability upon the grounds that an excepted risk was the cause, or origin of the proximate cause, of the fire, against which proximate cause defendant had insured, then defendant must specify the peril which was the proximate cause of loss, and upon what premises or at what place the peril excepted caused the peril insured against.⁹⁵

⁸⁷ Mahurin v. Stone, 37 Ohio St. 49.

⁸⁸ Thompson v. Lee, 8 Cal. 275. See, also, Cal. Code Civ. Proc., § 462.

⁸⁹ Doll v. Good, 38 Cal. 287.

⁹⁰ Beman v. Tugnot, 5 Sandf. 153.

⁹¹ Seawright v. Coffman, 24 Ind. 414.

⁹² Cal. Code Civ. Proc., § 448. See In re Garcelon, 104 Cal. 570, 43 Am.

St. Rep. 134, 38 Pac. 1414, 32 L. R. A. 595.

⁹³ Gray v. Tunstall, Hempst. 555, Fed. Cas. No. 5730.

⁹⁴ Taylor v. Hilary, 1 Gale (Eng.) 22. But see Dewey v. Hoag, 15 Barb. 368; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384.

⁹⁵ Cal. Code Civ. Proc., § 437a, as amended 1907.

FORMS OF ANSWERS.

§ 393. Formal parts of answer—General form.

Form No. 88.

[Name of Court.]

A., B., C. and D.,	Plaintiffs,	}
	v.	
E. F. [answering defendants, and where there are others who do not answer add: impleaded with G. H. and others],		
	Defendant[s].	

The defendant E. F., answering the complaint herein, denies [or if the defense is new matter, alleges, or if the new matter be available as a counterclaim, alleges for a counterclaim thereto];

I. That, etc.

[If there be no counterclaim, a prayer for a judgment of dismissal is probably unnecessary, but it is usual to add it, as follows:]

Wherefore, the said defendant demands judgment dismissing said complaint with costs.

[If there be a counterclaim, there should be a prayer for judgment of dismissal of the complaint, and for affirmative relief upon the counterclaim, as though it were a complaint.]

J. K., Attorney for defendant, E. F.

§ 394. Interposing both denial and new matter in defense.

Form No. 89.

The plaintiff, replying to the answer of the defendant W. X. herein, as to the [first] counterclaim,

First. Denies each and every allegation of the answer respecting same.

Second. For a second defense to said counterclaim the plaintiff alleges:

That at the time alleged in the complaint as the time of the making of the supposed note therein mentioned, this plaintiff

was an infant under the age of twenty-one years, to wit, of the age of . . . years [or stating other defense, as if in answer to a complaint].

§ 395. Denial by assignee.

Form No. 90.

The defendant denies that any assignment of the lease described in the complaint was at any time made to or accepted by the defendant, and further denies that the defendant at any time occupied the said premises under the said lease.

§ 396. Specific denial.

Form No. 91.

The defendant, answering the complaint herein, denies that he ever indorsed the said note.

§ 397. General outline form of answer, denial, justification, and mitigation. [Libel.]

Form No. 92.

The defendant, answering the complaint of the plaintiff, denies [here deny publication or any other material fact or facts which are to be put in issue].

II. For a second and further defense the defendant alleges [upon information and belief] that the said supposed defamatory words set forth in the complaint herein are true; that, on or about . . . , 19 . . . , and prior to the alleged time of the speaking [or publishing] of said words the plaintiff feloniously stole and carried away . . . the property of defendant, of the value of . . . dollars, and that the said . . . so stolen is the same property referred to in the alleged slanderous words set forth in plaintiff's complaint.

III. And for a partial defense, and by way of mitigation of damages, the defendant alleges [here set forth want of malice, provocation, republication of current news, honest belief in truth, with facts on which it was based, etc.].

§ 398. Formal parts of answer, where there are several defenses and counterclaim.

Form No. 93.

The defendant, E. F., answering the complaint herein:

First. For a first defense to the first alleged cause of action denies [etc., generally or specifically].

Second. For a further defense to said first cause of action, said defendant alleges [here set forth the facts constituting the defense].

Third. For a further defense to said first cause of action, said defendant alleges [here set forth the facts constituting it, except that if any of them have been alleged above, an express reference to and adoption of those allegations will suffice instead of a repetition of them].

Fourth. For a counterclaim to the second alleged cause of action, said defendant alleges, etc.

Wherefore, said defendant demands, etc.

§ 399. Commencement of answer by defendant appearing in person.

Form No. 94.

The defendant Y. Z., in person, answering the plaintiff's complaint herein, alleges [or, denies]:

§ 400. The same—By defendant sued by wrong name.

Form No. 95.

This defendant, E. F., in the summons and complaint in this action called G. E., answering the plaintiff's complaint herein, alleges [or, denies]:

§ 401. The same—By infant.

Form No. 96.

This defendant, an infant under the age of twenty-one years, by C. D., his guardian, answering the plaintiff's complaint herein, alleges, [or, denies]:

§ 402. The same—By lunatic.

Form No. 97.

The defendant, E. F., a lunatic [or, a person of unsound mind; or, an idiot; or, an habitual drunkard], by M. N., his committee and guardian, [or, by O. P., his duly appointed guardian *ad litem*], answering the plaintiff's complaint herein, alleges [or, denies]:

§ 403. The same—By husband and wife answering jointly.

Form No. 98.

E. F., one of the above-named defendants, and G. F., his wife, answering the plaintiff's complaint in this action, jointly allege [or, deny]:

§ 404. Answer alleging partial defense.

Form No. 99.

The defendant for a partial defense to the alleged cause of action set forth in the complaint, alleges [or, denies]:

§ 405. Answer upon information and belief.

Form No. 100.

The defendant, answering the complaint of the plaintiff herein, upon information and belief, denies [or, alleges]:

§ 406. General denial of knowledge or information, by several defendants answering together.

Form No. 101.

Severally say, each for himself, that he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations of the said complaint.

CHAPTER XXII.

DEFENSES—GENERAL DENIAL.

§ 407. **Sufficiency of a general denial.**—Under the code system of pleading a general denial is equivalent to the general issue at common law,¹ but a general denial cannot be framed as was the general issue.² Special matters of defense such as excuse or justification of alleged trespass, and public or private right of way, or any interest in land, short of property or right of possession, must still be pleaded, and are not available under a general denial.³ It puts the plaintiff upon proof of all the facts necessary to entitle him to recover,⁴ and not merely of every fact alleged, but all implications and conclusions arising out of those facts.⁵ There is no such thing as common-law general issue under the code of New York,⁶ although the general denial is in most respects like it.⁷ And under the Colorado practice there is neither general denial nor general issue; each material allegation must be specifically traversed.⁸

A general denial is always sufficient where the complaint is not verified, but it only puts in issue the material allegations of the complaint.⁹ So where an unverified complaint alleges the value of property converted, and the answer is a general denial, the value is put in issue.¹⁰ Under the Idaho statutes¹¹ a complaint by a public officer in his official capacity need not be verified; but if the complaint be not in fact verified, a general verified answer may put in issue the main allegations of the complaint.¹² It follows from this that where a complaint

¹ *White v. Moses*, 11 Cal. 69.

² *Clark v. Gramling*, 54 Ark. 525, 16 S. W. 475.

³ *American Co. v. Bradford*, 27 Cal. 367; *Lux v. Haggin*, 69 Cal. 276, 10 Pac. 674.

⁴ *Ward v. Packard*, 18 Cal. 391.

⁵ *Bellinger v. Craigue*, 31 Barb. 534; *Academy of Music v. Hackett*, 2 Hilt. 217; *Lord v. Cheesebrough*, 4 Sandf. 696.

⁶ 1 Van Santv. 406.

⁷ *Livingston v. Finkle*, 8 How. Pr. 486.

⁸ *Watson v. Lemen*, 9 Colo. 200, 11 Pac. 88. But see *Goodridge v. Union Pacific R. R. Co.*, 37 Fed. 182.

⁹ Cal. Code Civ. Proc., § 437.

¹⁰ *Paden v. Goldbaum (Cal.)*, 37 Pac. 759.

¹¹ § 4199.

¹² *United States v. Shoup*, 2 Idaho, 459, 21 Pac. 656.

is verified the denials of the answer must be specific; a general denial raises no issue.¹³

A general denial may be in any words which fairly import a denial of all the averments of the complaint. Thus a denial of "each and every allegation" is sufficient. A denial of all the "material allegations," however, does not constitute a good general denial,¹⁴ the reason for this being that a pleader cannot be permitted, by the use of the qualifying word "material," to assume the determination of the question as to what facts are material. Under the California practice a counter averment may constitute a general denial.¹⁵ So if an answer in response to an allegation in the complaint, instead of denying it in express terms, contains the averment that the defendant did not commit the act charged, or that the facts alleged to exist did not exist, these averments of the answer traverse the matters alleged, and are good denials.¹⁶

A general denial of the averments of a complaint "except as hereinafter admitted" is insufficient to raise any issue of material fact where the pleadings are verified. The answer having admitted an indebtedness charged in the complaint, a denial of the promise to pay is immaterial; the law implies such a promise.¹⁷ So, also, the concluding part of an answer which traverses each and every allegation set forth in the complaint "not inconsistent with this answer" raises no issue.¹⁸

§ 408. Definition of general denial.—There are but two forms in which a defendant can controvert the allegations of a verified complaint: 1. Positively, when the facts are within his personal knowledge; and, 2. Upon information and belief, when they are not.¹⁹ But now, by the California Code of Civil Procedure,²⁰ he may also place his denial on the ground that he has no information or belief on the subject sufficient to answer the allegations in the complaint. A general denial is a denial in gross of all the allega-

¹³ Cal. Code Civ. Proc., § 437; *Power v. Gum*, 6 Mont. 5, 9 Pac. 575; *State v. Western Union Tel. Co.*, 4 Nev. 338.

¹⁴ *Dole v. Burleigh*, 1 Dak. 227, 46 N. W. 692.

¹⁵ *Hill v. Smith*, 27 Cal. 276; *Thompson v. Lynch*, 29 Cal. 189; *Siter v. Jewett*, 33 Cal. 92; *Way v. Oglesby*,

45 Cal. 655; *Burris v. People's Ditch Co.*, 104 Cal. 253, 37 Pac. 722.

¹⁶ *Hill v. Smith*, 27 Cal. 479.

¹⁷ *Levinson v. Schwartz*, 22 Cal. 229.

¹⁸ *Richardson v. Smith*, 29 Cal. 529.

¹⁹ *Curtis v. Richards*, 9 Cal. 33; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

²⁰ Cal. Code Civ. Proc., § 437.

tions of the complaint.²¹ Such a denial only puts in issue the allegations of the complaint.²² An implied admission does not control a general denial.²³ Under the California Code of Civil Procedure,²⁴ if the complaint be verified, the answer must contain a specific denial of each allegation controverted. The mere form of the denial is not material, provided it directly traverses the allegation which it is intended to meet.²⁵ "The defendant for answer says he denies," etc., is in form of expression unexceptional, and the court will not call in question the fact of denial.²⁶ A general denial which "denies each and every allegation alleged in said complaint" is sufficient.²⁷ But a denial of each and every material allegation of complaint is bad, as being evasive.²⁸ The legal effect of such denials is not changed by expressions showing that they were intended to be specific.²⁹ The denial should not be of "all the allegations," but of "each and all," or "each and every," and a denial of all the material allegations, though good on demurrer, is not sufficiently certain and specific.³⁰ "That no allegation thereof is true," was recommended by the code commissioners of New York.³¹ "Denies each and every allegation in said complaint contained, not herein specifically admitted or specifically controverted," has been sustained.³² If several material matters are stated in the complaint conjunctively, an answer which undertakes to deny them as a whole conjunctively stated is evasive, and an admission of the allegation attempted to be denied.³³ An answer filed three weeks after the complaint, denying that defendants were and still are doing business under a certain firm

²¹ *Dennison v. Dennison*, 9 How. Pr. 246; *Seward v. Miller*, 6 How. Pr. 312.

²² *Glazer v. Clift*, 10 Cal. 303; *Coles v. Soulsby*, 21 Cal. 47; *Stone v. Quaal*, 36 Minn. 46, 29 N. W. 326.

²³ *Bessemer Irr. Ditch Co. v. Woolley*, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1053.

²⁴ Cal. Code Civ. Proc., § 347.

²⁵ *Hill v. Smith*, 27 Cal. 476. See *Power v. Gum*, 6 Mont. 5, 9 Pac. 575.

²⁶ *Espinosa v. Gregory*, 40 Cal. 58; *Jones v. Ludlum*, 74 N. Y. 61; *Moen v. Eldred*, 22 Minn. 538; *Munn v. Taulman*, 1 Kan. 254, 81 Am. Dec. 508.

²⁷ *Kellogg v. Church*, 4 How. Pr. 339. But see *Dennison v. Dennison*, 9 How. Pr. 246; *Rosenthal v. Brush*, 1 Code Rep. (N. S.) 228; *Seward v. Miller*, 6 How. Pr. 312.

²⁸ *Mattison v. Smith*, 19 Abb. Pr. 288.

²⁹ *Hensley v. Tartar*, 14 Cal. 508.

³⁰ *Lewis v. Coulter*, 10 Ohio St. 451.

³¹ See Report, 128, for the reasoning thereon.

³² *Parshall v. Tillou*, 13 How. Pr. 7; *Hunt v. Bennett*, 4 E. D. Smith, 647; *Davison v. Sehermerhorn*, 1 Barb. 480; *Griffin v. Railroad Co.*, 101 N. Y. 354, 4 N. E. 740.

³³ *Doll v. Good*, 38 Cal. 287.

name, is not a denial of the allegation of the complaint, applying it to the time the complaint was filed.³⁴ The words "other than as hereinafter set out" does not make a sufficient complaint objectionable, even if nothing is thereafter set out.³⁵ If a denial, although informal, has been treated by the parties as sufficient on the trial, the same effect will be given it on appeal.³⁶ Colorado practice recognizes no general denial or general issue.³⁷ But in some jurisdictions a general denial in code procedure is deemed equivalent to the general issue at common law.³⁸ Although the denial in an answer to a complaint may not be as specific as good pleading requires, for the reason that the defendants "say that they deny each and every allegation," yet where there is no motion to make the denial more specific, and it appears from the answer as a whole just what allegations of the complaint are denied and what are admitted, the denial will be held sufficient.³⁹ When a general denial to an unverified complaint is qualified by an exception of "such allegations as are hereinafter admitted, stated, or qualified," it will not control the effect of an affirmative allegation of the answer, which, in legal effect, admits the cause of action.⁴⁰

§ 409. What evidence is admissible.—Under the general denial authorized by the code, evidence of a distinct affirmative defense is not admissible. The defendant is limited to contradicting the plaintiff's proof, and disproving the case made by him.⁴¹ Persons sued for any matter, act, or thing done under the copyright law may plead the general issue and give the special matter in evidence,⁴² may avail themselves of the invalidity of an ordinance upon which plaintiff relies to support the contract sued upon.⁴³ In an action on an indebtedness the defendant, under the general denial, may prove that he was never indebted at all, or that he owes less than is

³⁴ *Nolan v. Hentig*, 138 Cal. 281, 71 Pac. 440.

³⁵ *Anderson v. War Eagle Consol. Min. Co.*, 8 Idaho, 789, 72 Pac. 671.

³⁶ *Hiatt v. School District*, 65 Cal. 481, 4 Pac. 464.

³⁷ *Watson v. Lemen*, 9 Colo. 200, 11 Pac. 88.

³⁸ See *Louisville etc. Ry. Co. v. Trammell*, 93 Ala. 350, 9 South. 870; *Perkins v. Ermel*, 2 Kan. 325.

³⁹ *Town of Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926.

⁴⁰ *People v. Otto*, 77 Cal. 45, 18 Pac. 869. But compare *Lamberton v. Shannon*, 13 Wash. 404, 43 Pac. 336.

⁴¹ *Beaty v. Swarthout*, 32 Barb. 293.

⁴² U. S. Rev. Stats. 1875, § 4969.

⁴³ *Weaver v. Cañon Sewer Co.*, 18 Colo. App. 242, 70 Pac. 953.

claimed, or that services were rendered as a gratuity, in whole or in part, or that plaintiff had himself fixed a less price for his services than he claims to recover.⁴⁴ A denial of indebtedness alleged in the complaint is held available as equivalent to plea of *nil debet*.⁴⁵ Defendant cannot prove an eviction on a claim for rent in arrear, under the plea *nil debet*, or general denial. And consequently an eviction must be set up in the answer.⁴⁶ In California, the defense of payment is admissible under the general denial of indebtedness,⁴⁷ but in most of the states payment is considered new matter which must be specially pleaded,⁴⁸ as is also failure of consideration.⁴⁹

§ 410. When general denial is allowable.—A defendant after specifically admitting some of the allegations may make a general denial as to the rest,⁵⁰ or as to all within certain specified folios.⁵¹ Where the facts alleged were presumptively within the defendant's knowledge, he must admit or deny positively, unless there be something special in the circumstances of the case.⁵² So held in action for assault.⁵³ So of bond executed by defendant as surety.⁵⁴ So in contract, where complaint specifically alleges contract.⁵⁵ So in defendant causing

⁴⁴ Schermerhorn v. Van Allen, 18 Barb. 29; Andrews v. Bond, 16 Barb. 633.

⁴⁵ Simmons v. Sisson, 26 N. Y. 264; Swanholm v. Reeser, 3 Idaho, 476, 31 Pac. 804.

⁴⁶ Piercy v. Sabin, 10 Cal. 30, 70 Am. Dec. 692, overruling McLarren v. Spaulding, 2 Cal. 510.

⁴⁷ Frisch v. Calor, 21 Cal. 71; Fairchild v. Amsbaugh, 22 Cal. 572; Wetmore v. San Francisco, 44 Cal. 294; Davanay v. Eggenhoff, 43 Cal. 395; Brown v. Orr, 29 Cal. 120; Brooks v. Chilton, 6 Cal. 640; Staab v. Jaramillo, 3 N. Mex. 33, 1 Pac. 170.

⁴⁸ Hubler v. Pullen, 9 Ind. 273; 68 Am. Dec. 620; Baker v. Kistler, 13 Ind. 63; Stevens v. Thompson, 5 Kan. 305; Clark v. Spencer, 14 Kan. 398; 19 Am. Rep. 96; McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696; Texier v. Gouin, 5 Duer, 389; Edson v. Dillaye, 8 How. Pr. 273; Morrill v. Irving Fire Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396; Martin v. Pugh, 23

Wis. 184; Phillips v. Jarvis, 19 Wis. 204; Knapp v. Runals, 37 Wis. 135.

⁴⁹ Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124.

⁵⁰ Parshall v. Tillou, 13 How. Pr. 7; Blaisdell v. Raymond, 6 Abb. Pr. 148; Smith v. Wells, 20 How. Pr. 158.

⁵¹ Gassett v. Crocker, 9 Abb. Pr. 39; Blake v. Eldred, 18 How. Pr. 240.

⁵² Vassault v. Austin, 32 Cal. 597; Humphreys v. McCall, 9 Cal. 59; Brown v. Scott, 25 Cal. 195; Shearman v. New York Cent. Mills, 1 Abb. Pr. 187; Thorn v. New York Cent. Mills Co., 10 How. Pr. 19; Lewis v. Acker, 11 How. Pr. 163; Edwards v. Lent, 8 How. Pr. 28; Fales v. Hicks, 12 How. Pr. 153; Slater v. Maxwell, 6 Wall. 268.

⁵³ Richardson v. Wilton, 4 Sandf. 708.

⁵⁴ Hance v. Rummig, 1 Code Rep. (N. S.) 204, 2 E. D. Smith, 48.

⁵⁵ Ord v. Steamer Uncle Sam, 13 Cal. 369.

process to issue.⁵⁶ So of fact admitted by original defendant.⁵⁷
So of goods sold and delivered to partner.⁵⁸

§ 411. **Partial denial.**—Where the cause of action is divisible, or where several causes of action are stated, defendant in his answer may deny part or some or one of the causes of action, and leave the residue unanswered.⁵⁹ In answering a complaint which contains several causes of action, and such answer contains several defenses, each defense pleaded should refer to the cause of action which it is intended to answer.⁶⁰ But the effect of partial denial will be limited to the precise ground covered.⁶¹

§ 412. **Denial by articles.**—Where the defendant relies on a state of facts single and indivisible, it is not necessary to separately and distinctly state and number each mitigating circumstance.⁶² If the pleadings are under oath, and the replications in response to a material averment of the answer undertake to deny, by saying "it is not true," etc., the replication is evasive, and does not specifically deny the averment.⁶³ A denial made three weeks after filing of the complaint that defendants "were and still are" is evasive.⁶⁴ An implied admission does not control a general denial, which in addition to the general denial traverses "each and every allegation of the complaint not heretofore specifically admitted."⁶⁵ And only such allegations should be denied as defendant intends to controvert.⁶⁶ A denial cannot be made by implication.⁶⁷ Each proposition should be separately denied.⁶⁸ Nor should two or more grounds of defense be stated, when one of

⁵⁶ *Lawrence v. Derby*, 15 Abb. Pr. 346.

⁵⁷ *Forbes v. Waller*, 25 N. Y. 430.

⁵⁸ *Chapman v. Palmer*, 12 How. Pr. 38.

⁵⁹ Cal. Code Civ. Proc., § 441; *Smith v. Shufelt*, 3 Code Rep. 175; *Tracy v. Humphrey*, 3 Code Rep. 190; *Willis v. Taggard*, 6 How. Pr. 433; *Genesee Mut. Ins. Co. v. Moynihan*, 5 How. Pr. 322; *Longworthy v. Knapp*, 4 Abb. Pr. 115; *Otis v. Ross*, 8 How. Pr. 193.

⁶⁰ Or. Code, § 73; *Hindman v. Edgar*, 24 Or. 581, 17 Pac. 862.

⁶¹ *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

⁶² *Kinyon v. Palmer*, 20 Iowa, 138.

⁶³ *Verzan v. McGregor*, 23 Cal. 339.

⁶⁴ *Nolan v. Hentig*, 138 Cal. 281, 71 Pac. 440.

⁶⁵ *Bessemer Irr. Ditch Co. v. Woolley*, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1053.

⁶⁶ *Newell v. Doty*, 33 N. Y. 83.

⁶⁷ *West v. American Exch. Bank*, 44 Barb. 175.

⁶⁸ Cal. Code Civ. Proc., § 437; *More v. Del Valle*, 28 Cal. 170; *Fitch v. Bunch*, 30 Cal. 208.

them would be as effectual in law as all of them.⁶⁹ Such denials would be bad for duplicity, which must be avoided.⁷⁰ A specific denial of one or more allegations is held to be an admission of all others well pleaded.⁷¹ Denials of several allegations are but one defense.⁷² A special traverse, as originally devised and used, was simply a mode by which the pleader in the inducement spread his own right or title upon the record, adding to this implied denial of the opposing claim a direct denial under the *absque hoc*. The inducement in such a traverse must on its face give the pleader a good right or title, or the whole plea is bad.⁷³ Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation.⁷⁴ A denial in an answer should by its words so describe the allegations of the complaint which the pleader intends to controvert that any person of intelligence can identify them.⁷⁵

§ 413. Denials—Form and sufficiency—Continued.—Where an answer to a complaint raises material issues upon the matters alleged therein, the answer is not demurrable for want of sufficient facts.⁷⁶ And although an answer may be defective, if it can be gathered therefrom that an issue is tendered by the pleading upon a material matter, it is error to render judgment on the pleadings in favor of the plaintiff.⁷⁷ The denial of an allegation need not be absolute nor in any particular form.⁷⁸ Any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue is a good traverse, and sufficient as a denial.⁷⁹ But it is a rule of code pleading that denials must be specific, and that it must clearly

⁶⁹ Lord v. Tyler, 14 Pick. 164.

⁷⁰ Hooper v. Jellison, 22 Pick. 250;
Cahoon v. Bank of Utica, 7 N. Y.
486.

⁷¹ De Ro v. Cordes, 4 Cal. 117;
Caulfield v. Saunders, 17 Cal. 569;
Whitlock v. McKechnie, 1 Bosw. 427;
Pardee v. Schenck, 11 How. Pr. 500;
Archer v. Boudinet, 1 Code Rep. (N.
S.) 372; Corwin v. Corwin, 9 Barb.
219; Reilly v. Cook, 22 How. Pr. 93;
13 Abb. Pr. 255. See Walrod v. Ben-
nett, 6 Barb. 144; Harbeck v. Craft,
4 Duer, 122.

⁷² Otis v. Ross, 8 How. Pr. 193.

⁷³ Fox v. Nathans, 32 Conn. 348.

⁷⁴ Racouillat v. Rene, 32 Cal. 450.

⁷⁵ Mattison v. Smith, 19 Abb. Pr.
288.

⁷⁶ Bennett v. Tacoma etc. Water
Co., 3 Wash. 337, 28 Pac. 520.

⁷⁷ Rourk v. Miller, 3 Wash. 73, 27
Pac. 1029.

⁷⁸ Gee v. Culver, 12 Or. 228, 6 Pac.
775.

⁷⁹ Burris v. People's Ditch Co., 104
Cal. 248, 37 Pac. 922. See Churchill v.
Baumann, 95 Cal. 541, 30 Pac. 770.

and unequivocally appear what the pleader intends to deny.⁸⁰ It is held good pleading to deny wholly the wrong with which one is charged, putting the party alleging it to the proof, relying upon his inability to make any proof, or proof of the whole wrong.⁸¹ A stipulation by the parties may take the place of denials in an answer.⁸²

§ 414. **Defective denials.**—A defective answer may be aided by the proof;⁸³ or it may be cured by the plaintiff's reply.⁸⁴ An answer filed six months after filing a complaint, which simply denies that the plaintiffs are then the owners and in actual possession of the premises claimed, is a virtual confession of the complaint, and is not a denial.⁸⁵ Where an answer does not deny any of the facts upon which the plaintiff's claim for a lien is based, but denies indebtedness to the plaintiff, and that the plaintiff had any lien, the denials are to be deemed conclusions of law, and no issues of fact are raised by the pleadings.⁸⁶ So a denial in a pleading of "legal notice . . . so as in any way to affect . . . the title derived," etc., does not put in issue the allegation of notice in the pleading answered.⁸⁷ So an answer which states that "it does not deny or admit" the allegations of the plaintiff's complaint does not constitute "a general or specific denial," and is therefore insufficient under section 185 of the Washington Code of Procedure. So, as a general rule, where an answer does not deny the facts stated in a paragraph of the complaint, but controverts the conclusions drawn by the pleader from the facts stated, the answer does not traverse any material fact.⁸⁸ But where an answer is defective in its denials, if a trial is had in all respects, and evidence taken as though it properly raised an issue, without any objection in the court below to the defective denials, the

⁸⁰ *Denver etc. Construction Co. v. Stout*, 8 Colo. 61, 5 Pac. 627. See *Power v. Gum*, 6 Mont. 5, 9 Pac. 575.

⁸¹ *Little Pittsburg etc. Min. Co. v. Little etc. Mining Co.*, 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760.

⁸² *Alta Silver Min. Co. v. Mining Co.*, 78 Cal. 629, 21 Pac. 373, in which case an instance is given.

⁸³ *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81.

⁸⁴ *James v. McPhee*, 9 Colo. 486, 13 Pac. 535.

⁸⁵ *Leggatt v. Stewart*, 5 Mont. 107, 2 Pac. 320; *Nolan v. Hentig*, 138 Cal. 281, 71 Pac. 440; *Bessemer Irr. Ditch Co. v. Woolley*, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1053.

⁸⁶ *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

⁸⁷ *Seaman v. Hax*, 14 Colo. 536, 24 Pac. 461, 9 L. R. A. 341.

⁸⁸ *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767.

plaintiff cannot object upon an appeal taken by him that the answer raised no issue.⁸⁹ And imperfect and defective denials, if acted upon as sufficient at a trial, are in no sense admissions of the allegations of a pleading which are attempted to be denied.⁹⁰

§ 415. **Literal and conjunctive denials.**—Under our practice and that of the common law, a specific denial of one or more allegations is held to be an admission of all others well pleaded.⁹¹ It has also been held by our courts that a specific denial to each allegation of a complaint is a separate denial applicable only to the specific allegation controverted,⁹² as the object of the code in allowing the plaintiff to verify is to narrow the proof on the trial, and compel the defendant to deny specifically each separate allegation.⁹³ And the defendant must either deny the facts alleged or confess and avoid them.⁹⁴ Defendant sued on an account is entitled to join a plea of limitations with a general denial.⁹⁵ The rules of pleading under our system are intended to prevent evasion, and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment.⁹⁶ It is now the settled law that where defendant denies plaintiff's proposition in a verified complaint, as a whole and as conjunctively stated, it is alike in violation of the principles of common-law pleading as well as the express direction of our statute; and thus an answer to a verified complaint should contain a specific denial to each allegation of the complaint controverted, or a denial thereof according to the defendant's information and belief. The denial should be in the disjunctive, although the allegations of the complaint

⁸⁹ *Klopper v. Levy*, 98 Cal. 525, 33 Pac. 444.

⁹⁰ *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064.

⁹¹ *De Ro v. Cordes*, 4 Cal. 117; *Manning v. Bowman*, 26 Nev. 451, 69 Pac. 995.

⁹² *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Seward v. Miller*, 6 How. Pr. 312.

⁹³ *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

⁹⁴ *Piercy v. Sabin*, 10 Cal. 22, 70

Am. Dec. 692; *Fish v. Redington*, 31 Cal. 185.

⁹⁵ Or. B. & C. Codes, §§ 73, 74; *Dutro v. Ladd*, 50 Or. 120, 91 Pac. 459.

⁹⁶ *Oil Creek Gold Min. Co. v. Fairbanks*, 19 Colo. App. 142, 74 Pac. 543; *Blankman v. Vallejo*, 15 Cal. 638; *Castro v. Wetmore*, 16 Cal. 380; *Higgins v. Wortell*, 18 Cal. 333; *Morrill v. Morrill*, 26 Cal. 292; *Camden v. Mullen*, 29 Cal. 564; *Blood v. Light*, 31 Cal. 115; *Toland v. Mandell*, 38 Cal. 30; *Doll v. Good*, 38 Cal. 287.

are stated in the conjunctive.⁹⁷ But in New York the doctrine, it would seem, has been qualified.⁹⁸

If an allegation of a complaint consists of several clauses or propositions connected by the copulative conjunction "and," a denial of the entire allegation is evasive and insufficient. Each proposition should be separately denied.⁹⁹ Where several allegations of a complaint are not connected by the conjunction "and," a denial in the answer of these allegations conjunctively does not amount to a denial of the allegations to which the defendant professes to respond.¹⁰⁰

Literal denials, following the very words of the complaint, are insufficient. So where the answer denied the allegations of indebtedness as to the time, amount, and work, in the very words of the complaint, it was held that the answer raised an immaterial issue upon these particulars.¹⁰¹ So where the form of the allegation was that defendant "unlawfully and wrongfully seized and took said property into his possession from said plaintiff," and defendant denied "that he (defendant) wrongfully and unlawfully seized, took or carried away the said property," it was held that the fact that defendant took the property from the plaintiff was not denied, but admitted.¹⁰²

§ 416. Denial of legal conclusions.—If the answer merely denies a conclusion of law resulting from the facts contained in the complaint, it is insufficient;¹⁰³ and in such case the facts

⁹⁷ *Reed v. Calderwood*, 32 Cal. 109; *Burke v. Caruthers*, 31 Cal. 467; *Fish v. Redington*, 31 Cal. 194; *Brown v. Scott*, 25 Cal. 195; *Kuhland v. Sedgwick*, 17 Cal. 123; *Hensley v. Tartar*, 14 Cal. 508; *Wise v. Rose*, 110 Cal. 159, 42 Pac. 569; *Salinger v. Lusk*, 7 How. Pr. 430; *Davison v. Powell*, 16 How. Pr. 467; *Shearman v. New York Cent. Mills*, 1 Abb. Pr. 187; *Baker v. Bailey*, 16 Barb. 54; *Young v. Catlett*, 6 Duer, 443; *Beach v. Barons*, 13 Barb. 305; *Livingston v. Hammer*, 7 Bosw. 670; *Otis v. Ross*, 8 How. Pr. 193; *King v. Ray*, 11 Paige, 235; *Elton v. Markham*, 20 Barb. 343; *Blake v. Eldred*, 18 How. Pr. 240.

⁹⁸ *Wall v. Buffalo Water Works*, 18 N. Y. 119.

⁹⁹ *More v. Del Valle*, 28 Cal. 170; *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144.

¹⁰⁰ *Fitch v. Bunch*, 30 Cal. 208; *Leroux v. Murdock*, 51 Cal. 541.

¹⁰¹ *Caulfield v. Sanders*, 17 Cal. 569. See, also, *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 24 Pac. 1051.

¹⁰² *Woodworth v. Knowlton*, 22 Cal. 164; *Richardson v. Smith*, 29 Cal. 531.

¹⁰³ *Steph. Pl.* 180; *1 Chit. Pl.* 645; *1 Van Santv. Pl.* 416; *Nelson v. Murray*, 23 Cal. 338; *Wormouth v. Hatch*, 33 Cal. 128; *Lightner v. Menzle*, 35 Cal. 452; *Turner v. White*, 73 Cal. 299, 14 Pac. 794; *Gruwell v. Seybolt*, 82 Cal. 9, 22 Pac. 938; *Gale v. James*, 11 Colo. 542, 19 Pac. 446; *Lake v. Steinbach*, 5 Wash. 663, 32

stated in the complaint will be deemed admitted.¹⁰⁴ Conclusions of law need not be denied.¹⁰⁵ A denial that the defendant became or was lawfully bound by judgment declared on is merely a denial of a conclusion of law.¹⁰⁶ Nor is it a denial in an action for the possession of personal property to allege that the defendant did not at any time wrongfully take and detain the property from the plaintiff;¹⁰⁷ or in ejectment that the defendant did not wrongfully and unlawfully dispossess the plaintiff. This is an admission rather than a denial of the dispossession.¹⁰⁸ A mere denial of indebtedness is insufficient;¹⁰⁹ so, also, of an answer which without denying any fact stated in the complaint, merely says that "the defendant denies that the plaintiff is entitled to the money demanded";¹¹⁰ and an averment that "the plaintiff is not the real party in interest, nor is he an executor."¹¹¹

A denial which is in itself a conclusion of law raises no issue, as where an answer states in general terms that a municipal ordinance is illegal and void.¹¹² Where, however, the allegation of the complaint is couched in the form of a conclusion of law a denial in the same form will be permissible and is efficient for all purposes.¹¹³ For a complaint is not open to the objection that it does not state facts sufficient to constitute a cause of action merely because it contains a conclusion of law.¹¹⁴

§ 417. Negative pregnant.—The rules of pleading under the code are intended to preclude evasion and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal truth;¹¹⁵ and whenever the defendant fails to make such a denial, he admits the aver-

Pac. 767; *Hoopes v. Meyer*, 1 Nev. 433.

¹⁰⁴ *Nelson v. Murray*, 23 Cal. 338.

¹⁰⁵ *Kidwell v. Ketler*, 146 Cal. 12, 79 Pac. 514; *Zorn v. Livesley*, 44 Or. 501, 75 Pac. 1057.

¹⁰⁶ *People v. Supervisors*, 27 Cal. 655.

¹⁰⁷ *Richardson v. Smith*, 29 Cal. 529.

¹⁰⁸ *Busenius v. Coffee*, 14 Cal. 93; *Lay v. Neville*, 25 Cal. 549.

¹⁰⁹ *Gale v. James*, 11 Colo. 542, 19 Pac. 446; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767.

¹¹⁰ *Drake v. Cockroft*, 1 Abb. Pr. 203.

¹¹¹ *Russell v. Clapp*, 3 Code Rep. 64.

¹¹² *People v. Supervisors*, 27 Cal. 655; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514; *Richards v. Dower*, 81 Cal. 44, 22 Pac. 304; *Balfour v. Davis*, 14 Or. 47, 12 Pac. 89.

¹¹³ *Morrow v. Cougan*, 3 Abb. Pr. 328; *Wager v. Ide*, 14 Barb. 468; *McKnight v. Hunt*, 3 Duer, 615.

¹¹⁴ *Livingston v. Lovgren*, 27 Wash. 102, 67 Pac. 599.

¹¹⁵ *Estee's Pl. & Pr.*, § 3147.

ment.¹¹⁶ As a general rule, a denial in the precise language of the complaint is not good, but is a "negative pregnant," which is often held to admit a material part of the averment.¹¹⁷ And it is now the settled law that where the defendant denies the plaintiff's averments in a verified complaint as a whole and as conjunctively stated, it is alike in violation of the principles of common-law pleading as well as the express direction of the code provision.¹¹⁸ The denial should be in the disjunctive, although the allegations of the complaint are stated in the conjunctive.¹¹⁹ Thus where a complaint consists of several clauses or propositions connected by the copulative conjunction "and," a denial of the entire allegation is evasive, and insufficient; each proposition should be separately denied.¹²⁰ Even where several allegations of a complaint are not connected by the conjunction "and," a denial of these allegations conjunctively does not amount to a denial of the allegations to which the defendant professes to respond.¹²¹

It is unnecessary to say that an answer which denies *in ipsius verbis* the allegations of the complaint is open to the objection that it is evasive.¹²² Thus where an answer denied the allegations of indebtedness as to time, amount, or work, it was held that it raised no material issues.¹²³ And where it was alleged that the defendant "wrongfully and unlawfully seised and took into his possession said property," and the denial was that "he wrongfully and unlawfully seised and took said property into his possession" it was held that the taking was not specifically denied and was therefore to be deemed admitted.¹²⁴ In answer to an alle-

¹¹⁶ *Blankman v. Vallejo*, 15 Cal. 638; *Castro v. Wetmore*, 16 Cal. 380; *Higgins v. Wortell*, 18 Cal. 333; *Morrill v. Morrill*, 26 Cal. 292; *Camden v. Mullen*, 29 Cal. 564; *Toland v. Mandell*, 38 Cal. 30; *Doll v. Good*, 38 Cal. 287; *Westbay v. Gray*, 116 Cal. 663, 48 Pac. 800; *Power v. Gum*, 6 Mont. 9, 9 Pac. 575; *Stewart v. Budd*, 7 Mont. 579, 19 Pac. 221.

¹¹⁷ *Bradbury v. Cronise*, 46 Cal. 287; *Moser v. Jenkins*, 5 Or. 448; *Rock Springs Coal Co. v. Salt Lake Sanitarium Co.*, 7 Utah, 161, 25 Pac. 742; *Dillon v. Spokane County*, 3 Wash. T. 498, 17 Pac. 889.

¹¹⁸ *Estee's Pl. & Pr.*, § 314.

¹¹⁹ *Reed v. Calderwood*, 32 Cal. 109; *Burke v. Caruthers*, 31 Cal. 467.

¹²⁰ *More v. Del Valle*, 28 Cal. 170; *Westbay v. Gray*, 116 Cal. 663, 48 Pac. 800; *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144.

¹²¹ *Fitch v. Bunch*, 30 Cal. 208, *Leroux v. Murdock*, 51 Cal. 543; *State v. Board*, 53 Neb. 771, 74 N. W. 254.

¹²² *Caulfield v. Sanders*, 17 Cal. 569; *Higgins v. Wortell*, 18 Cal. 331; *Landers v. Bolton*, 26 Cal. 393; *Seovill v. Barney*, 4 Or. 290; *James v. McPhee*, 9 Colo. 486, 13 Pac. 535; *Blankman v. Vallejo*, 15 Cal. 638.

¹²³ *Caulfield v. Sanders*, 17 Cal. 569.

¹²⁴ *Woodworth v. Knowlton*, 22 Cal. 164; *Richardson v. Smith*, 29 Cal. 531.

gation that an act was "wrongfully and maliciously done" a denial that it was "wrongfully and maliciously done" does not put in issue the doing.¹²⁵ Likewise, where a complaint avers that defendant wrongfully broke down plaintiff's flume, an answer denying that the defendant wrongfully broke down the flume is an admission that defendant broke it down, and is a denial only as to the wrongful nature of the act.¹²⁶

§ 418. Negative pregnant—Continued.—As stated above, a denial in the precise language of the complaint is often held to admit a material part of the averment.¹²⁷ Thus, a denial that the defendant "wrongfully and unlawfully entered upon the premises, closed the window," is an admission that he closed the window therein.¹²⁸ So in replevin, to recover possession of a city warrant which the plaintiff alleges came into his hands by indorsement, an answer alleging "that whether said warrant came into the hands of the plaintiff as alleged, this defendant has no knowledge or information sufficient to form a belief, and he, therefore, denies the same," is an insufficient denial, for the reason that it constitutes a negative pregnant.¹²⁹ So an allegation in an answer, "that each and every of four separate causes of action set forth in the complaint did not accrue within six years," contains a negative pregnant, and is bad pleading.¹³⁰

But a negative pregnant allegation in an answer, admitting by implication a material allegation of the complaint, does not prevent an express denial of such fact from putting it in issue.¹³¹ An answer averring that "the remaining part of said paragraph is so intermingled with truthful and untruthful declarations that it is impossible to further segregate said allegations, and therefore defendant denies each and every part of said paragraph, excepting that which is heretofore admitted to be true," was not

¹²⁵ *Kinsey v. Wallace*, 36 Cal. 462.

¹²⁶ *Feely v. Shirley*, 43 Cal. 369;
Larney v. Mooney, 50 Cal. 610.

¹²⁷ See *Rock Spring Coal Co. v. Salt Lake Sanitarium Co.*, 7 Utah, 158, 25 Pac. 742; *Dillon v. Spokane County*, 3 Wash. T. 498, 17 Pac. 889; *Argard v. Parker*, 81 Wis. 581, 51 N. W. 1012; *Bradbury v. Cronise*, 46 Cal. 287; *Lawrence v. Cabot*, 9 Jones & Sp. 122; *Moser v. Jenkins*, 5 Or. 448; *Caldwell v. Cald-*

well, 45 Ohio St. 520, 15 N. E. 297.

¹²⁸ *Larney v. Mooney*, 50 Cal. 610.

¹²⁹ *National Bank v. Meerwaldt*, 8 Wash. 630, 36 Pac. 763. See *Collins v. North Side Publishing Co.*, 20 N. Y. Supp. 892.

¹³⁰ *Gammon v. Dyke*, 2 Wash. T. 266, 5 Pac. 845.

¹³¹ *Kennedy v. Dickie*, 27 Mont. 70, 69 Pac. 672; *Yank v. Bordeaux*, 29 Mont. 74, 74 Pac. 77.

an admission of any of the facts in that part of the paragraph of the complaint to which the answer referred.¹³² An allegation that an execution was issued before judgment was properly entered, being pregnant with the admission that judgment was in fact entered, is a mere conclusion of law, and presents no statement on which an issue of fact can be made.¹³³ A mere denial of the debt sued on without denying the facts pleaded in the complaint, and on which the debt is based, raises no issue of fact.¹³⁴

An averment in the complaint that the act was "wrongfully and maliciously done," and a denial in the answer that it was "wrongfully and maliciously done," does not put in issue the doing of the act.¹³⁵ But an allegation in a complaint that the assignment which the plaintiff seeks to set aside was made with intent to hinder, delay, and defraud creditors, etc., is sufficiently put in issue by a denial that the assignment was made with intent to hinder and defraud creditors.¹³⁶

An allegation in a sworn answer that "on a certain day the said French and Robinson, by deed duly executed, acknowledged, and recorded, conveyed said premises to this defendant, for the sum of seven thousand seven hundred and fifty dollars," is not denied by a statement in the replication that "the plaintiffs further deny that said French and Robinson, or either of them, conveyed said premises to the defendant for the sum of seven thousand seven hundred and fifty dollars, or for any other sum." Such denial does not deny the conveyance, the material fact, but only a conveyance for a consideration. Under such denial, the party making such averment is not required to offer his deed in evidence on the trial. The allegation of the answer is deemed admitted under the provisions of the statute.¹³⁷

§ 419. Sham, irrelevant, and frivolous matters.—Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading may be stricken out upon such terms as the court may in its discretion impose.¹³⁸ A "sham" answer is one good in

¹³² *Turner v. Turner*, 33 Wash. 118, 74 Pac. 55; *Higgins v. Graham*, 143 Cal. 131, 76 Pac. 898; *Agle v. Standard Drug Co.*, 29 Mont. 111, 74 Pac. 135.

¹³³ *Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563.

¹³⁴ *Jackson v. Green*, 13 Okla. 314, 74 Pac. 502.

¹³⁵ *Kinsey v. Wallace*, 36 Cal. 463.

¹³⁶ *Read v. Worthington*, 6 Bosw. 617.

¹³⁷ *Landers v. Bolton*, 26 Cal. 416.

¹³⁸ Cal Code Civ. Proc., § 453. See *Frost v. Harford*, 40 Cal. 166; *Felch v. Beaudry*, 40 Cal. 444; *Davis v. Honey Lake Water Co.*, 98 Cal. 417, 33 Pac. 270.

form but false in fact and not pleaded in good faith. It sets up new matter which is false.¹³⁹ A "frivolous" answer is one so clearly and palpably bad as to require no argument or illustration to show its character, and which would be pronounced indicative of bad faith in the pleader upon a bare inspection;¹⁴⁰ in other words, it denies no material averment in the complaint and sets up no defense.¹⁴¹ Immaterial averments in a pleading need not be denied;¹⁴² and if it be done, both the complaint and the answer, so far as they relate to such immaterial averments, will be disregarded when the sufficiency of the pleadings are questioned.¹⁴³ A denial of immaterial circumstances may in some cases, however, be treated as sufficient at the trial, if not previously objected to.¹⁴⁴ Non-issuable matter need not be denied;¹⁴⁵ nor allegations anticipating a defense.¹⁴⁶ Matter not well pleaded need not be denied, for if a defendant merely denies what is non-essential in the averments of the complaint, it is an admission of all that is essential to a recovery,¹⁴⁷ and the denial of such averments is unnecessary. Allegations of matters of evidence in a pleading are not issuable facts; if the answer puts in issue the ultimate facts resulting from the evidence, it is a sufficient denial.¹⁴⁸ Allegations of intention showing express malice are not issuable facts;¹⁴⁹ nor allegations of aggravation;¹⁵⁰ nor allegations of special damages, unless they are the gist of the action.¹⁵¹

A denial clearly evasive is insufficient to raise an issue.¹⁵² In order to determine whether the denials in an answer are evasive, each separate denial and each separate allegation must be taken

¹³⁹ *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Gostorfs v. Taafe*, 18 Cal. 385.

¹⁴⁰ *Strong v. Sproul*, 53 N. Y. 497; *Cottrill v. Cramer*, 40 Wis. 555; *Bank of Commerce v. Humphrey*, 6 S. Dak. 415, 61 N. W. 444.

¹⁴¹ *Hemme v. Hays*, 55 Cal. 337.

¹⁴² *Racouillat v. Rene*, 32 Cal. 450; *McCaughy v. Schuette*, 117 Cal. 225, 59 Am. St. Rep. 178, 46 Pac. 666, 48 Pac. 1088; *Pence v. Durban*, 1 Idaho, 552; *McNabb v. Wixom*, 7 Nev. 172.

¹⁴³ *Jones v. City of Petaluma*, 36 Cal. 230; *Doyle v. Franklin*, 48 Cal. 539.

¹⁴⁴ *Wall v. Buffalo Water Works Co.*, 18 N. Y. 119.

¹⁴⁵ *Harbeck v. Craft*, 4 Duer, 122; *Edgerton v. Smith*, 3 Duer, 614.

¹⁴⁶ *Canfield v. Tobias*, 21 Cal. 349; *Wormouth v. Hatch*, 33 Cal. 128.

¹⁴⁷ *Leffingwell v. Griffing*, 31 Cal. 231; *Landers v. Bolton*, 26 Cal. 416; *Camden v. Mullen*, 29 Cal. 567. See *Seovill v. Barney*, 4 Or. 289.

¹⁴⁸ *Moore v. Murdock*, 26 Cal. 524; *Siter v. Jewett*, 33 Cal. 96; *Thomas v. Desmond*, 63 Cal. 427.

¹⁴⁹ *Fry v. Bennett*, 5 Sandf. 54.

¹⁵⁰ *Bates v. Loomis*, 5 Wend. 134; *Gilbert v. Rounds*, 14 How. Pr. 49; *Schnaderbeck v. Worth*, 8 Abb. Pr. 37.

¹⁵¹ *Malony v. Dows*, 15 How. Pr. 265; *Perring v. Harris*, 2 M. & Rob. 5.

¹⁵² *Beebe v. Marvin*, 17 Abb. Pr. 194; *Lawrence v. Derby*, 24 How. Pr. 133.

by itself. If the answer to a particular allegation is a denial of it, and there is no admission in the answer inconsistent with this denial, an issue will be said to be fairly made.¹⁵³ A general denial of the material allegations of a complaint cannot be stricken out on the ground that it is sham or frivolous.¹⁵⁴ And although a general denial of the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the court as to the good faith of the defendant in pleading it, nor can it be stricken out as a sham on the application of the plaintiff.¹⁵⁵ And the defendant cannot be compelled to give an affidavit or deposition in support of his answer.¹⁵⁶ Nor can an answer, verified by the defendant and setting up a sufficient defense be stricken out as sham, whether such answer consists of denials or sets up an affirmative defense.¹⁵⁷ Where a negative allegation is made in stating the cause of action, although it must, of course, precede an averment by the opposite party of the fact negated, it, nevertheless, constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse and not as an averment of new matter.¹⁵⁸

Under the California code,¹⁵⁹ denials contained in an answer which do not explicitly traverse the material allegations of the complaint may be stricken out on motion as sham and irrelevant.¹⁶⁰ So a denial which argumentatively disputes a fact averred in the complaint is bad; the traverse must be direct.¹⁶¹ Denials must not be in the alternative, as such denials are defective in form and leave it uncertain what is intended to be denied.¹⁶² So an answer merely stating a different version of the transaction from that set up in the complaint is not a denial,¹⁶³ as it does not explicitly

¹⁵³ *Racouillat v. Rene*, 32 Cal. 450.

¹⁵⁴ *Larsen v. Winder*, 14 Wash. 647, 45 Pac. 315; *State v. King*, 6 S. Dak. 297, 60 N. W. 75.

¹⁵⁵ *Fay v. Cobb*, 51 Cal. 313; *Greenbaum v. Turrill*, 57 Cal. 287; *Cupples v. Jensen*, 4 Dak. 151, 27 N. W. 206, 28 N. W. 193; *Green v. Hughitt Agency*, 5 S. Dak. 456, 59 N. W. 224.

¹⁵⁶ *In re Bartholamew*, 41 Kan. 276, 21 Pac. 273.

¹⁵⁷ *Greenbaum v. Turrill*, 57 Cal.

285; *King v. Waite*, 10 S. Dak. 5, 70 N. W. 1056.

¹⁵⁸ *Frisch v. Caler*, 21 Cal. 71. See, also, *Scott v. Wood*, 81 Cal. 404, 22 Pac. 871.

¹⁵⁹ Code Civ. Proc., § 453.

¹⁶⁰ *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

¹⁶¹ *Gallagher v. Dunlap*, 2 Nev. 326; *Frisbee v. Lindley*, 23 Ind. 511.

¹⁶² *Otis v. Ross*, 8 How. Pr. 193; *Corbin v. George*, 2 Abb. Pr. 467.

¹⁶³ *West v. American Exch. Bank*, 44 Barb. 176.

traverse the allegations of the complaint.¹⁶⁴ If the defendant desires to give a different version of the matter in controversy, it should be accompanied by a specific denial of all the allegations of the complaint not consistent with the allegation of the new version.

An answer containing an absolute and unqualified denial of one or more material allegations of the complaint is good,¹⁶⁵ and if it indicates a good defense, although stating it imperfectly, the defect should be met by a motion calling for an amendment curing such defect and not by motion for judgment on the answer as frivolous.¹⁶⁶ So, in an action for the breach of a contract to clear certain land of standing timber so as to fit it for seeding, the answer admitting the contract but denying a breach thereof, and showing affirmatively that the defendants were proceeding with due diligence to perform the contract according to its terms, until requested by the plaintiffs to desist, cannot be said to be either sham or immaterial.¹⁶⁷ If a case is tried upon the theory that the answer denies the allegation of the complaint, the plaintiff will not be permitted to raise objection for the first time on appeal.¹⁶⁸

§ 420. *Immaterial allegations.*—Averment of plaintiff's belief is not traversable.¹⁶⁹ Allegations anticipating a defense need not be denied.¹⁷⁰ Persons who make contracts with a corporation cannot deny its legal existence.¹⁷¹ The credit given on an account in the complaint is not a traversable fact.¹⁷²

The amount of damages need not be denied.¹⁷³ So the amount of damages on a breach of covenant need not be denied.¹⁷⁴ So

¹⁶⁴ Wood v. Whiting, 21 Barb. 190; Levy v. Bend, 1 E. D. Smith, 169; Hamilton v. Hough, 13 How. Pr. 14; Corwin v. Corwin, 9 Barb. 219.

¹⁶⁵ Hill v. Walsh, 6 S. Dak. 421, 61 N. W. 440.

¹⁶⁶ Yerkes v. Crum, 2 N. Dak. 72, 49 N. W. 422.

¹⁶⁷ Brown v. Porter, 7 Wash. 327, 34 Pac. 1105.

¹⁶⁸ White v. San Rafael etc. R. R. Co., 50 Cal. 417; Alhambra Water Co. v. Richardson, 72 Cal. 599, 14 Pac. 379; Toulouse v. Beckett, 2 Idaho, 288, 13 Pac. 172.

¹⁶⁹ Radway v. Mather, 5 Sandf. 654; Patterson v. Caldwell, 1 Mete. (Ky.) 492; Walters v. Chinn, 1 Mete. (Ky.) 502.

¹⁷⁰ Canfield v. Tobias, 21 Cal. 349.

¹⁷¹ White v. Ross, 15 Abb. Pr. 66; East River Bank v. Rogers, 7 Bosw. 494; Steam Navigation Co. v. Weed, 17 Barb. 378; Park Bank v. Tilton, 15 Abb. Pr. 384.

¹⁷² Hodgins v. Hancock, 14 Mee. & W. 120.

¹⁷³ Van Santv. Pl. 249.

¹⁷⁴ Hackett v. Richards, 3 E. D. Smith, 13; Raymond v. Traffarn, 12 Abb. Pr. 52.

circumstances of aggravation are not traversable;¹⁷⁵ nor allegations of special damages, unless of the gist of the action.¹⁷⁶ In Indiana, matters in mitigation of damages only, except in actions for libel and slander, cannot be specially pleaded or set up in the answer, but should be given in evidence under the general denial.¹⁷⁷ Allegations of matters of evidence in a pleading are not issuable facts. If the answer puts in issue the ultimate facts resulting from the evidence, it is a sufficient denial.¹⁷⁸

Conclusions of law do not call for a denial, and are not binding as admissions when not denied.¹⁷⁹ Where plaintiffs' declaration averred that defendants promised to pay plaintiffs as "the heirs of C.," a denial that plaintiffs were the heirs of C. was held bad, as not denying any material allegation.¹⁸⁰ Allegations of intention showing express malice are not issuable facts.¹⁸¹ The denial of time or place at which an act is alleged to have been done is frivolous, where time or place are not the substance of the action.¹⁸² Value in detention of property should not be denied.¹⁸³

§ 421. **Insufficient denial.**—If a cause is tried upon the theory that the answer denies the allegation of the complaint, the plaintiff will not be permitted to raise the objection in the supreme court that the answer is insufficient in this respect.¹⁸⁴ An answer containing a different version of the transaction to that contained in the complaint is not a denial,¹⁸⁵ as it does not specially controvert the allegations contained in the complaint.¹⁸⁶ Where

¹⁷⁵ *Bates v. Loomis*, 5 Wend. 134; *Gilbert v. Rounds*, 14 How. Pr. 49; *Schnaderbeck v. Worth*, 8 Abb. Pr. 37.

¹⁷⁶ *Malony v. Dows*, 15 How. Pr. 265; *Perring v. Harris*, 2 M. & Rob. 5.

¹⁷⁷ *Smith v. Lisher*, 23 Ind. 500.

¹⁷⁸ *Moore v. Murdock*, 26 Cal. 524; *Racouillat v. Rene*, 32 Cal. 450.

¹⁷⁹ *Kidwell v. Kettler*, 146 Cal. 12, 79 Pac. 514; *Zorn v. Livesley*, 44 Or. 501, 75 Pac. 1057.

¹⁸⁰ *Chandler v. Chandler*, 21 Ark. 95.

¹⁸¹ *Fry v. Bennett*, 5 Sandf. 54.

¹⁸² *Castro v. Wetmore*, 16 Cal. 379; *Kuhland v. Sedgwick*, 17 Cal. 123; *Livingston v. Hammer*, 7 Bosw. 670; *Davison v. Powell*, 16 How. Pr. 467; *Baker v. Bailey*, 16 Barb. 54; *Salinger v. Lusk*, 7 How. Pr. 430.

¹⁸³ *Connoss v. Meir*, 2 E. D. Smith, 314; *McKensie v. Farrell*, 4 Bosw.

193; *Woodruff v. Cook*, 25 Barb. 505. See, however, *Archer v. Boudinet*, 1 Code Rep. (N. S.) 373. As to where a denial upon information and belief is evasive of the issue tendered, see *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *Brown v. Scott*, 25 Cal. 194; *Vassault v. Austin*, 32 Cal. 597; *Edwards v. Lent*, 8 How. Pr. 28; *Ketchum v. Zerega*, 1 E. D. Smith, 554; *Kellogg v. Baker*, 15 Abb. Pr. 287; *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13796.

¹⁸⁴ *White v. San Rafael etc. R. R. Co.*, 50 Cal. 417.

¹⁸⁵ *West v. American Exch. Bank*, 44 Barb. 176.

¹⁸⁶ *Wood v. Whiting*, 21 Barb. 190; *Levy v. Bend*, 1 E. D. Smith, 169; *Hamilton v. Hough*, 13 How. Pr. 14; *Corwin v. Corwin*, 9 Barb. 219;

a defendant gives a different version of the matter in controversy, it should be accompanied by a specific denial of all the allegations of the complaint not consistent with the allegations in the answer.¹⁸⁷ A denial manifestly inconsistent with statements of fact in other parts of the same pleading is bad.¹⁸⁸ A mere denial of interest or ownership in the plaintiff will be insufficient where no statement of fact is made to sustain it.¹⁸⁹ Where a negative allegation is necessary in stating the cause of action, although it must, of course, precede an averment by the opposite party of the fact negatived, it nevertheless constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse, and not as an averment of new matter.¹⁹⁰ A denial which argumentatively disputes a fact averred in the complaint is demurrable, as the traverse must be direct.¹⁹¹ Denials must not be in the alternative, as they are defective in form, and leave it uncertain what is denied.¹⁹² A party cannot controvert the declaration he has made by deed.¹⁹³ Although a general denial of the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the court as to the good faith of the defendant in pleading it, nor can it be stricken out as sham on the application of the plaintiff.¹⁹⁴

§ 422. **Sham matter.**—It is error to strike out as sham a verified answer, or portion thereof, which alleges matters constituting a defense, although it contains other irrelevant or evidential matter. The motion should go to only the objectionable part.¹⁹⁵ An answer alleging that defendants were merely sureties, that plaintiff extended the time of payment to the principal for a valuable consideration, without the consent of the sureties, which allegations are not false in fact, nor pleaded in bad faith, is not

Loosey v. Orser, 4 Bosw. 392. See, as to its implying a denial of plaintiff's title to relief, *Peck v. Brown*, 26 How. Pr. 350.

¹⁸⁷ Compare *Dykens v. Woodward*, 7 How. Pr. 313.

¹⁸⁸ *Livingston v. Harrison*, 2 E. D. Smith, 197.

¹⁸⁹ *Russell v. Clapp*, 7 Barb. 482, 4 How. Pr. 347.

¹⁹⁰ *Frisch v. Caler*, 21 Cal. 71.

¹⁹¹ *Gallagher v. Dunlap*, 2 Nev. 326; *Mower v. Burdick*, 4 McLean, 7,

Fed. Cas. No. 9890; *Frisbee v. Lindley*, 23 Ind. 511.

¹⁹² *Otis v. Ross*, 8 How. Pr. 193; *Corbin v. George*, 2 Abb. Pr. 467.

¹⁹³ *Tartar v. Hall*, 3 Cal. 263; *United States v. Thompson*, 1 Gall. 388, *Fed. Cas. No. 16486*.

¹⁹⁴ *Fay v. Cobb*, 51 Cal. 313. See *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315.

¹⁹⁵ *Continental Building etc. Assn. v. Boggess*, 145 Cal. 30, 78 Pac. 245.

a sham plea which may be stricken out on motion.¹⁹⁶ But the court may expunge from its records scandalous matter which raises no issue, and serves no purpose, except to injure the reputation of the parties at whom it is aimed.¹⁹⁷

§ 423. **Contract.**—In an action for the breach of a contract to clear certain land of standing timber so as to fit it for seeding, an answer which admits the contract, but denies a breach thereof, and shows affirmatively that the defendants were proceeding with due performance thereof according to its terms until requested by the plaintiffs to desist from so doing, cannot be said to be either sham, frivolous, or immaterial.¹⁹⁸ Where an answer shadows forth a good defense, but states it imperfectly, the defect should be met by a motion calling for an amendment curing such defect, and not by motion for judgment on the answer as frivolous.¹⁹⁹ A frivolous answer is one so clearly and palpably bad as to require no argument or illustration to show its character, and which would be pronounced frivolous and indicative of bad faith in the pleader upon a bare inspection.²⁰⁰ A general denial of the material allegations of a complaint cannot be stricken out on the ground that it is sham or frivolous pleading.²⁰¹ A plea in an action on a written contract setting up a contemporaneous parol agreement inconsistent with the written contract is insufficient, and requires no replication.²⁰²

§ 424. **The same—Demand.**—In an action on contract, the defense that no demand was made before the commencement of the suit cannot be taken advantage of, unless pleaded in the answer.²⁰³ A denial that the demand was made on a certain day, as alleged, is a denial that the demand was made on the particular day stated in the complaint, when the statement of the demand is not qualified as to the manner of its being made.²⁰⁴ The plead-

¹⁹⁶ *Randall v. Simmons*, 40 Or. 554, 67 Pac. 513.

¹⁹⁷ *Morrison v. Snow*, 26 Utah, 247, 72 Pac. 924.

¹⁹⁸ *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105.

¹⁹⁹ *Yerkes v. Crum*, 2 N. Dak. 72, 49 N. W. 422.

²⁰⁰ *Strong v. Sproul*, 53 N. Y. 499; *Cottrill v. Cramer*, 40 Wis. 555; *Bank of Commerce v. Humphrey*, 6 S. Dak. 415, 61 N. W. 444.

²⁰¹ *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315; *State v. King*, 6 S. Dak. 297, 60 N. W. 75.

²⁰² *Fitzgerald v. Burke*, 14 Colo. 559, 23 Pac. 993. When copy of a written instrument in answer is deemed admitted under Montana Code, see *Teitig v. Boesman*, 12 Mont. 404, 31 Pac. 371.

²⁰³ *Rabsuhl v. Lack*, 35 Mo. 316.

²⁰⁴ *Hoopes v. Meyer*, 1 Nev. 433.

ing of oral conversation leading up to a written contract should be stricken out as immaterial and redundant.²⁰⁵

§ 425. Denial of fraud.—Defendant may deny fraud in a transaction which is actually tainted by it; for what constitutes fraud, particularly fraud in law, is often a matter of much diversity of opinion. But a general denial of fraud in answer to a bill of discovery is not enough; he, therefore, must answer to every material allegation.²⁰⁶

§ 426. Judgment on answer.—Under Colorado procedure every material allegation of an answer not controverted by a replication shall be taken as true, and the defendant may become entitled to judgment on his answer. But this right is waived where the defendant goes to trial as if the issues were properly made up.²⁰⁷

§ 427. Admissions in the answer.—While a general denial may be coupled with admissions, such an answer must be definite and specific as to the allegation admitted, and if an answer is equivocal in this respect, the court will resolve all doubts against the defendant.²⁰⁸ An admission that since the making of the contract sought to be enforced in equity, the defendant had conveyed the land to another, is an admission of ownership at the time of making the contract.²⁰⁹ The denials ought to be so framed as to leave no doubt as to what is denied and what admitted.²¹⁰ An admission made in a special defense must be confined to that defense, irrespective of whether the facts admitted could have been proved under a general denial.²¹¹ If a defendant in his answer argumentatively denies the execution of a note in suit, but avers the execution of a note of the exact description of the one sued on and alleges payment, he will be held to admit the execution of the note in suit;²¹² and a denial in an answer that the defendant wrongfully or forcibly committed the acts alleged in the complaint, except as thereafter stated, is an admission of the facts

²⁰⁵ *Jordan v. Coulter*, 30 Wash. 116, 70 Pac. 257.

²⁰⁶ *Pettitt v. Candler*, 3 Wend. 618; *Candler v. Pettitt*, 1 Paige, 427.

²⁰⁷ *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462.

²⁰⁸ *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226; *Malcolm v. Lyon*, 19 N. Y. Supp. 210; *St. Anthony Falls*

Water Co. v. King Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; *Leyde v. Martin*, 16 Minn. 38.

²⁰⁹ *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007.

²¹⁰ *Long v. Long*, 79 Mo. 644.

²¹¹ *Miller v. Chandler*, 59 Cal. 540.

²¹² *Mutzenburg v. McGowan*, 10 Colo. App. 486; 51 Pac. 523.

so alleged.²¹³ Where a plaintiff in an action against a city for injuries received alleges in his complaint that notice was given of his intention to sue, as required by statute, and the city in its answer admits the service, such an answer admits the legal sufficiency of the notice.²¹⁴

Where an answer contains several defenses stated separately an admission in one merely for the sake of pleading is not available against the others,²¹⁵ and the effect of the denial of the matter thus admitted is not destroyed.²¹⁶ Nor is an admission in an answer avoided by a special averment of immaterial matter.²¹⁷

A plea which denies the execution of an instrument and sets up matter in avoidance is not objectionable as amounting to the general issue.²¹⁸ In some states an explicit admission of a fact alleged in the complaint may be used by the plaintiff to sustain the allegations of the complaint, and when a fact is so admitted the plaintiff is relieved from the necessity of proving it at the trial;²¹⁹ but the rule is otherwise in California.²²⁰ An admission of a legal conclusion by the defendant in his answer is in no way binding on the court or on a referee, whose duty it is to apply the law as it exists to the facts of the case.²²¹

An admission by an attorney of record of the correctness of the amount for which judgment is taken, when not done in fraud of the rights of his client, destroys the effect of a denial in the answer.²²² And if a defendant in his answer admits a material allegation of the complaint, he is precluded from afterwards contesting it;²²³ but he may show that there were provisions of the contract other than those pleaded by the plaintiff.²²⁴ Where a defendant pleads the performance of duties alleged, he cannot

²¹³ *Peterson v. Bean*, 22 Utah, 43, 61 Pac. 213.

²¹⁴ *City of Denver v. Soloman*, 2 Colo. App. 534, 31 Pac. 507.

²¹⁵ *Nudd v. Thompson*, 34 Cal. 39.

²¹⁶ *Siter v. Jewett*, 33 Cal. 92; *Swift v. Kingsley*, 24 Barb. 541.

²¹⁷ *Reed v. Calderwood*, 32 Cal. 109.

²¹⁸ *Thomas v. Page*, 3 McLean, 167, Fed. Cas. No. 13906.

²¹⁹ *Dickson v. Cole*, 34 Wis. 621; *Paige v. Willet*, 38 N. Y. 28; *McLaughlin v. Alexander*, 2 S. Dak. 226, 49 N. W. 99.

²²⁰ *Amador County v. Butterfield*, 51 Cal. 526; *McDonald v. Southern Cal-*

ifornia R. R. Co., 101 Cal. 206, 35 Pac. 643; *De Baker v. Railway Co.*, 106 Cal. 278, 46 Am. St. Rep. 247, 39 Pac. 610.

²²¹ *Cutting v. Lincoln*, 9 Abb. Pr. (N. S.) 436.

²²² *Taylor v. Randall*, 5 Cal. 79. See *Sampson v. Ohleyer*, 22 Cal. 210.

²²³ *Manning v. Bowman*, 26 Nev. 451, 69 Pac. 995; *Spangel v. Reay*, 47 Cal. 608; *Howard v. Throckmorton*, 48 Cal. 482.

²²⁴ *Young v. Borzoni*, 26 Wash. 4, 66 Pac. 135, 421; *American Copper Co. v. Galland etc. Co.*, 30 Wash. 178, 70 Pac. 236.

demur to evidence showing his responsibility under them.²²⁵ Where, in an action on a note, defendants have set out in their answer an agreement under which they received the note, such agreement is a part of the defendants' admissions respecting the note, and may be considered by the court in determining whether the plaintiff has stated a cause of action.²²⁶

§ 428. Admissions by failure to deny.—It is almost unnecessary to state that matters well pleaded in a complaint, which are not denied by the answer, are to be taken as admitted.²²⁷ This rule, of course, applies only to material allegations.²²⁸ And where a complaint avers evidence, a failure on the part of the defendants to deny the averments does not constitute an admission.²²⁹ So, also, where the pleadings contain a fair issue of fact, the mere failure to deny legal conclusions cannot prejudice a defendant.²³⁰ Nor does the rule apply where the allegation which is unanswered is not direct and positive,²³¹ or where the averment is not issuable.²³²

In California, where a defense is founded on a written instrument, and a copy is contained in the answer or annexed thereto, the genuineness and due execution will be deemed admitted unless the plaintiff, within ten days after service of the answer, file with the clerk and serve upon the defendant an affidavit denying the same; but this rule does not apply where the party desiring to controvert it is, upon demand, refused an inspection of the writing.²³³

²²⁵ *Middleton v. Commonwealth*, 11 Ky. 347.

²²⁶ *Kirby v. Scanlan*, 8 S. Dak. 623, 67 N. W. 828.

²²⁷ Cal. Code Civ. Proc., § 462; Colo. Civ. Code, § 61; *Hanson v. Fricker*, 79 Cal. 283, 21 Pac. 751; *Watson v. Lemen*, 9 Colo. 200, 11 Pac. 88; *Snell v. Crowe*, 3 Utah, 26, 5 Pac. 522; *Amanda Gold Mining Co. v. People's Mining Co.*, 28 Colo. 251, 64 Pac. 218; *Murphy v. Coppieters*, 136 Cal. 317, 68 Pac. 970; *Gabriel v. Tonner*, 138 Cal. 63, 70 Pac. 1021; *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 73 Pac. 972; *Lackmann v. Supreme Council*, 142 Cal. 22, 75 Pac. 583; *Davenport v. Dose*, 40 Or. 336, 67 Pac. 112.

²²⁸ *Powell v. Oullahan*, 14 Cal. 114; *Canfield v. Tobias*, 21 Cal. 349.

²²⁹ *Siter v. Jewett*, 33 Cal. 92; *McCaughy v. Schuette*, 117 Cal. 225, 59 Am. St. Rep. 176, 46 Pac. 666, 48 Pac. 1088. See *Packard v. Denver Savings Bank*, 8 Colo. App. 209, 45 Pac. 511.

²³⁰ *Hoopes v. Meyer*, 1 Nev. 433; *Barton v. Sackett*, 3 How. Pr. 358; *Jordan v. National Shoe etc. Bank*, 74 N. Y. 467; 30 Am. Rep. 319.

²³¹ *Oechs v. Cook*, 3 Duer, 161.

²³² *Raymond v. Traffarn*, 12 Abb. Pr. 52.

²³³ Cal. Code Civ. Proc., §§ 448, 449; Colo. Code, § 62; *Sloan v. Diggins*, 49 Cal. 38; *United States v. Alexander*, 2 Idaho, 386, 17 Pac. 746.

The failure to plead a defense specially is not cured by the introduction of evidence without objection in support of it.²³⁴

§ 429. Answer not evidence.—An answer responsive to and denying the charges in a bill of equity is not evidence for the defendant.²³⁵ An answer under our statute is not proof for defendant, but an admission in the answer of a fact stated in the complaint is conclusive evidence against him.²³⁶ Omission to plead a defense specially is not cured by the introduction of evidence without objection in support of it.²³⁷

§ 430. Verification of answer.—An answer unverified to a verified complaint may be stricken out on motion.²³⁸ But if the plaintiff goes to trial on the merits without objecting to the non-verification of the answer, he will not be allowed to raise the point in the appellate court.²³⁹ When the complaint is verified, or when the state, or any officer of the state, in his official capacity, is plaintiff, the answer shall be verified also,²⁴⁰ except when the admission of the truth of the complaint might subject the party to a criminal prosecution, or an officer of the state, in his official capacity, is defendant.²⁴¹ By verification of the complaint the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange, by requiring a sworn answer.²⁴² A plea that denies the execution of the instrument, when required to be sworn to, if filed without affidavit, admits the execution of the instrument, but may be good for other purposes,²⁴³ unless an inspection of the original is refused.²⁴⁴ If a fact, which is directly averred in one part of a verified pleading, is in another part directly denied, whether it

²³⁴ *Smith v. Owens*, 21 Cal. 11; *McComb v. Reed*, 28 Cal. 284, 87 Am. Dec. 118; *Nordholt v. Nordholt*, 87 Cal. 556, 22 Am. St. Rep. 271, 26 Pac. 599.

²³⁵ *Goodwin v. Hammond*, 13 Cal. 168, 73 Am. Dec. 574; *Bostie v. Love*, 16 Cal. 69.

²³⁶ *Fremont v. Seals*, 18 Cal. 433; *Blankman v. Vallejo*, 15 Cal. 638.

²³⁷ *Smith v. Owens*, 21 Cal. 11; *McComb v. Reed*, 28 Cal. 281, 87 Am. Dec. 115.

²³⁸ *Drum v. Whiting*, 9 Cal. 422. Sufficient verification of pleading.

Claiborne v. Castle, 98 Cal. 30, 32 Pac. 807.

²³⁹ *McCullough v. Clark*, 41 Cal. 298.

²⁴⁰ Cal. Code Civ. Proc., § 446, as amended 1907.

²⁴¹ *Id.*; N. Y. Code, § 523.

²⁴² *Brooks v. Chilton*, 6 Cal. 640.

²⁴³ Cal. Code Civ. Proc., § 447; *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *McClintick v. Johnson*, 1 McLean, 414, Fed. Cas. No. 8700; *Sacramento Co. v. Bird*, 31 Cal. 73; *Coreoran v. Doll*, 32 Cal. 88; *Burnett v. Stearns*, 33 Cal. 473.

²⁴⁴ Cal. Code Civ. Proc., § 449.

be in the statement of several causes of action in a complaint, or of several defenses in an answer, the party verifying it is guilty of perjury, and, on the trial, the averment which bears most strongly against the pleader will be taken as true.²⁴⁵ Verification or affidavit to a plea is held necessary in particular cases.²⁴⁶ It is no error to allow the defendant to verify his answer before trial, unless it is shown that the plaintiff is thereby taken by surprise.²⁴⁷ To a complaint verified the defendant filed a copy of the original verified answer, by mistake. Parties took depositions under the pleadings, and subsequently went to trial. After the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the court, by moving for judgment by default, which motion the court sustained, and refused to allow defendant to then verify his answer; it was held that the court erred, and should have allowed the defendant to have verified his answer.²⁴⁸

FORMS OF GENERAL DENIAL.

§ 431. General denial.

Form No. 102.

[TITLE.]

The defendant, E. F., answering the complaint herein, denies each and every allegation thereof.

§ 431a. General denial of one of several causes of action.

Form No. 103.

[TITLE.]

The defendant, answering the first alleged cause of action contained in the complaint herein, denies each and every allegation in the said alleged first cause of action contained.

²⁴⁵ Bell v. Brown, 22 Cal. 671.

²⁴⁶ Bullock v. Van Pelt, 1 Baldw. 463, Fed. Cas. No. 2131; Contee v. Garner, 2 Cranch C. C. 162, Fed. Cas. No. 3139; Edmondson v. Barrell, 2 Cranch C. C. 228, Fed. Cas. No. 4284; Fenwick v. Grimes, 5 Cranch C. C. 603, Fed. Cas. No. 4734;

McClintick v. Cummins, 2 McLean, 98, Fed. Cas. No. 8698; Thomas v. Clark, 2 McLean, 194, Fed. Cas. No. 13894; Benedict v. Maynard, 6 McLean, 21, Fed. Cas. No. 1296.

²⁴⁷ Angier v. Masterson, 6 Cal. 61.

²⁴⁸ Arrington v. Tupper, 10 Cal. 464.

§ 432. General denial in replevin.

Form No. 104.

[TITLE.]

The defendant, answering the complaint of the plaintiff herein, denies each and every allegation in said complaint contained.

§ 433. General denial—Positive.

Form No. 105.

[TITLE.]

The defendant answers [or, if only a part of the defendants join, the defendants A. B. and C. D. answer] the complaint of the plaintiff herein, and denies generally and specifically each and every allegation in the said complaint contained.

§ 434. General denial as to part of a pleading.

Form No. 106.

[TITLE.]

The defendant answers to the complaint:

I. That he denies each and every allegation contained in the paragraphs numbered . . . and . . . , on folios . . . and . . . of plaintiff's complaint.

§ 435. General denial of one of several causes of action.

Form No. 107.

[TITLE.]

The defendant answers to the first cause of action contained in the complaint herein, and denies each and every allegation in the complaint respecting the same.

§ 436. Denial by articles.

Form No. 108.

[TITLE.]

The defendant answers to the complaint, and denies each and every allegation contained in the [third and fifth] articles thereof.

§ 437. Denial of the agreement alleged.

Form No. 109.

[TITLE.]

The defendant answers to the plaintiff's complaint:

That he denies that he contracted or agreed with the said plaintiff in manner or form as alleged in the complaint, or in any manner or form, or at all.

§ 438. Another form.

Form No. 110.

[TITLE.]

The defendant answers the complaint, and denies:

That he ever promised [or warranted or covenanted], as alleged in the complaint [or that he ever made the agreement mentioned in the complaint, or any agreement, at any time or place].

§ 439. Another form.

Form No. 111.

[TITLE.]

The defendant answers to the plaintiff's complaint:

I. That he did not make with said plaintiff the said agreement by the said plaintiff set forth and alleged in his said complaint, and denies each and every allegation in said complaint in regard thereto.

§ 440. Controverting conditions precedent.

Form No. 112.

[TITLE.]

The defendant answers the complaint, and denies:

That the plaintiff did perform the conditions precedent to said [contract] on his part to be performed, or any one of them, or at all, or that he made any deposit or tender, or [state what, as in contract required].

§ 441. Denial of deed.

Form No. 113.

[TITLE.]

The defendant answers the complaint, and denies:

That the deed mentioned therein is his deed, or that the defendant did execute such deed to plaintiff as alleged, or that the defendant did convey to the plaintiff the possession [or equity of redemption] in said premises as alleged, or at all.

§ 442. Denial of conditional delivery.

Form No. 114.

[TITLE.]

The defendant answers to the complaint, and denies:

That the said promissory note [or deed] was executed or delivered by the plaintiff, on the condition and understanding alleged, but avers that it was delivered by him absolutely and without condition.

§ 443. Denial of demand.

Form No. 115.

[TITLE.]

The defendant answers to the complaint, and denies:

That the plaintiff demanded the proceeds of the goods therein mentioned before the commencement of this action.

§ 444. Denial of falsity.

Form No. 116.

[TITLE.]

The defendant answers to the complaint, and denies:

That the representations alleged to have been made by the defendant to the plaintiff were false; but on the contrary thereof, avers that said representations and each of them were and are true.

§ 445. Denial of fraud.

Form No. 117.

[TITLE.]

The defendant answers to the complaint, and denies:

That he made the said representations in manner and form as the same are in the said complaint alleged, or otherwise, or at all.

§ 446. The same—Another form.

Form No. 118.

[TITLE.]

The defendant answers to the plaintiff's complaint, and denies:

That he [obtained the said deed from the plaintiff] by fraud and misrepresentation, in manner and form as the said plaintiff hath in his said complaint alleged, or by any fraud or misrepresentation whatever.

§ 447. Special denial of part performance.

Form No. 119.

[TITLE.]

The defendant answers to the complaint, and denies:

I. That he put plaintiff into or consented to plaintiff's taking possession of the said premises, under and in part execution of the said pretended sale and contract of the said premises, as charged in said complaint, or at all.

II. The defendant avers that the said . . ., of his own wrong, and without the license and against the consent of said defendant, entered into said premises, and occupied and improved the same.

§ 448. Denial of partnership.

Form No. 120.

[TITLE.]

The defendant, answering the complaint, denies:

That the said [naming them] were partners, as alleged, [or that the said A. B. was a partner with the said [naming them] as assigned].

§ 449. Denial of representations.

Form No. 121.

[TITLE.]

The defendant, answering the complaint, denies:

That he made the representations alleged, or any or either of them.

§ 450. Denial of sale.

Form No. 122.

[TITLE.]

The defendant, answering the complaint, denies that he sold the . . . to the plaintiff.

§ 451. Denial of a trust.

Form No. 123.

[TITLE.]

The said defendant answers to the complaint of plaintiff:

And denies that he received the said . . ., in said complaint mentioned, for the purposes and on the trusts aforesaid, or any of them, or in trust at all, in manner alleged in said complaint, or in any manner.

§ 452. Another form.

Form No. 124.

[TITLE.]

The defendant answers to the complaint of plaintiff:

I. That the said plaintiff did not deliver, and the said defendant did not receive, the said [describe what] in the said complaint mentioned, upon the trust and confidence therein alleged.

II. The said defendant avers that he received the same as and for his own property, absolutely, and without any trust thereto attached.

DENIALS RELATING TO CAPACITY TO SUE.

§ 453. Denial of assignment.

Form No. 125.

[TITLE.]

The defendant [upon information and belief] denies that the said [alleged assignor] on the . . . day of . . . , 19.., or at any other time, assigned or transferred to the plaintiff the said note and mortgage [or, in case of a mere claim or cause of action, the said claim or cause of action] described in the complaint, and denies that the plaintiff was or is the holder or owner thereof. [If the execution of a formal instrument of assignment is alleged in the complaint, the above form should be varied so as to deny that the alleged assignor on the . . . day of . . . , 19.., or at any other time, executed or delivered to the plaintiff the alleged assignment of the said note and mortgage, or claim, as in said complaint alleged, etc.]

§ 454. Allegation of payment to assignor without notice.

Form No. 126.

[TITLE.]

That on or about the . . . day of . . . , 19.., and prior to the commencement of this action, the defendant, without knowledge or notice of the alleged assignment of the said note [or, claim] described in the complaint, paid to the said assignor the full amount due thereon [or, the sum of . . . dollars], which was accepted and received by the said [assignor] in full payment and discharge of said note [or, claim; or, cause of action].

§ 455. Denial of partnership.

Form No. 127.

[TITLE.]

The defendant, further answering the complaint, expressly denies that the said A. B. and C. D. were or are now partners, as alleged in said complaint, and, on the contrary, alleges that the said A. B. and C. D. were not at the time of the commencement of this action and are not now partners. [Or, that the said A. B. was not and is not a partner with the said, naming the others.]

[Add verification.]

§ 456. Denial of representative character.

Form No. 128.

[TITLE.]

The defendant, further answering the complaint, expressly denies that the plaintiff was on the . . . day of . . ., 19.., or at any time, appointed executor of the estate of E. F., deceased, [or, administrator; or, guardian; or trustee, as the case may be], and denies that the said plaintiff was or now is such executor [or, guardian, etc.].

[Add verification.]

CHAPTER XXIII.

DEFENSES—NEW MATTER.

§ 457. **In general.**—The codes contemplate only two classes of defenses—general or specific denials of the allegations of the complaint, and statements of new matter constituting a defense or counterclaim. New matter is matter sought to be introduced by the defendant which is not disclosed by the pleadings; something relied upon by him, but not put in issue by the plaintiff, and is such matter as the defendant must affirmatively establish.¹ It is a settled rule of code pleading that such matter must be specially pleaded,² and the right to rely on the defense so pleaded must be affirmatively shown by the answer. In this respect there is no difference between the classes of new matter, for whatever admits, either directly or by way of necessary implication, that a cause of action as stated in a complaint once existed, but at the same time avoids it and shows that it has ceased to exist, is new matter.³ If, however, the facts averred merely show that some essential allegation of the complaint is untrue, they do not constitute new matter, but only a traverse. The answer must allege those facts which, when the cause of the complaint is admitted or proved, the defendant must prove in order to defeat a recovery.⁴ And the *onus* is therefore on the defendant to prove this new matter, even though it involve a negative.⁵ In fact, the true test as to whether matter pleaded by the defendant in his answer is new matter is whether the burden of proof is thrown upon the defendant,⁶ the only difference between the plaintiff's statement of his cause of action and the defendant's alle-

¹ *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Bridges v. Paige*, 13 Cal. 640.

² *Coles v. Soulsby*, 21 Cal. 47; *Landis v. Morrissey*, 69 Cal. 86, 10 Pac. 258; *Gillson v. Price*, 18 Nev. 118, 1 Pac. 459; *Staubach v. Rexford*, 2 Mont. 566; *Michalitschke v. Wells-Fargo & Co.*, 118 Cal. 690, 50 Pac. 847.

³ *Piercy v. Sabin*, 10 Cal. 22, 70

Am. Dec. 692; *Glazer v. Clift*, 10 Cal. 303; *Churchill v. Baumann*, 95 Cal. 542, 30 Pac. 770; *San Luis Obispo County v. Gage*, 139 Cal. 401, 73 Pac. 174.

⁴ *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692.

⁵ *Wilson v. California etc. Co.*, 94 Cal. 172, 29 Pac. 861.

⁶ *Thompson v. Lee*, 8 Cal. 275; *Horton v. Ruhling*, 3 Nev. 498.

gations of new matter being that under the code the latter are to be deemed controverted by the opposite party.⁷

An affirmative plea seeking to raise a question which has already been put in issue by the complaint and the denial thereto, is demurrable.⁸

An answer which seeks to avoid the complaint by new matter should confess that but for the new matter the plaintiff could maintain his action.⁹ The confession, however, may be by implication as well as directly.¹⁰ The rule in Oregon is different from that obtaining in California and other states. The Oregon code¹¹ provides that when the answer contains new matter constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief. And decisions under this section of the Oregon code have established the rule that where new matter is alleged in the answer the failure to reply to it amounts to an admission, and when the new matter in the answer amounts to a complete defense, judgment will be given for the defendant, notwithstanding a verdict.¹²

Affirmative allegations in the answer which are in effect only denials are not new matter, for, as we have just noted, new matter confesses and avoids either expressly or impliedly the cause of action set up in the complaint.¹³ So any matter which does not discharge or avoid a cause of action theretofore existing, but the purpose of which is to show that the alleged cause of action never did exist and that material allegations of the complaint are not true, is not new matter such as is required to be specially pleaded.¹⁴ That is not new matter in an answer which

⁷ Cal. Code Civ. Proc., § 462.

⁸ *Hastings v. Anacortes etc. Co.*, 29 Wash. 224, 69 Pac. 776.

⁹ *McMurray v. Gifford*, 5 How Pr. 15; *Tobias v. Rogers*, 3 Code Rep. 156; *Howes v. Carver*, 7 Iowa, 491; *Martin v. Swearengen*, 17 Iowa, 346; *Morgan v. Hawkeye Ins. Co.*, 37 Iowa, 359.

¹⁰ *Sylvis v. Sylvis*, 11 Colo. 319, 17 Pac. 912; *Morgan v. Hawkeye Ins. Co.*, 37 Iowa, 359; *Abbott v. Sartori*, 57 Iowa, 656, 11 N. W. 626.

¹¹ § 77.

¹² *Benicia Agricultural Works v. Creighton*, 21 Or. 495, 28 Pac. 775, 30 Pac. 676; *Larsen v. Oregon Ry. etc. Co.*, 19 Or. 240, 23 Pac. 974; *Wyatt v. Henderson*, 31 Or. 54, 48 Pac. 790.

¹³ *Goddard v. Fulton*, 21 Cal. 430; *Alden v. Carpenter*, 7 Colo. 93, 1 Pac. 904.

¹⁴ *Churchill v. Baumann*, 95 Cal. 541, 30 Pac. 770. See, also, *Hudson v. Wabash etc. R. R. Co.*, 101 Mo. 13, 14 S. W. 15.

might have been shown under a general denial.¹⁵ But whatever averments in the answer amount to an admission of the allegations of the complaint and tend to establish some fact not inconsistent with such allegations constituting a defense or counterclaim, and which could not have been proved under a specific denial, are new matter, requiring a replication under Montana practice.¹⁶ Where the defendant pleads new matter as a defense, praying to be discharged, he is not precluded thereby from obtaining such relief as he shows himself entitled to.¹⁷ So, in a suit for specific performance, the defendant has a right to plead in his answer as new matter, a contract different from the one alleged in the complaint, and the court will then ascertain from the evidence which was the real agreement.¹⁸

New matter arising after issue joined must ordinarily be set up by supplemental answer.¹⁹ The plaintiff and the defendant, respectively, may be allowed on motion to make a supplemental complaint or answer and show facts material to the case arising after issue joined.²⁰

§ 458. **Examples of new matter.**—The following are defenses constituting new matter, and in pleading them the defendant must set forth the facts relied upon to show the defense:

Accord and satisfaction;²¹ duress;²² estoppel *in pais*;²³ former recovery;²⁴ justification, such as attachment or execution;²⁵ composition with creditors;²⁶ equitable defenses;^{26a} eviction;²⁷ fraud;²⁸ statute of frauds;²⁹ statute of limitations;³⁰ defense that an action

¹⁵ Leggatt v. Stewart, 5 Mont. 107, 2 Pac. 320.

¹⁶ Mauldin v. Ball, 5 Mont. 100, 1 Pac. 409. See Sylvis v. Sylvis, 11 Colo. 319, 17 Pac. 912.

¹⁷ Davis v. Davis, 9 Mont. 267, 23 Pac. 715.

¹⁸ Thompson v. Hawley, 14 Or. 199, 12 Pac. 276.

¹⁹ Jessup v. King, 4 Cal. 331.

²⁰ Cal. Code Civ. Proc., § 464.

²¹ Sweet v. Burdett, 40 Cal. 97; Berdell v. Bissell, 6 Colo. 162; Hogan v. Burns (Cal.), 33 Pac. 631; Wilkerson v. Bruce, 37 Mo. App. 156.

²² Connecticut Life Ins. Co. v. McCormick, 45 Cal. 580.

²³ McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354; Barnhart v. Fulkerth, 90 Cal. 157, 27 Pac. 71.

²⁴ Anderson v. Fisk, 36 Cal. 626.

²⁵ Thornburgh v. Hand, 7 Cal. 554; Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 204; McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115; Nordholt v. Nordholt, 87 Cal. 556, 22 Am. St. Rep. 268, 26 Pac. 599; Mulford v. Estudillo, 23 Cal. 94.

²⁶ Smith v. Owens, 21 Cal. 11.

^{26a} Kentfield v. Hayes, 57 Cal. 409; Downer v. Smith, 24 Cal. 115; Kahn v. Old Tel. Mining Co., 2 Utah, 175.

²⁷ Hastings v. Halleck, 10 Cal. 30.

²⁸ Marshall v. Shafter, 32 Cal. 176; Oroville etc. R. R. Co. v. Plumas County, 37 Cal. 355; Capuro v. Builders' Ins. Co., 39 Cal. 123.

²⁹ Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498.

³⁰ Cal. Code Civ. Proc., § 458;

is prematurely brought;³¹ defense of privilege in an action for libel;³² illegality of contract;³³ after-acquired title;³⁴ tax-titles.³⁵

§ 459. **Pleas.**—Pleas, by that name, are unknown to the code. The only pleadings, on the part of the defendant, are demurrer and answer. But in an equitable case, prior to the code, a plea was but a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, or delayed, or barred. At law, it was the defendant's answer, by matter of fact, to the plaintiff's declaration. Now the defendant's pleading, while performing any or all these several offices, is known only as an answer. A respondent is not bound to reserve, for a final hearing, any matter which amounts to a bar of the relief prayed, but he may, if it be the subject for a plea, put it into that shape, in order to save the expense of going into a general examination.³⁶ It is a general rule that a plea ought not to contain more defenses than one. Various facts can never be pleaded in one plea, unless they are all conducive to the single point on which the defendant means to rest his defense.³⁷ A plea professing to answer the whole complaint, but which answers only a part, is bad on demurrer.³⁸ A defendant cannot in different counts deny the same facts in different language, or make only a partial defense to a whole cause of action, or set out matter in avoidance, without confessing that which he attempts to avoid.³⁹ A plea is defective when its averments, if admitted to be true, would not constitute a defense to the action.⁴⁰ The plea should be direct in stating with sufficient precision the matter of defense, and not leave it to be found out by inference, however strong.⁴¹ But

Grattan v. Wiggins, 23 Cal. 16;
Schroeder v. Jahns, 27 Cal. 278.

³¹ Elder v. Rourke, 27 Or. 363, 41
Pac. 6.

³² Gilman v. McClatchy, 111 Cal.
306, 44 Pac. 241.

³³ McCamant v. Batsell, 59 Tex.
363.

³⁴ Moss v. Shears, 30 Cal. 468.

³⁵ Russell v. Mann, 22 Cal. 132;
McMinn v. O'Connor, 27 Cal. 246.

³⁶ Wilson v. Graham, 4 Wash. C.
C. 53, Fed. Cas. No. 17804.

³⁷ Rhode Island v. Massachusetts,
14 Pet. 210, 10 L. Ed. 423.

³⁸ Wallace v. Bear River Water etc.

Co., 18 Cal. 461; Weimer v. Shelton,
7 Mo. 237; Leslie v. Harlow, 18 N.
H. 518; Feaster v. Woodfill, 23 Ind.
493; Fitzsimmons v. City Fire Ins.
Co., 18 Wis. 234, 86 Am. Dec. 761;
Hogan v. Ross, 13 How. 173, 14 L.
Ed. 100.

³⁹ Martin v. Swearengen, 17 Iowa,
346.

⁴⁰ White v. How, 3 McLean, 291,
Fed. Cas. No. 17549; Smith v. Ely,
5 McLean, 76, Fed. Cas. No. 13043.

⁴¹ Brooks v. Byam, 1 Story, 296,
Fed. Cas. No. 1947, Savary v. Goe,
3 Wash. C. C. 140, Fed. Cas. No.
12388.

material facts inferentially stated are good after judgment, if no demurrer has been interposed specially for that reason.⁴² Matters of inducement in a plea should be an answer to the opposite party's allegations. The traverse is but an inference from the inducement.⁴³ A plea which might be objectionable on the ground of want of sufficient certainty cannot be treated as a nullity by the court, unless its sufficiency is excepted to.⁴⁴

If the allegations of a defense are pertinent to the controversy, their sufficiency is only to be tested by demurrer, or on the trial.⁴⁵ But in New York it has been held, an answer merely defensive which does not set up a counterclaim is not demurrable.⁴⁶ Where a party sets up matter in his answer not recognized by law as a defense to the action, while the objection may be taken by demurrer, it is not waived by failure to demur, but may be taken advantage of at any time.⁴⁷ The defense that the defendant acted by advice of counsel must show that such advice was given upon a full and fair statement of the facts.⁴⁸ It is improper to set up in an answer that the complaint does not contain facts sufficient to constitute a cause of action.⁴⁹

§ 460. **Pleas in abatement.**—A plea in abatement defeats the present proceedings, but a plea in bar goes to the merits, and admits that plaintiff once had a right of action, but insists that it is determined, and an answer in abatement, when taken with a plea in bar, cannot be made available;⁵⁰ but under the New York code a plea in abatement is properly joined in the same answer with a defense in bar.⁵¹ It is a bad mode of pleading to unite pleas in abatement and pleas to the merits, and if, after pleas in abatement, a defense be interposed going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived.⁵² Failure of executors to plead non-

⁴² Hill v. Haskin, 51 Cal. 175.

⁴³ Egberts v. Dibble, 3 McLean, 86, Fed. Cas. No. 4307.

⁴⁴ Cunningham v. Wheatly, 21 Tex. 184.

⁴⁵ Carpenter v. Bell, 19 Abb. Pr. 258.

⁴⁶ Reilay v. Thomas, 11 How. Pr. 266.

⁴⁷ Macdougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98.

⁴⁸ Bliss v. Wyman, 7 Cal. 257.

⁴⁹ Slack v. Heath, 1 Abb. Pr. 331.

But see Cal. Code Civ. Proc., § 431.

⁵⁰ Spencer v. Lapsley, 20 How. 264, 15 L. Ed. 902.

⁵¹ Sweet v. Tuttle, 14 N. Y. 465; Gardner v. Clark, 21 N. Y. 399. See Bridal Veil Lumber Co v. Johnson, 25 Or. 105, 34 Pac. 1026.

⁵² Sheppard v. Graves, 14 How. 505, 14 L. Ed. 518; Fenwick v. Grimes, 5 Cranch C. C. 603, Fed. Cas. No. 4734.

presentation of the claims against the estate, until after answering to the merits of the case and after the statutory time for presenting such claims, is a forfeiture to the right to thus object.⁵³ If defendant answers an abatement for misnomer, alleging its true name, it is error for the court to enter judgment on the merits against defendant, without plaintiff first amends his complaint in accordance with the answer, its truth being conceded.⁵⁴ Where there is a plea to the merits, and issue joined thereon, and the parties go to trial accordingly, irregularities previously set up by pleas in abatement and demurrers to them are waived.⁵⁵ Under the California code⁵⁶ the defendant is permitted to set forth in his answer as many defenses as he may have. If certain matters, as another action pending, appear on the face of the complaint, the objection may be taken by demurrer; but if it does not so appear, it may be taken by answer. Matters in abatement are then proper in an answer, and may be pleaded with other defenses, but at all times, since they merely defeat the present proceeding, must be specially set up in the answer with such particularity as to exclude every conclusion to the contrary.⁵⁷ Such pleas are not favored. The party pleading them relies on technical law to defeat the plaintiff's action, and is held to "technical exactness in his pleading."⁵⁸

§ 461. Joint plea as to one defendant.—Under the Colorado practice, the rigid rule in common-law actions that a joint plea insufficient as to one defendant is insufficient as to all is inapplicable to an equitable defense.⁵⁹

§ 462. Waiver by pleading to merits.—The acceptance of an informal or insufficient undertaking in replevin must be taken

⁵³ Clayton v. Dinwoodey, 33 Utah, 251, 93 Pac. 723.

⁵⁴ Clark v. Oregon Short Line, 29 Mont. 317, 74 Pac. 734.

⁵⁵ Bell v. Railroad Co., 4 Wall. 598, 18 L. Ed. 338. See, also, Midland Ry. Co. v. Stevenson, 6 Ind. App. 207, 33 N. E. 254; Watts v. Sweeney, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680.

⁵⁶ Cal Code Civ. Proc., § 441.

⁵⁷ Hentsch v. Porter, 10 Cal. 555; Tooms v. Randall, 3 Cal. 438.

⁵⁸ Thompson v. Lyon, 14 Cal. 42; Larco v. Clements, 36 Cal. 132; Anonymous, Hempst. 215, Fed. Cas. No. 18224; Capwell v. Sipe, 17 R. I. 475, 33 Am. St. Rep. 890, 23 Atl. 14; East v. Cain, 49 Mich. 473, 13 N. W. 822; Craig v. Smith, 10 Colo. 220, 15 Pac. 337; Jenkins v. State, 35 Fla. 737; 48 Am. St. Rep. 267, 18 South. 182.

⁵⁹ Wilson v. Hawthorne, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548.

advantage of at the earliest practicable opportunity, failing in which, and by pleading to the merits, the defendant will be presumed to have waived his objection.⁶⁰

§ 463. **Pleas in bar.**—Whenever the subject-matter of the plea or defense is that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar, and must be specially set up; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement.⁶¹ The pleading must be determined, not from the subject-matter of the plea, but from its conclusion or prayer.⁶² Where a plea in answer is but notice of special matter by way of abatement, and goes to but part of the cause of action, it cannot be relied on as a plea in bar.⁶³ It is not a sufficient objection to the plea that it avers that the obligation was obtained from him by fraudulent representations, or that it concludes with a general prayer for judgment. Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject-matter. In this respect there is a difference between pleas in bar and pleas in abatement.⁶⁴ Upon a hearing on an issue on a plea in bar to a bill in chancery, no question arises as to the sufficiency of the plea in point of law; it is only necessary to be proved in point of fact.⁶⁵ Pleas in bar which seek to avoid the equity of the case are not to be favored.⁶⁶ An answer setting up in bar to a whole cause of action a matter which constitutes a bar to only a part of it is bad.⁶⁷ Where there are several items in a plea in bar, there must be enough items in the whole, each one well pleaded, to meet the whole of the demand.⁶⁸ An error in the

⁶⁰ *Morris v. Hanson*, 2 Colo. App. 154, 30 Pac. 139.

⁶¹ *Hentsch v. Porter*, 10 Cal. 555.

⁶² *Sutherlin v. Bloomer*, 50 Or. 398, 93 Pac. 135.

⁶³ *United States v. Dashiell*, 4 Wall. 182, 18 L. Ed. 319; *Leslie v. Harlow*, 18 N. H. 518; *Fitzsimmons v. City etc. Ins. Co.*, 18 Wis. 234, 86 Am. Dec. 761.

⁶⁴ *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

⁶⁵ *Hughes v. Blake*, 1 Mason, 515, Fed. Cas. No. 6845.

⁶⁶ See *Piatt v. Oliver*, 1 McLean, 295, Fed. Cas. No. 11114.

⁶⁷ *Id.*; *Lewis v. Baird*, 3 McLean, 56, Fed. Cas. No. 8316; *McClintic's Admr. v. Cory*, 22 Ind. 170; *Richardson v. Hickman*, 22 Ind. 244; *Postmaster-General v. Reeder*, 4 Wash. C. C. 678, Fed. Cas. No. 11311; *Culbertson v. Wabash Navigation Co.*, 4 McLean, 544, Fed. Cas. No. 3464. See *Parker v. Lewis*, Hempst. 72, Fed. Cas. No. 10741a; *Peyatte v. English*, Hempst. 24, Fed. Cas. No. 11054a.

⁶⁸ *Mullanphy v. Phillipson*, 1 Mo. 188.

prayer for judgment in a plea in bar will not prevent the rendition of the judgment appropriate to the substance of the plea, confessed by general demurrer.⁶⁹ A plea to a bill in equity may be good in part, and not so in the whole; and the court will allow it as to so much of the bill as is properly applicable, unless it has the vice of duplicity in it.⁷⁰ So if any one of several pleas, going to the whole merits of the case, is well pleaded, and contains a full and sufficient answer, it will entitle the defendant to judgment.⁷¹ A promise to forbear to sue for a definite time, where the promise is based upon a sufficient consideration, may be pleaded in bar to an action.⁷²

§ 464. **Effect of special pleas.**—A plea to the merits is a waiver of all pleas in abatement subsequent to it,⁷³ and of all former irregularities.⁷⁴ After a plea in bar to an action, the defendant cannot plead in abatement, unless for new matter arising after the commencement of the suit.⁷⁵ Hence it is too late to object that a writ has no seal after the defendant has pleaded to its merits;⁷⁶ or to a mistake in the writ, or variance between the count and the writ, which must be taken advantage of by a plea in abatement.⁷⁷ It cannot be taken advantage of on general demurrer;⁷⁸ nor by motion in arrest of judgment.⁷⁹ So of omission to indorse a writ.⁸⁰ In California, the remedy for such variance is by motion. If a party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment, nor in a *scire facias*.⁸¹ Special pleas, the averments of which amount

⁶⁹ Withers v. Greene, 9 How. 213, 13 L. Ed. 109.

⁷⁰ Kirkpatrick v. White, 4 Wash. C. C. 595, Fed. Cas. No. 7850.

⁷¹ Brown v. Duchesne, 2 Curt. 97, Fed. Cas. No. 2003; Vermont v. Society for Prop. of Gospel, 2 Paine, 545, Fed. Cas. No. 16920.

⁷² Staver v. Missimer, 6 Wash. 173, 36 Am. St. Rep. 142, 32 Pac. 995.

⁷³ Winter v. Norton, 1 Or. 42; Potter v. Smith, 7 R. I. 55; Potter v. James, 7 R. I. 313; Fugate v. Glasscock, 7 Mo. 577.

⁷⁴ Bell v. Railroad Co., 4 Wall. 598, 18 L. Ed. 338.

⁷⁵ Ricker v. Scofield, 23 Ill. App. 32.

⁷⁶ Potter v. Smith, 7 R. I. 55.

⁷⁷ Chirac v. Reinicker, 11 Wheat. 280, 6 L. Ed. 474; McKenna v. Fisk, 1 How. 241, 11 L. Ed. 117. Compare Burrow v. Dickson, 1 Overt. 366, Fed. Cas. No. 2203.

⁷⁸ Duvall v. Craig, 2 Wheat. 45, 4 L. Ed. 180; Wilder v. McCormick, 2 Blatchf. 31, Fed. Cas. No. 17650; Triplet v. Warfield, 2 Cranch C. C. 237, Fed. Cas. No. 14177.

⁷⁹ Wilson's Admr. v. Berry, 2 Cranch C. C. 707, Fed. Cas. No. 17791.

⁸⁰ Miller v. Gages, 4 McLean, 436, Fed. Cas. No. 9571.

⁸¹ Dickson v. Wilkinson, 3 How. 57, 11 L. Ed. 491.

only to the general issue, are bad.⁸² A special plea, simply a traverse of a portion of facts which plaintiff is bound to prove to establish a *prima facie* right to recover, is bad, as amounting to the general issue.⁸³ In Alabama, it is no objection that a special plea presents matter of defense available under the general issue, which is also pleaded.⁸⁴ Bad pleas which are cured by verdict are those which, although they would be bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue all the material points of the declaration.⁸⁵ Where the pleas are bad, they should be demurred to by the plaintiff, and not traversed; but after the verdict of the jury the same effect will be given to them as if they had been demurred to; and they are not aided by the fact that immaterial issues have been formed upon them, and found for the defendant.⁸⁶ Where an averment in a plea purports to be made by the plaintiff, instead of the defendant, it is bad on demurrer.⁸⁷

§ 465. **Matter in avoidance.**—The cases are so numerous where defendant should specially plead matters in avoidance or estoppel that it is scarcely possible to make more than a reference to those coming under this general proposition. Matters in avoidance must be specially pleaded; they cannot be used as defenses under an answer which is a simple denial of the allegations,⁸⁸ but, after pleading the general issue, a specific defense provable under the general denial is surplusage and demurrable.⁸⁹ A further answer by way of confession and avoidance of the matters alleged in a complaint is inconsistent with a specific denial thereof, but may properly be pleaded with a special or qualified denial, such as a denial with an *absque hoc*.⁹⁰ Under the California statute,⁹¹ the statement of any new matter in an answer, in avoidance or constituting a defense or counterclaim, is deemed

⁸² *Matthews v. Matthews*, 2 Curt. 105, Fed. Cas. No. 9288; *Halsted v. Lyon*, 2 McLean, 226, Fed. Cas. No. 5968; *Dibble v. Duncan*, 2 McLean, 553, Fed. Cas. No. 3880; *Curtis v. Central Railway*, 6 McLean, 401, Fed. Cas. No. 3501; *Parker v. Lewis*, Hempst. 72, Fed. Cas. No. 10741a; *Vowell v. Lyles*, 1 Cranch C. C. 329, Fed. Cas. No. 17020; *Liter v. Green*, 2 Wheat. 306, 4 L. Ed. 246; *Van Ness v. Forrest*, 8 Cranch, 30, 3 L. Ed. 478.

⁸³ *Knoebel v. Kircher*, 33 Ill. 308.

⁸⁴ *Hopkinson v. Shelton*, 37 Ala. 306.

⁸⁵ *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907.

⁸⁶ *Tams v. Lewis*, 42 Pa. St. 402.

⁸⁷ *Barclay v. Ross*, 32 Ill. 211.

⁸⁸ *Gaskill v. Moore*, 4 Cal. 233.

⁸⁹ *Hopkins v. Dipert*, 11 Okla. 630, 69 Pac. 883.

⁹⁰ *McDonald v. American Mort. Co.*, 17 Or. 626, 21 Pac. 883.

⁹¹ Code Civ. Proc., § 462.

upon the trial to be controverted by the opposite party, and any proper evidence is admissible to meet and overcome such defense.⁹² Matter of avoidance arising since suit brought, but pleaded at the first term at which the defendant appears, need not be pleaded *puis darrein continuance*.⁹³ Such a plea must have the same certainty as to time and place as other pleas, and if it does not allege the day on which the matter pleaded happens, it is bad.⁹⁴ The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.⁹⁵ A plea *puis darrein continuance* is a relinquishment of all preceding pleas,⁹⁶ and its allowance is in the discretion of the court.⁹⁷ When this plea is adjudged bad on demurrer, judgment is final against the defendant.⁹⁸

§ 466. Joinder of defenses.—Under the code system of pleading the distinction between what were formerly known as pleas in abatement and pleas in bar is no longer of any practical importance. A plea in abatement was a plea going to some defect or error which merely defeated the proceeding for the time being, but did not show that the plaintiff was forever precluded from maintaining his action. It was called a dilatory plea, because it merely operated to delay the plaintiff so far as the present proceedings were concerned. A plea in bar, however, went to the merits of the case, and while admitting that the plaintiff once had a right of action, insisted that that right of action had ceased to exist. Under the old practice, it was not permissible to unite in the same action a plea in bar and a plea in abatement. The defendant was bound to interpose his plea in abatement first, and if he failed to do so and pleaded in bar of the action, he could not afterwards interpose a plea in abatement, unless for new matter arising after the commencement of the suit.⁹⁹ The

⁹² Williams v. Dennison, 94 Cal. 540, 29 Pac. 946; Sterling v. Smith, 97 Cal. 343, 32 Pac. 320.

⁹³ Cutter v. Folsom, 17 N. H. 139.

⁹⁴ Cummings v. Smith, 50 Me. 568; 79 Am. Dec. 629.

⁹⁵ Cal. Code Civ. Proc., § 464.

⁹⁶ Tanner v. Roberts, 1 Mo. 416; Lincoln v. Thrall, 26 Vt. 305; Wallace v. McConnell, 13 Pet. 136, 10 L. Ed. 95; Yeaton v. Lynn, 5 Pet. 223,

8 L. Ed. 105; Spafford v. Woodruff, 2 McLean, 191, Fed. Cas. No. 13198; Good v. Davis, Hempst. 16, Fed. Cas. No. 5530a; Wisdom v. Williams, Hempst. 460, Fed. Cas. No. 17904. See, as to the nature and effect of this plea, Mount v. Scholes, 120 Ill. 394, 11 N. E. 401.

⁹⁷ Nettles v. Sweazea, 2 Mo. 100; Thomas v. Van Doren, 6 Mo. 201.

⁹⁸ McKeen v. Parker, 51 Me. 589.

⁹⁹ Baylies' Code Pl., p. 241.

code system contemplates but one answer, and in it the defendant may set forth as many defenses and counterclaims as he may have, the only restriction being that the defenses must be separately stated, and must refer to the causes of action which they are intended to answer in such a manner that they may be intelligibly distinguished.¹⁰⁰ Objections formerly taken by plea in abatement under the old practice may now be set up by demurrer, unless they do not appear on the face of the complaint. To this extent matters in abatement are still proper under our system of procedure. The New York code discriminates in one respect between pleas in abatement and pleas in bar. An answer involving the merits need not be verified unless the complaint is verified, but the code prohibits the defendant from pleading a defense which does not involve the merits by that act. Such a defense when unverified may be treated as a nullity by the plaintiff, provided he gives notice to the defendant's attorney that he elects to do so.¹⁰¹

Whenever the subject-matter of the plea or defense is that the defendant cannot maintain any action at any time, whether present or future, in respect to the supposed cause of action, it may and usually must be pleaded in bar, and must be specially set up. But matter which merely defeats the present proceeding and does not show that the plaintiff is forever concluded should in general be pleaded in abatement.¹⁰² Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject-matter. In this respect there is a difference between pleas in bar and pleas in abatement.¹⁰³ Matters in abatement which merely defeat the present proceeding must be specially set up in the answer with such particularity as to exclude every conclusion to the contrary.¹⁰⁴ Such pleas are not favored; the party pleading them relies on technical law to defeat the plaintiff's action, and is held to "technical exactness in his pleading."¹⁰⁵

¹⁰⁰ Cal. Code Civ. Proc., § 441.

¹⁰¹ Baylies' Code Pl., p. 242; N. Y. Code Civ. Proc., § 528.

¹⁰² Hentsch v. Porter, 10 Cal. 555.

¹⁰³ Withers v. Greene, 9 How. 213, 13 L. Ed. 109.

¹⁰⁴ Hentsch v. Porter, 10 Cal. 555; Tooms v. Randall, 3 Cal. 438.

¹⁰⁵ Thompson v. Lyon, 14 Cal. 42; Larco v. Clements, 36 Cal. 132; Ontario Bank v. Tibbits, 80 Cal. 70, 22 Pac. 66; California Sav. etc. Soc. v. Harris, 111 Cal. 136, 43 Pac. 525; Craig v. Smith, 10 Colo. 220, 15 Pac. 337; Beardsley v. Morrison, 18 Utah, 478, 72 Am. St. Rep. 795, 56 Pac. 303.

As already stated, in most of the code states a defendant must in his answer set up all his defenses, whether they consist of matter in abatement, or of matter going to the merits, or both. In Oregon, however, the rule is otherwise; the defendant must plead matter in abatement first, for the reason that issues in dilatory pleas and issues on the merits cannot be tried together; and it is further held that a plea in abatement pleaded with matter to the merits is considered waived or abandoned.¹⁰⁶ In some of the code states, also, inconsistent defenses may be set up in the answer, and no motion to strike out or to complete an allegation will be entertained. The question as to which defense is true and which is false is thus left to be determined at the trial.¹⁰⁷ In this respect, however, the rule again differs in Oregon. A defendant may plead as many defenses as he may have and join them with denials, if the two are not inconsistent, but, if inconsistent, the denials should be qualified;¹⁰⁸ if not qualified when thus inconsistent, they are to be taken as true.¹⁰⁹

In general, however, two or more defenses are held to be inconsistent only where the proof of one necessarily disproves the other, so that any rule requiring consistency is merely one of fact. Any affirmative defense may be joined with a denial, provided it is possible for both defenses to be true,¹¹⁰ and a general denial and matter in avoidance may both be true, and therefore pleaded together.¹¹¹ Likewise, two affirmative defenses may be joined when the proof of one does not disprove the other.

Objections that conditions have not been performed must be specially set up.¹¹² And where performance is prevented by the plaintiff, excuse for non-performance must be set out in the answer.¹¹³

A special plea which is simply a traverse of a portion of the facts which plaintiff is bound to prove to establish a *prima facie*

¹⁰⁶ Hopwood v. Patterson, 2 Or. 50; Oregon Cent. Ry. v. Wait, 3 Or. 428.

¹⁰⁷ Billings v. Drew, 52 Cal. 565; Buhne v. Corbett, 43 Cal. 264; Siter v. Jewett, 33 Cal. 93; Banta v. Siller, 121 Cal. 414, 53 Pac. 935; Wall v. Mines, 130 Cal. 27, 62 Pac. 386; People v. Lothrop, 3 Colo. 428; Duffield v. Denver etc. R. R. Co., 5 Colo. App. 25, 36 Pac. 622.

¹⁰⁸ Veasey v. Humphreys, 27 Or. 518, 41 Pac. 8; McDonald v. Amer-
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ican Mort. Co., 17 Or. 633, 21 Pac. 883.

¹⁰⁹ Maxwell v. Bolles, 28 Or. 5, 41 Pac. 661.

¹¹⁰ Mott v. Burnett, 2 E. D. Smith, 50; Otis v. Ross, 8 How. Pr. 193; Lewis v. Acker, 11 How. Pr. 163.

¹¹¹ Snodgrass v. Andross, 19 Or. 236; 23 Pac. 969.

¹¹² People v. Jackson, 24 Cal. 632; Hoppe v. Stout, 2 Cal. 460; Rogers v. Cody, 8 Cal. 324.

¹¹³ Garvey v. Fowler, 4 Sandf. 665; Crist v. Armour, 34 Barb. 378.

right to recover is bad, as amounting to the general issue.¹¹⁴ Bad pleas which are cured by verdict are those which although they would be bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue all of the material parts of the complaint.¹¹⁵

§ 467. Denials on information and belief.—The codes provide that where the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer and place his denial on that ground.¹¹⁶ If the statute requires the denial on information and belief to allege lack of knowledge or information upon which to base a belief, an allegation that the pleader had not "sufficient information on which to base a belief," is sufficient.¹¹⁷ "Belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant drawn from information.¹¹⁸ Belief may be founded on the statement of others not competent witnesses, and not under oath, but if the defendant has formed a belief from this source, he must so state; he cannot be the judge as to whether his information is legal testimony.¹¹⁹ Where the alleged fact, however, is from its nature presumptively within the personal knowledge of the defendant, he cannot be permitted to answer on information and belief, but must answer in positive form.¹²⁰ But such knowledge will not be presumed unless the facts are clear.¹²¹ Denials in the answer upon information and belief are not such denials as will serve as the basis of a motion to dissolve a temporary restraining order on the ground that the equities of a bill are fully denied by the answer.¹²² And when the defendant is a corporation it cannot place its denials upon the ground of want of information and belief if the

¹¹⁴ *Knoebel v. Kircher*, 33 Ill. 308.

¹¹⁵ *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Tams v. Lewis*, 42 Pa. St. 402.

¹¹⁶ Cal. Code Civ. Proc., § 437; N. Y. Code Civ. Proc., § 500; Mont. Code Civ. Proc. 1895, § 690; *Milwaukee etc. Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995.

¹¹⁷ *Downing North Denver Land Co. v. Burns*, 30 Colo. 283, 70 Pac. 413.

¹¹⁸ *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621.

¹¹⁹ *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621.

¹²⁰ *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844; *Gribble v. Columbus etc. Co.*, 100 Cal. 75, 34 Pac. 527; *Mulcahy v. Buckley*, 100 Cal. 489, 35 Pac. 144. But see *Bartow v. Northern Assurance Co.*, 10 S. Dak. 136, 72 N. W. 86.

¹²¹ *Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111.

¹²² *Porter v. Jennings*, 89 Cal. 440, 26 Pac. 965.

matters denied are presumptively within the knowledge of any of its officers, even though the officer verifying the answer was himself without any information or belief on the subject.¹²³ Where any presumption exists that the defendant has knowledge of the matters alleged in the complaint, he must by proper statement of the facts and circumstances overcome the presumption of knowledge on his part, which being done, his answer on information and belief will be deemed sufficient.¹²⁴

Where the plaintiff directly charged that the defendant had made and entered into a certain agreement, a simple denial by the defendant in his answer "according to his recollection and belief," is insufficient, and must be treated as a mere evasion.¹²⁵

A mere allegation of ignorance of the facts alleged is insufficient to raise an issue, and the facts so attempted to be controverted will be deemed admitted.¹²⁶ The plaintiff must answer positively or state how it is that he is ignorant of the facts alleged in the complaint.¹²⁷ The duty of acquiring the requisite knowledge or information is imposed by statute on the defendant to enable him to answer in the proper form.¹²⁸ A denial as to a material allegation or as to all of the allegations of a complaint, and any knowledge or information sufficient to form a belief, raises a complete issue under the code practice.¹²⁹ In Montana, however, a denial that as to a fact alleged the pleader "has no knowledge or information sufficient to form a belief, and therefore denies the same," is insufficient.¹³⁰

§ 468. **Colorado rule.**—Under the Colorado statute allowing a denial to be stated in the form that defendant has no knowledge or information on which to base a belief, a denial that a defend-

¹²³ *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

¹²⁴ *Brown v. Scott*, 25 Cal. 194; *Vassault v. Austin*, 32 Cal. 606; *Cowie v. Ahrenstedt*, 1 Wash. 419, 25 Pac. 458.

¹²⁵ *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13796.

¹²⁶ *Wood v. Staniels*, 3 Code Rep. 152; *Elton v. Markham*, 20 Barb. 343; *Sayre v. Cushing*, 7 Abb. Pr. 371.

¹²⁷ *Vassault v. Austin*, 32 Cal. 597; *Brown v. Scott*, 25 Cal. 189; *Curnow*

v. Happy Valley Blue Gravel etc. Co., 68 Cal. 263, 9 Pac. 149.

¹²⁸ *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Fish v. Reddington*, 31 Cal. 185.

¹²⁹ *Read v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555; *People v. Swift*, 96 Cal. 165, 31 Pac. 16; *Wilson v. Allen*, 11 Or. 154, 2 Pac. 91; *National Bank v. Meerwaldt*, 8 Wash. 631, 36 Pac. 763.

¹³⁰ *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560; *State v. Butte City Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 565, 44 Pac. 966, 32 L. R. A. 697.

ant "cannot obtain sufficient information on which to base a belief," is not in compliance with the statute and tenders no issue.¹³¹

§ 469. **Information and belief—Damages.**—A denial upon information and belief that the plaintiff suffered and sustained damages in the amount of twenty-five thousand dollars, and an averment upon information and belief that the plaintiff has not sustained any damage or damages whatsoever to exceed the sum of two thousand five hundred dollars, which sum, and none other, is admitted by defendant as the damages suffered, with an offer to pay the same, the pleadings not being verified, is not considered a model answer for imitation;¹³² it being the employment of negative averments instead of denials. But in a California case,^{132a} an answer of this character was upheld, upon the principle that the mere form of a denial is not material, provided it directly traverse the allegation which it is intended to meet. A denial of the full amount claimed, and admission of a certain amount to be due, and a tender of that amount, all properly go to constitute one defense.¹³³

§ 470. **The same—Judgment.**—If the complaint aver the recovery of a judgment against one of several defendants, the court in which it was recovered, and the date and amount of the same, the defendants, in their answer, may deny the same upon information and belief.¹³⁴

§ 471. **On information and belief—Deed.**—An allegation in an answer by an administrator that the defendant "avers, on information and belief, that no such deed or deeds were ever executed," is a sufficient denial of the averment in the complaint that defendant's intestate executed and delivered the particular deeds referred to.¹³⁵ The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties

¹³¹ Grand Valley Irr. Co. v. Leshner, 28 Colo. 273, 65 Pac. 44.

¹³² Chamon v. San Francisco, Cal. Super. Ct., July Term, 1869.

^{132a} Hill v. Smith, 27 Cal. 746.

¹³³ Spencer v. Tooker, 12 Abb. Pr. 354.

¹³⁴ Vassault v. Austin, 32 Cal. 597.

¹³⁵ Thompson v. Lynch, 29 Cal. 189; Roussin v. Stewart, 33 Cal. 208;

Jones v. City of Petaluma, 36 Cal. 230. That defendant may deny on information and belief in the New York practice, see Sackett v. Havens, 7 Abb. Pr. 371, note; Davis v. Potter, 4 How. Pr. 155; Dunham v. Gates, Hoff. Ch. 185; Macauley v. Bromell, 14 Abb. N. C. 316; 67 How. Pr. 252; Wilson v. Doran, 110 N. Y. 101, 17 N. E. 688. But in Therasson v.

admit the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument.¹³⁶

§ 472. **Presumption of knowledge.**—The true test to determine when a defendant may base his denial upon lack of sufficient information or belief, is whether the facts alleged are presumptively within the defendant's knowledge. Of course, if they are, this form of denial is not available.¹³⁷ A defendant cannot interpose this form where the means of information are open to him.¹³⁸ He cannot plead ignorance of a public record to which he has access, and which affords him the means necessary to obtain positive knowledge.¹³⁹ Thus in a *mandamus* proceeding to compel the chairman of a board of county commissioners to sign a warrant, an allegation in the answer that the defendant has no knowledge or information sufficient to form a belief that there is money in the treasury sufficient to satisfy the warrant, and therefore denies that fact, is not a sufficient denial; the fact attempted to be denied being one which the defendant ought to know and has the means of knowing by reason of his office.¹⁴⁰ It has been held that a party cannot deny on information and belief that a judgment was rendered against him.¹⁴¹ But in a California case it was held that where a complaint averred a recovery of a judgment against one of several defendants, the court in which it was recovered, and the date and amount of the same, the defendants in their answer might deny upon information and belief, and explain the reason for lack of knowledge.¹⁴² A defendant cannot admit the execution of a contract, and at the same time deny information as to its contents.¹⁴³ But it has been

McSpedon, 2 Hilt. 1, a denial upon information and belief was held not sufficient. See, also, Hackett v. Richards, 3 E. D. Smith, 13; Swinburne v. Stockwell, 58 How. Pr. 312.

¹³⁶ Lee v. Evans, 8 Cal. 424.

¹³⁷ Thorn v. New York Cent. Mills, 10 How. Pr. 19; Edwards v. Lent, 8 How. Pr. 28; Kellogg v. Baker, 15 Abb. Pr. 286; Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621; Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238; Fravert v. Fesler, 11 Colo. App. 387, 53 Pac. 288; Appel v. State, 9 Wyo. 187, 61 Pac. 1015; Ensley v. Page, 13 Colo. App. 452, 59 Pac. 225.

¹³⁸ Hance v. Remming, 1 Code Rep. 204; Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527.

¹³⁹ Muleahy v. Buckley, 100 Cal. 484, 35 Pac. 144; Mullally v. Townsend, 119 Cal. 54, 50 Pac. 1066; Simpson v. Remington, 6 Idaho, 681, 59 Pac. 360; Thompson v. Skeen, 14 Utah, 214, 46 Pac. 1103.

¹⁴⁰ Appel v. State, 9 Wyo. 187, 61 Pac. 1015.

¹⁴¹ Buller v. Sidell, 43 Fed. 116; Roblin v. Long, 60 How. Pr. 200; Beebe v. Marvin, 17 Abb. Pr. 194.

¹⁴² Vassault v. Austin, 32 Cal. 597.

¹⁴³ Wesson v. Judd, 1 Abb. Pr. 254.

held that a defendant is not presumed to recollect the date or contents of a written instrument not in his possession or control.¹⁴⁴ Whether a defendant made or indorsed a note, and whether he transferred it, is presumably within his own knowledge.¹⁴⁵ He may, however, deny knowledge of its indorsement or transfer, by the payee.¹⁴⁶ There is always a presumption arising from the professional obligations of an attorney that he will not abuse his privilege by representing a party without his authority, and this presumption cannot be overcome by information and belief however honestly entertained.¹⁴⁷

In an action against an executor, facts alleged in the complaint to the effect that the plaintiff rendered services to the testatrix, their character and value, the amount paid thereon and the amount still due, and that the testatrix promised to pay for the same by making a provision for her in her will, are not presumably within the knowledge of the defendant, and he may place his denial thereof upon the ground of a want of sufficient information or belief upon the subject.¹⁴⁸ But in an action for goods sold and delivered, whether or not the plaintiff had sold and delivered to the defendant, at the latter's request, the property mentioned in the complaint, is a matter presumably within the knowledge of the defendant, and the denial thereof for want of information or belief will be held insufficient.¹⁴⁹

There may, however, be cases in which, although apparently within the knowledge of the defendant, he may not know or remember the facts alleged. If so, he must state in his answer the circumstances which warrant his denial on information and belief.¹⁵⁰

§ 473. Form of denial for want of information or belief.—In drafting a denial based upon want of information or belief, the better practice probably is to follow the words of the statute, although slight deviations therefrom are generally held not to impair it. The provisions of the codes generally are for the denial

¹⁴⁴ Kellogg v. Baker, 15 Abb. Pr. 286.

¹⁴⁵ San Francisco Gas Co. v. San Francisco, 9 Cal. 465; Fales v. Hicks, 12 How. Pr. 153; Thorn v. New York Cent. Mills, 10 How. Pr. 19.

¹⁴⁶ Caswell v. Bushnell, 14 Barb. 393.

¹⁴⁷ City & County of San Francisco

v. Staude, 92 Cal. 560, 28 Pac. 778; Robinson v. Robinson, 32 Mo. App. 88.

¹⁴⁸ Echaz v. Orena, 121 Cal. 270, 53 Pac. 798.

¹⁴⁹ Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238.

¹⁵⁰ Brown v. Scott, 25 Cal. 190; Vassault v. Austin, 32 Cal. 597; Jones v. Perot, 19 Colo. 141, 34 Pac. 728.

of knowledge or information sufficient to form a belief, but the courts have held that the mere statement of a denial in the words "upon information and belief" is allowable;¹⁵¹ although where this form is used instead of the statutory language it may well be doubted whether it does not allow a little wider latitude for evasion; but it has been widely adopted by pleaders, and it is now settled that it is sufficient.¹⁵²

That the defendant "does not know of his information or otherwise,"¹⁵³ or that the defendant "is not informed and cannot state,"¹⁵⁴ or "has no knowledge," or "is ignorant whether," or that he "has no recollection concerning it," are not sufficient denials under this provision.¹⁵⁵ The allegation must be positive that the defendant has no information or belief sufficient to enable him to answer, and an answer placing a denial on that ground, without also averring want of belief on the subject sufficient to enable such answer, is insufficient to raise an issue.¹⁵⁶ So an allegation in a verified complaint is not sufficiently controverted by the averment in the answer "that defendant has not sufficient knowledge to form a belief and therefore neither admits nor denies."¹⁵⁷

If in the body of an answer no fact is denied upon information and belief the verification is to be regarded as a positive affirmance of the truth of the allegations in the answer, notwithstanding the use of the form of verification containing the usual words "except as to matters and things therein stated on his information and belief."¹⁵⁸

¹⁵¹ Jones v. City of Petaluma, 36 Cal. 230; Kirstein v. Madden, 38 Cal. 163; Russell v. Amundson, 4 N. Dak. 117, 59 N. W. 477.

¹⁵² Vassault v. Austin, 32 Cal. 606; Roussin v. Stewart, 33 Cal. 211; Jones v. City of Petaluma, 36 Cal. 230; Kirstein v. Madden, 38 Cal. 158.

¹⁵³ Sayre v. Cushing, 7 Abb. Pr. 371.

¹⁵⁴ Elton v. Markham, 20 Barb. 348.

¹⁵⁵ Mott v. Burnett, 1 Code Rep. 225; Robinson v. Woodgate, 3 Edw. Ch. 422; Nichols v. Jones, 6 How. Pr. 355; Wood v. Staniels, 3 Code Rep. 152.

¹⁵⁶ Naftzger v. Gregg, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757.

¹⁵⁷ Anderson v. Parker, 6 Cal. 197.

¹⁵⁸ Christopher v. Condodge, 128 Cal. 581, 61 Pac. 174.

FORMS OF DENIAL ON INFORMATION AND BELIEF.

§ 474. Denial of knowledge, explaining cause of ignorance.

Form No. 129.

[TITLE.]

The defendant answers to the plaintiff's complaint:

- I. That he denies that he has ever been within the state of . . . , that he ever personally transacted any business therein.
- II. Denies that he did at the time stated, or at any other time, do or say [state what].

§ 475. Denial on information and belief.

Form No. 130.

[TITLE.]

The defendant answers to the complaint:

That he has been informed, and believes, that each and every allegation in plaintiff's complaint is untrue and wholly false, and basing his answer upon such information and belief he denies generally and specifically each and every allegation in the plaintiff's complaint contained.

§ 476. Denial of knowledge sufficient to form a belief.

Form No. 131.

[TITLE.]

The defendant answers to the complaint:

That he has no knowledge, information, or belief sufficient to enable him to answer any or either of the allegations in said complaint contained, and, therefore, he denies each and every of said allegations. [Or if confined to one allegation, after the word "answer" proceed] the allegation that [set out the allegation, or refer to it so as to clearly identify it]; and, therefore, denies the same.

CHAPTER XXIV.

DEFENSES—SPECIAL PLEAS.

§ 477. **Defense of accord and satisfaction.**¹—The defense of accord and satisfaction must be specially pleaded.² And evidence of the discharge of the debt sued on, pending the action, is admissible only under this plea.³ The plaintiff on an execution may receive promissory notes by a special agreement, as an absolute payment of the same, but the agreement must be proved by testimony other than the sheriff's certificate.⁴ An accord and satisfaction after issue joined must be pleaded specially as happening since the last continuance.⁵ A plea of accord and satisfaction must aver the payment and receipt in satisfaction.⁶ A mere readiness to perform the accord, or a tender of performance, or even part performance and readiness to perform the rest, is not enough.⁷ A plea which alleges that the defendant executed to the plaintiff a deed of certain property, which was to be absolute in case the note sued on was not paid by a certain day, without alleging that the deed was accepted as a satisfaction, is bad.⁸

§ 478. **The same and when allowed.**—A satisfaction may result from the acceptance of another as debtor,⁹ or from action for part of an entire demand;¹⁰ or a payment of a less sum where the amount is disputed, but not otherwise.¹¹ An agree-

¹ For a form in the defense of accord and satisfaction, see 2 Greenl. Ev. 28, note, and authorities there cited.

² *Piercy v. Sabin*, 10 Cal. 30, 70 Am. Dec. 692; *Jacobs v. Day*, 5 Misc. 410, 25 N. Y. Supp. 763; *Berdell v. Bissell*, 6 Colo. 162; *Coles v. Soulsby*, 21 Cal. 47; *Sweet v. Burdett*, 40 Cal. 97; *Young v. Jones*, 64 Me. 563, 18 Am. Rep. 279; *Watson v. Elliott*, 57 N. H. 511; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534.

³ *Jessup v. King*, 4 Cal. 331.

⁴ *Mitchell v. Hockett*, 25 Cal. 542, 85 Am. Dec. 151.

⁵ *Good v. Davis*, Hempst. 16, Fed. Cas. No. 5530a.

⁶ *Maze v. Miller*, 1 Wash. C. C. 328, Fed. Cas. No. 9362; *United States v. Clarke*, Hempst. 315, Fed. Cas. No. 14812. See Cal. Civ. Code, §§ 1521-1524.

⁷ *Hearn v. Kiehl*, 38 Pa. St. 147, 80 Am. Dec. 472.

⁸ *Shaw v. Burton*, 5 Mo. 478.

⁹ *Van Etten v. Troudden*, 1 Hun, 432.

¹⁰ *O'Beirne v. Lloyd*, 43 N. Y. 248.

¹¹ *Williams v. Irving*, 47 How. Pr. 440; *Maack v. Schneider*, 51 Mo. App. 92; *Truax v. Miller*, 48 Minn.

ment to receive some other thing instead of that specified in the contract, when executed, is good;¹² but part payment and tender is an unexecuted accord, and not a satisfaction.¹³ This plea is allowed to be put in after the defendant has already pleaded, where some new matter of defense arises after issue joined, such as payment, a release by the plaintiff, the discharge of the defendant under an insolvent or bankrupt law, and the like.¹⁴ A plea of accord and satisfaction founded upon services should aver that the services were accepted in satisfaction of the plaintiff's demand; otherwise, the plea is bad.¹⁵

§ 479. **Another action pending—Foreign suits.**—It would seem that under the decisions of the New York courts a discontinuance of the other action, even after the answer, avoids this defense.¹⁶ That a prior suit *in personam*, between the same parties and for the same cause of action was pending in another state, at the time of bringing the action, is not a defense;¹⁷ but the pendency of a suit between the same parties and respecting the same subject-matter in another state may be pleaded in abatement in the courts of the United States,¹⁸ or in a state court, on account of pending suit in the United States court, where there is concurrent jurisdiction.¹⁹ Where an appearance in a foreign attachment suit in another state is after the service of a writ in an action between the same parties in this state, the pendency of the foreign suit cannot be pleaded in bar or abatement of the action here.²⁰

§ 480. **The same—Identity of cause and parties.**—In New York, it is not enough to allege service of process for the same cause, without showing a declaration or complaint for the

62, 50 N. W. 935; *Sicotte v. Barber*, 83 Wis. 431, 53 N. W. 697. See *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58.

¹² *Howard v. Norton*, 65 Barb. 161.

¹³ *Noe v. Christie*, 51 N. Y. 270.

¹⁴ 2 Burr. Law Dict. 353; 3 Bl. Com. 316; 2 *Tedd's Pr.* 847; 1 Burr. Pr. 232; *Steph. Pl.* 64.

¹⁵ *Johnson v. Hunt*, 81 Ky. 321.

¹⁶ *Beals v. Cameron*, 3 How. Pr. 414; *Averill v. Patterson*, 10 How. Pr. 85. See, also, *Moore v. Hopkins*, 83 Cal. 270, 17 Am. St. Rep. 248, 23

Pac. 318; *Dyer v. Scalmanini*, 69 Cal. 639, 11 Pac. 327; *Hixon v. Schooley*, 26 N. J. L. 461.

¹⁷ *SeEVERS v. Clements*, 28 Md. 426. See *Douglass v. Insurance Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448, note, 33 N. E. 938, 20 L. R. A. 118.

¹⁸ *Ex parte Balch*, 3 McLean, 221, Fed. Cas. No. 790.

¹⁹ *State v. Tallman*, 29 Wash. 411, 69 Pac. 1115.

²⁰ *Wilson v. Mechanics' Bank*, 45 Pa. St. 488.

same cause.²¹ In an action to recover land, an answer of another action pending for the same cause must show that the same title, the same injury, and the same subject-matter are in controversy in both actions.²² A former suit in foreclosure which could not rightfully be maintained while the plaintiff retained title in fee to the premises, cannot be set up to abate an action between the same parties for the possession of the premises.²³ If the second is brought on a title acquired after the commencement of the first, the defense will not avail.²⁴ To sustain this defense, it must appear that the two actions are for the same identical cause; but where the plaintiff seeks to split an entire demand, and brings a suit for a part, and then another suit for the residue, the pendency of the former may be pleaded in abatement or bar of the second action,²⁵ and may be pleaded though the plaintiff did not ask for the same relief in the former suit, if he was in fact entitled to the relief.²⁶ The defense of a prior *lis pendens* is available only where the plaintiff, at least, in both actions is the same.²⁷ It is enough to state merely that the action was between the same parties. Describing the parties is unnecessary.²⁸ If defendant is the successor in interest to the defendant in the former suit, the parties defendant are the same.²⁹ In a plea in abatement that a prior suit is pending, the absence of an affidavit verifying allegations in the plea that parties and cause of action are the same is fatal.³⁰ The pendency of an action for an accounting may be pleaded in abatement of a subsequent action between the same parties founded on one or more items involved in a prior action.³¹

§ 481. The same—What must be shown.—A plea to abate an action by reason of another action pending is not good unless it shows that the pending action was brought for the same cause as the one in which the plea is interposed.³² To support a

²¹ Gardner v. Clark, 21 N. Y. 399.

²² Larco v. Clements, 36 Cal. 132.

²³ Howard v. Hewitt, 139 Cal. 614,
73 Pac. 414.

²⁴ Vance v. Olinger, 27 Cal. 358.

²⁵ Bendernagle v. Cocks, 19 Wend.
207, 32 Am. Dec. 448.

²⁶ Wetzstein v. Boston & M. etc.
Min. Co., 28 Mont. 451, 72 Pac. 865.

²⁷ O'Connor v. Blake, 29 Cal. 312;
Walsworth v. Johnson, 41 Cal. 61.

²⁸ Ward v. Dewey, 12 How. Pr.
193.

²⁹ Wetzstein v. Boston & M. etc.
Min. Co., 28 Mont. 451, 72 Pac. 865.

³⁰ Trenton Bk. v. Wallace, 9 N. J.
L. 83; White v. Whitman, 1 Curt.
494, Fed. Cas. No. 17561.

³¹ Coubrough v. Adams, 70 Cal.
374, 11 Pac. 634.

³² Calaveras County v. Brockway,
30 Cal. 325. See Putnam v. Lyon, 3

plea in abatement founded on the pendency of a prior action, it is necessary to show that process was issued in such action.³³ A plea which sets up, in bar of an action upon a contract, that property was attached in a previous suit to answer for the same demand, and was lost, should show how the loss occurred.³⁴ A plea in abatement setting up pendency of a prior suit must show that the other court has jurisdiction of the action there pending.³⁵ It has been held in New York that the answer should show where the action is pending. But pendency of another action in a court of another state, or in a court of the United States, is not generally a good defense.³⁶

§ 482. Equitable defense, and how pleaded.—An equitable defense which may be interposed to an action at law, and which must be tried by the court before proceeding to a trial of the issues of law, is such a defense as is properly an equitable right of action existing in behalf of the defendant which he might have asserted in an independent suit brought by him against the plaintiff for the purpose of enforcing such right, but which he can rely upon as a defense in an action involving the same subject-matter brought against him by the plaintiff. The party relying upon such equitable defense must, however, plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in equity, and his answer, being in the nature of a bill in equity, must contain all the essential averments of such a bill.³⁷

§ 483. Answer—Variance.—An answer alleging a joint loan to both the plaintiffs is not sustained by proof of a loan to one of them individually.³⁸

Colo. App. 144, 32 Pac. 492; *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963.

³³ *Primm v. Gray*, 10 Cal. 522. See, also, *People v. De La Guerra*, 24 Cal. 73.

³⁴ *Starr v. Moore*, 3 McLean, 354, Fed. Cas. No. 13315.

³⁵ *White v. Whitman*, 1 Curt. 494, Fed. Cas. No. 17561; *Ex parte Balch*, 3 McLean, 221, Fed. Cas. No. 790.

³⁶ *Cook v. Litchfield*, 5 Sandf. 330; *Burrows v. Miller*, 5 How. Pr. 51.

See *Republic of Mexico v. Arrangois*, 1 Abb. Pr. 437; *People v. The Sheriff etc.*, 1 Park. Cr. 659; *Hecker v. Mitchell*, 5 Abb. Pr. 453; *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Johns. 99; *O'Reilly v. New York R. Co.*, 16 R. I. 388, 17 Atl. 171, 19 Atl. 244.

³⁷ *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119; *Bacon v. Green*, 36 Fla. 325, 18 South. 870.

³⁸ *York v. Fortenbury*, 15 Colo. 129, 25 Pac. 163.

§ 484. **Another action—When defense does and does not lie.**—A plea in abatement may be interposed to the entire action on the ground that another suit is pending for the same cause of action if the copy of the record be annexed. Still the proofs must show that the first cause of action is for the same matter sued for in the second suit.³⁹ It would also appear that proceedings other than an action—e. g. by petition—may be pleaded as a defense in the same way.⁴⁰ Where defendant pleads another suit pending, and it appears no summons was ever issued on the complaint, and there was no voluntary appearance on the part of the defendant, it was held that there was no suit pending,⁴¹ and likewise where summons and complaint were served but never filed, the former suit was not pending.⁴² So where the complaint is so defective that a judgment entered thereon would be a nullity.⁴³ So where the other suit pending was for only a part of the same matter sued for in the second suit.⁴⁴ The pendency of an action to quiet title to land will not abate a subsequent action between the same parties to recover possession of the same land in which the same facts are litigated.⁴⁵ The plaintiff, at least, must be the same in both cases.⁴⁶

A plea in abatement on the ground of the pendency of a former action will not be sustained, unless it appears that the plaintiff in the former action is the same as in the action in which the plea is offered, and that the cause of action in both is founded upon one entire contract, or upon one single or continuous tort.⁴⁷ Where two joint tort-feasors are sued separately for the same tort, the pendency of the suit against one cannot be pleaded in abatement of the suit against the other.⁴⁸ A plea in abatement interposed to two causes of action, good as to one cause and bad as to the other, is demurrable.⁴⁹

³⁹ *Thompson v. Lyons*, 14 Cal. 42; *People v. De La Guerra*, 24 Cal. 73.

⁴⁰ See *Groshon v. Lyon*, 16 Barb. 461; *Ogden v. Bodie*, 2 Duer, 611.

⁴¹ *Weaver v. Conger*, 10 Cal. 233; *Primm v. Gray*, 10 Cal. 522.

⁴² *Harris v. Fidalgo Mill Co.*, 38 Wash. 169, 80 Pac. 289.

⁴³ *Reynolds v. Harris*, 9 Cal. 338.

⁴⁴ *Thompson v. Lyon*, 14 Cal. 39.

⁴⁵ *Bolton v. Landers*, 27 Cal. 106.

⁴⁶ *O'Connor v. Blake*, 29 Cal. 314; *Walsworth v. Johnson*, 41 Cal. 61.

⁴⁷ *Lindsay v. Stewart*, 72 Cal. 540, 14 Pac. 516. See *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782; *Phelps v. Winona etc. R R Co.*, 37 Minn. 485, 5 Am. St. Rep. 867, 35 N. W. 273; *Bryan v. Scholl*, 109 Ind. 367, 10 N. E. 107.

⁴⁸ *State v. Boyce*, 72 Md. 140, 20 Am. St. Rep. 458, 19 Atl. 366, 7 L. R. A. 272; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330.

⁴⁹ *Pappe v. Trout*, 3 Okla. 260, 41 Pac. 397.

An allegation in the answer that another action is pending between the parties for dissolution of a copartnership and settlement of accounts is immaterial, and cannot bar the right of the plaintiff to have his title or interest in the property in controversy determined in an action to quiet title.⁵⁰ The Oregon code allows the filing of an answer by way of plea in abatement, setting forth the pendency of another suit between the same parties, for the same cause of suit, and it is immaterial that a third party is joined in the former suit.⁵¹

§ 485. Award—Performance.—Although it may not be necessary to set forth its terms, its substance must be set forth so fully as to enable the court to say that if such an award was made the action is barred.⁵² An award or former recovery for the same cause is new matter, which must be specially stated in the answer, and is not otherwise available, even though it appears by plaintiff's evidence.⁵³ A prior decision,⁵⁴ turning on the same point, was reversed on the ground that as plaintiff did not appear to have been misled or surprised, and not having objected that the evidence of a defense not pleaded was not admissible, he could not have the judgment reversed because it had been admitted.⁵⁵ An award which merely settles the amount due cannot be pleaded in bar to the action without alleging performance; for the money until paid is due in respect of the original debt.⁵⁶ And it is more recently held that it is not essential to the validity of the plea that payment of the amount awarded should be alleged.⁵⁷ A submission of a cause to arbitration operates as a continuance.⁵⁸ An award, to be effective as a bar to a subsequent suit over the same matters, should follow

⁵⁰ *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398.

⁵¹ *Crane v. Larsen*, 15 Or. 345, 15 Pac. 326. See *Beyersdorf v. Sump*, 39 Minn. 495, 12 Am. St. Rep. 678, 41 N. W. 101. But see, as to lack of parties plaintiff in former suit, *Bent v. Maxwell etc. R. R. Co.*, 3 N. Mex. 158, 3 Pac. 721.

⁵² *Gihon v. Levy*, 2 Duer, 176.

⁵³ *Brazill v. Isham*, 12 N. Y. 9, 1 E. D. Smith, 437; *Martin v. Rexroad*, 15 W. Va. 512.

⁵⁴ *Underhill v. Saratoga etc. Co.*, 20 Barb. 460.

⁵⁵ *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.

⁵⁶ *Brazill v. Isham*, 1 E. D. Smith, 437; questioned in 12 N. Y. 9.

⁵⁷ *Giles Lithographic etc. Co. v. Recamier Mfg. Co.*, 14 Daly, 475, 479. See *Terre Haute R. R. Co. v. Harris*, 126 Ind. 7, 25 N. E. 831.

⁵⁸ *Gunter v. Sanchez*, 1 Cal. 47; *Camp v. Root*, 18 Johns. 22; *Green v. Patchin*, 13 Wend. 293. See *Callanan v. Port Huron etc. R. R. Co.*, 61 Mich. 15, 27 N. W. 718.

the terms of the submission, and should cover everything submitted, but nothing more. An award will not operate as a bar to an action wherein there appears other facts and issues not contemplated in the original submission or included in the award.⁵⁹

§ 486. Bankruptcy—Essential averments.—The plea of bankruptcy is not favored, and may be defeated by proof of fraud.⁶⁰ The bankruptcy of the plaintiff must be specially pleaded.⁶¹ So bankruptcy of the defendant must be specially pleaded.⁶² It is not properly a plea in abatement, but it is rather a plea in bar; and until such plea is interposed, the plaintiff is not bound to take notice of the bankruptcy of the defendant.⁶³ To a suit brought in the name of a bankrupt subsequent to the appointment of his assignee, the defendant may plead the bankruptcy of the plaintiff, and the appointment of the assignee in abatement.⁶⁴ It is not essential to admit the existence of the debt.⁶⁵ But it should be averred to have been provable under the act.⁶⁶ A special averment that the demand in suit was included in the list of creditors contained in the petition is unnecessary.⁶⁷ It has been held in New York, a plea of discharge under the voluntary provisions of the bankrupt act must aver positively that the defendant, at the time of presenting the petition, owed debts. Averring that the petition so alleged is not sufficient.⁶⁸ In pleading an insolvent's discharge, it is not necessary to state the facts conferring jurisdiction on the officer who granted it.⁶⁹ A discharge in insolvency is no bar to an action brought by a non-resident creditor who was not a party to the insolvency proceedings.⁷⁰ So a discharge in insolvency only affects such debts of the

⁵⁹ *Garrow v. Nicolai*, 24 Or. 76, 32 Pac. 1036. See *Mt. Desert v. Tremont*, 75 Me. 252; *Truesdale v. Straw*, 58 N. H. 218.

⁶⁰ *Fellows v. Hall*, 3 McLean, 281, Fed. Cas. No. 4722. See, also, *In re McEachran*, 82 Cal. 219, 23 Pac. 46; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248, 5 Sup. Ct. 1038.

⁶¹ *Cook v. Lansing*, 3 McLean, 571, Fed. Cas. No. 3162.

⁶² *Fellows v. Hall*, 3 McLean, 281, Fed. Cas. No. 4722; *Cutter v. Folsom*, 17 N. H. 139; *Hollister v. Abbott*, 31 N. H. 442, 64 Am. Dec. 342.

⁶³ *Fellows v. Hall*, 3 McLean, 281,

Fed. Cas. No. 4722; *Detroit Stove Works v. Osmun*, 74 Mich. 7, 41 N. W. 845.

⁶⁴ *Cook v. Lansing*, 3 McLean, 571, Fed. Cas. No. 3162.

⁶⁵ *McCormick v. Pickering*, 4 N. Y. 276.

⁶⁶ *Sackett v. Andross*, 5 Hill, 327.

⁶⁷ *McCormick v. Pickering*, 4 N. Y. 276.

⁶⁸ *Varnum v. Wheeler*, 1 Denio, 331; *Dresser v. Brooks*, 3 Barb. 429.

⁶⁹ *Livingston v. Oaksmith*, 13 Abb. Pr. 183.

⁷⁰ *Rhodes v. Borden*, 67 Cal. 7, 6 Pac. 850; *Bean v. Loryea*, 81 Cal.

insolvent as existed at the time his petition was filed.⁷¹ A plea that defendant did owe debts which are not within the excepted classes, and that he presented a petition, etc., imports that he was a bankrupt within the act.⁷² It should be averred that the plaintiff's debt did not arise by reason of a defalcation as a public officer, etc., which debts are excepted by the act.⁷³ The rights and remedies of a plaintiff to recover for the wrongful seising of his store, under a chattel mortgage against the stock, does not abate upon appointment of a receiver.⁷⁴

§ 487. **The same—Presentation of papers—Voluntary assignment.**—A discharge duly granted under the bankrupt act of 1867 may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting the same forth *in hæc verba*, as a full and complete bar to all suits brought, the certificate to be conclusive evidence of the facts of the discharge.⁷⁵ This is the rule to be followed in this class of answers.⁷⁶ A general allegation that such affidavits, schedules, and other necessary and proper papers as are required by the bankrupt act were presented, is not enough, but the plea should state what papers were presented.⁷⁷ It should be averred that the petition of the bankrupt was presented to the court, and the discharge granted by the court, and not by the judge.⁷⁸ A voluntary assignment by debtors for the benefit of their creditors, which would have been good at common law, and was permitted by the state insolvency law, was held valid, although the United States bankrupt law was in force, and applicable

151, 22 Pac. 513; *Main v. Messner*, 17 Or. 78, 20 Pac. 255; *Bedell v. Scruton*, 54 Vt. 493; *Roberts v. Atherton*, 60 Vt. 563, 6 Am. St. Rep. 133, 15 Atl. 159; *Denny v. Bennett*, 128 U. S. 489, 32 L. Ed. 491, 9 Sup. Ct. 134.

⁷¹ *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831.

⁷² *McNulty v. Frame*, 1 Sandf. 128.

⁷³ *Sackett v. Andross*, 5 Hill, 327; *Maples v. Burnside*, 1 Denio, 332; *Dresser v. Brooks*, 3 Barb. 429. These decisions, as will be seen, were not made under the present bankruptcy act.

⁷⁴ *Tootle v. Kent*, 12 Okla. 674, 73 Pac. 310.

⁷⁵ Act Cong. March 2, 1867; U. S. Rev. Stats., § 5119.

⁷⁶ For form of pleading a discharge under the act of 1841, see *Ex parte Balch*, 3 McLean, 221, Fed. Cas. No. 790; *White v. How*, 3 McLean, 291, Fed. Cas. No. 17549. See *Chit. Form of Practice*, 110; *Seaman v. Stoughton*, 3 Barb. Ch. 344; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *Morse v. Cloyes*, 11 Barb. 100; *Ruckman v. Cowell*, 1 N. Y. 505. For a brief form, see *Stephens v. Ely*, 6 Hill, 607.

⁷⁷ *Sackett v. Andross*, 5 Hill, 327.

⁷⁸ *Gillon v. Bruen*, 5 N. Y. Leg. Obs. 227; *Sackett v. Andross*, 5 Hill, 327.

at the time of the assignment.⁷⁹ The statute of California for the relief of insolvent debtors and protection of creditors⁸⁰ was in conflict with the federal bankrupt law, and was suspended from the time the latter law went into effect.⁸¹ This statute was not repealed by the Code, but has been superseded by an act of the legislature, approved March 26, 1895, which is now in force. Debt resulting from the neglect of the attorney at law to pay over to his client money which he had collected for him is not a debt contracted while acting in a fiduciary capacity, and was not as such excepted from being discharged by a certificate under the United States bankrupt act of 1841.⁸²

§ 488. **Compromise—Pleadings.**—A note given in consideration of an antecedent indebtedness does not *per se* discharge the debt. In the absence of an agreement to the contrary, the only effect is to suspend the remedy until the maturity of the note.⁸³ If the creditors of a failing debtor agree among themselves, with the assent of the debtor, to a composition of their respective debts, and to receive in lieu thereof securities of a certain character, and one of the creditors subsequently obtains from the debtor new notes of a character more favorable to the creditor than those provided for in the composition agreement, such new notes are void for fraud, not only as to the other creditors, but as to the assenting debtor.⁸⁴ A plea of an assignment for the benefit of creditors made as a composition is bad on demurrer, if it does not aver payment or a tender of the composition, although it stated that defendant was always ready and willing to pay the same.⁸⁵ Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing, for that purpose, though without any new consideration, extinguishes the obligation.⁸⁶

⁷⁹ Hawkins' Appeal, 34 Conn. 548; Sedgwick v. Place, 34 Conn. 552, note, Fed. Cas. No. 12622.

⁸⁰ Hitt. C. & S. 15505.

⁸¹ Martin v. Berry, 37 Cal. 208.

⁸² Wolcott v. Hodge, 15 Gray, 547, 77 Am. Dec. 381.

⁸³ Smith v. Owens, 21 Cal. 11.

⁸⁴ Id. See Graham v. Meyer, 99 N. Y. 611, 1 N. E. 143.

⁸⁵ Fessard v. Mugnier, 18 Com. B. (N. S.) 286. For the allegations of P. P. F. Vol. I—20

an answer alleging composition by giving renewal notes which the plaintiff subsequently refused to receive, see Warburg v. Wilcox, 7 Abb. Pr. 336. For the allegations of an answer setting up an assignment for benefit of creditors made as a composition, see Watkinson v. Inglesby, 5 Johns. 386.

⁸⁶ See Cal. Civ. Code, § 1524. Offer of compromise in answer. See Hammond v. Northern Pacific R. R. Co., 23 Or. 157, 31 Pac. 299.

§ 489. **Debt not due.**—An allegation in an answer that certain goods were sold on a credit which had not expired is a conclusion of law.⁸⁷ The facts from which the conclusion is drawn should be stated. Such a plea is held to be not new matter requiring a reply, but a special denial that the defendant is indebted as alleged in the complaint.⁸⁸ It would seem that in Pennsylvania the fact that a suit was brought in violation of an agreement to give time is not a reason for dismissing the action. It should have been regularly pleaded and tried.⁸⁹ A covenant not to sue for five years is no bar to an action within that time.⁹⁰ The objection that the suit was commenced before the cause of action accrued should be taken by answer.⁹¹

§ 490. **Abatement—When does not abate.**—An action or proceeding does not abate by death or any disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.⁹² Similar provisions are found in the codes of the other states. Section 387 of the California Code of Civil Procedure, as amended in 1907, gives a party the right to intervene during the pendency of suit, at any time before trial.^{92a} An intervention cannot be allowed after final judgment.⁹³ Whether the cause of action survives on the death of a party depends upon local law.⁹⁴ But an action for a penalty and causes of action *ex delicto* die with the defendant.⁹⁵ So actions in trespass do not survive.⁹⁶ This section applies only where the cause of action survives against the surviving defend-

⁸⁷ Levinson v. Schwartz, 22 Cal. 229.

⁸⁸ Gilbert v. Cram, 12 How. Pr. 455.

⁸⁹ Murdock v. Steiner, 45 Pa. St. 349.

⁹⁰ Howland v. Marvin, 5 Cal. 501. Legal effect of covenant not to sue. See Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271.

⁹¹ Smith v. Holmes, 19 N. Y. 271.

⁹² Cal. Code Civ. Proc., § 385; New York Code, 1877, § 725.

^{92a} See Brooks v. Hager, 5 Cal. 281.

⁹³ Owen v. Colgan, 97 Cal. 455, 32 Pac. 519; Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

⁹⁴ Hatfield v. Bushnell, 1 Blatchf. 393, Fed. Cas. No. 6211.

⁹⁵ Jones v. Vanzandt's Admr., 4 McLean, 604, Fed. Cas. No. 7504; Henshaw v. Miller, 17 How. 212, 15 L. Ed. 222.

⁹⁶ Dyckman v. Allen, 2 How. Pr. 17.

ant.⁹⁷ Although technically sounding in tort, an action for injury to property survives under the New York statute in the same manner as an action on contract.⁹⁸ The statute has changed the practice in this respect, for at common law all personal actions die with the party.⁹⁹ So, at common law, in actions *ex delicto*, where the wrongdoer acquired no real gain, although the injured party may have much loss, the death of either party destroyed the right of action.¹⁰⁰ In Colorado, the general rule is that actions at law do not die with the person. The exceptions are specified by statute.¹⁰¹

§ 491. Abatement—Death of sole plaintiff.—On the death of a sole plaintiff, the action may be continued in the name of the representative of the decedent.¹⁰²

§ 492. Abatement—Death of sole defendant.—On the death of sole defendant before verdict or judgment, his representatives cannot be substituted against the wishes of plaintiff, unless the defendant has acquired some rights in the litigation, as where a counterclaim has been pleaded.¹⁰³ An action in such case for the recovery of possession of specific personal or real property wholly abates.¹⁰⁴ It is otherwise in California. Section 1584

⁹⁷ Williams v. Kent, 15 Wend. 360.

⁹⁸ Haight v. Hayt, 19 N. Y. 464; Cregin v. Brooklyn etc. R. R. Co., 75 N. Y. 192, 31 Am. Rep. 459. See Hess v. Lowrey, 122 Ind. 225; 17 Am. St. Rep. 355, 23 N. E. 156, 7 L. R. A. 90; Lee v. Hill, 87 Va. 497, 24 Am. St. Rep. 666, 12 S. E. 1052.

⁹⁹ Wilber v. Gilmore, 21 Pick. 250; Mason v. Union Pacific Ry. Co., 7 Utah, 77, 24 Pac. 796.

¹⁰⁰ Middleton v. Robinson, 1 Bay (S. C.) 58, 1 Am. Dec. 596; Mellen v. Baldwin, 4 Mass. 480; Holmes v. Moore, 5 Pick. 257; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717; Jones v. Townsend, 23 Fla. 355, 2 South. 612.

¹⁰¹ Kelley v. Union Pacific Ry. Co., 16 Colo. 455, 27 Pac. 1058; Munal v. Brown, 70 Fed. 967. See, also, Mont. Code Civ. Proc., § 587; Overlock v.

Shinn, 28 Wash. 205, 68 Pac. 436; Jones v. Miller, 35 Wash. 499, 77 Pac. 811.

¹⁰² Ridgeway v. Bulkley, 7 How. Pr. 269; Banta v. Marcellus, 2 Barb. 373; Bain v. Pine, 1 Hill, 616; Jarvis v. Felch, 14 Abb. Pr. 46; Reed v. Butler, 11 Abb. Pr. 128; Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55; Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888; Campbell v. West, 93 Cal. 653, 29 Pac. 219.

¹⁰³ Livermore v. Bainbridge, 61 Barb. 358. Substitution of personal representative of deceased defendant. See Strong v. Eldridge, 8 Wash. 595, 36 Pac. 696; Mitchell v. Schoonover, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867. The death of the defendant after levy of an attachment does not vacate or dissolve it. Id.

¹⁰⁴ Hopkins v. Adams, 5 Abb. Pr. 351; Mosely v. Mosely, 11 Abb. Pr.

of the Code of Civil Procedure provides that "any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate, who, in his lifetime, has wasted, destroyed, taken, or carried away, or converted to his own use, the goods and chattels of any such person, or committed any trespass on the real estate of such person." In an action to recover damages for death by a wrongful act, the action may be continued against personal representatives of defendant.¹⁰⁵

§ 493. **Abatement—Death of one of several defendants.**—In case of the death of one of several defendants, the action may be continued as to the others.¹⁰⁶ Where defendants are executors, trustees, joint tenants, or copartners, the action continues against the survivors.¹⁰⁷

§ 494. **Abatement—Death of husband.**—A wife may proceed or not, at her election, and is not liable for costs if she refuses.¹⁰⁸ A demand in right of the wife does not abate on death of the husband.¹⁰⁹ If, after a decree of divorce, directing division of the common property, the husband dies, the heirs must be substituted as parties in his stead.¹¹⁰

§ 495. **Abatement—Death of wife.**—An action against husband and wife, for the debt of a wife contracted while a *feme sole*, abates on her death, before judgment.¹¹¹ The death of a wife without issue living defeats a recovery by the husband in an action for the homestead.¹¹²

§ 496. **Abatement—Death of appellant.**—In action on a personal tort, on the death of appellant during an appeal from a judgment against him, the appeal may be continued by his representatives in their name.¹¹³ The death of appellant after

105; Putnam v. Van Buren, 7 How. Pr. 31; Mosely v. Albany Northern R. R. Co., 14 How. Pr. 71.

106 Yertore v. Wiswall, 16 How. Pr. 8; Doedt v. Wiswall, 15 How. Pr. 128.

108 Gardner v. Walker, 22 How. Pr. 405; Gordon v. Sterling, 13 How. Pr. 405.

107 Lachaise v. Libby, 13 Abb. Pr. 7; Buckman v. Brett, 13 Abb. Pr. 119.

108 Mitf. Pl. 59; Dewall v. Covenhoven, 5 Paige 581.

109 Id.; McDowl v. Charles, 6 Johns. Ch. 132.

110 Ewald v. Corbett, 32 Cal. 493.

111 Williams v. Kent, 15 Wend. 360.

112 Gee v. Moore, 14 Cal. 472.

113 Miller v. Gunn, 7 How. Pr. 159.

But see Hastings v. McKinley, 8 How. Pr. 175. In writs of error in

argument of the case upon appeal, does not constitute a ground for delaying decision or departing from the ordinary course of procedure. Judgment may be entered, but it should be on a day anterior to appellant's death.¹¹⁴

§ 497. Abatement—Death before trial.—Where plaintiff in an action died before trial, and the subsequent order for judgment contained a recital as follows: "This action having been continued, in consequence of death of plaintiff, by his executor, Samuel Webb, and jury having found verdict for plaintiff, and then awarded judgment in favor of plaintiff," it was held that the recital sufficiently showed a suggestion of death of original plaintiff, and continuance and revival of the cause in the name of the executor.¹¹⁵ The remedy of a son for any cause of action individually for his own suffering caused by the mutilation of his father's body, is by action in the court of original jurisdiction, and not by substitution as plaintiff, on death of his mother, in an action commenced by her, for her own suffering, and pending on appeal at the time of her death.¹¹⁶

§ 498. Abatement—Death before argument.—The rule is different if the death occurs previous to argument. In that event, proceedings can only be had upon leave given after suggestion of death is made.¹¹⁷

§ 499. Abatement—Death after verdict.—In California, where a party to an action dies after verdict or other decision thereon, judgment in pursuance of such verdict or decision may nevertheless be rendered, as provided in section 202 of the Practice Act, without becoming a lien on the real property of the deceased;¹¹⁸ but in no other such case can judgment be rendered so as to affect the interests of the representatives or successors of the party deceased, without the proper substitution of such representatives or successors.¹¹⁹

the United States Supreme Court, see *Green v. Watkins*, 6 Wheat. 260, 5 L. Ed. 256; *McKinney v. Carroll*, 12 Pet. 66, 9 L. Ed. 1002. As to limitation of time for suggestion of death, see *Phillips v. Preston*, 11 How. 294, 13 L. Ed. 702.

¹¹⁴ *Black v. Shaw*, 20 Cal. 68; *Brach v. Gregory*, 2 Abb. Pr. 203.

¹¹⁵ *Sanchez v. Roach*, 5 Cal. 248; *Gregory v. Haynes*, 21 Cal. 443.

¹¹⁶ *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811.

¹¹⁷ *Black v. Shaw*, 20 Cal. 68; *Warren v. Eddy*, 13 Abb. Pr. 28.

¹¹⁸ Cal. Code Civ. Proc., § 669.

¹¹⁹ *Judson v. Love*, 35 Cal. 463.

§ 500. **Abatement—Death before or after judgment.**—Death of defendant before judgment destroys the lien of an attachment, and the property passes into possession of the administrator.¹²⁰ The death of a party before judgment, when presumed, though not proved, renders any subsequent proceedings irregular.¹²¹ The death of a party after hearing, but before actual decision, works no abatement; judgment may be entered *nunc pro tunc*.¹²² Death of party after decree works no abatement.¹²³ An action for divorce cannot survive the death of either party, and where the plaintiff in such action dies subsequent to the entry of a judgment decreeing a divorce in her favor the court is deprived of all power to review its action and determine her right to a divorce.¹²⁴

§ 501. **Death pending supplementary proceedings.**—The proceedings abate on the death of sole judgment debtor.¹²⁵

§ 502. **Death of party in equitable actions.**—In equity the suit does not abate by death of a co-plaintiff or co-defendant; the suit may be amended by adding the necessary parties.¹²⁶

§ 503. **Abatement—Party civilly dead.**—When plaintiff or defendant is sentenced to state prison, the action abates.¹²⁷ But this cannot be pleaded by the party so civilly dead, it must be by his representatives.¹²⁸ A corporation cannot relieve itself of liability to suit by simply going out of business.¹²⁹ And the appointment of a receiver of a corporation does not prevent suit against it upon an obligation entered into prior to the receivership.¹³⁰

¹²⁰ Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49; Hensley v. Morgan, 47 Cal. 622; Ham v. Cunningham, 50 Cal. 365. Compare Mitchell v. Schoonover, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867.

¹²¹ Gerry v. Post, 13 How. Pr. 118.

¹²² Ehle v. Moyer, 8 How. Pr. 244; Diefendorf v. House, 9 How. Pr. 243; Crawford v. Wilson, 4 Barb. 504.

¹²³ Cowell v. Buckelew, 14 Cal. 641; Thwing v. Thwing, 18 How. Pr. 458, 9 Abb. Pr. 323; Lynde v. O'Donnell, 21 How. Pr. 34, 12 Abb. Pr. 286.

¹²⁴ Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064.

¹²⁵ Hasewell v. Penman, 2 Abb. Pr. 230.

¹²⁶ Fisher v. Rutherford, Baldw. 188, Fed. Cas. No. 4823.

¹²⁷ Graham v. Adams, 2 Johns. Cas. 408; O'Brien v. Hagan, 1 Duer, 664.

¹²⁸ Freeman v. Frank, 10 Abb. Pr. 370.

¹²⁹ Jones v. Spartanburg Herald Co., 44 S. C. 526, 22 S. E. 731.

¹³⁰ Allen v. Olympia Power Co., 13 Wash. 307, 43 Pac. 55.

§ 504. **Abatement—Suggestion of death.**—It is regular and proper to suggest the death of a party to an action in any court, and at any stage of the proceedings, and the death of a party occurring before the appeal taken may be shown in the appellate court by affidavit of the fact.¹³¹

§ 505. **Substitution of party and revivor.**—A party substituted as plaintiff on death of the original plaintiff, is not required to file new pleadings.¹³² An order continuing an action against the estate of defendant is void unless made upon notice to the representatives of decedent, and judgment secured thereafter is of no effect.¹³³

§ 506. **Duress, what amounts to.**—Duress is personal restraint, or fear of personal injury or imprisonment.¹³⁴ Duress of imprisonment is where a man actually loses his liberty. If a man be illegally deprived of his liberty until he sign and seal a bond, or the like, he may allege this duress and avoid the bond.¹³⁵ But if a man be legally imprisoned, and, either to procure his discharge or on any other fair account, seal a bond or deed, this is not by duress of imprisonment, and he is not at liberty to avoid it.¹³⁶

Duress per minas, which is either for fear of loss of life or else for fear of mayhem or loss of limb, must be upon sufficient reason.¹³⁷ Lord Coke adds to these, fear of imprisonment.¹³⁸ In order to avoid a note on the ground that it was procured by menace of arrest or imprisonment, it must appear that the menace was of unlawful imprisonment, and that the maker was put in fear of such imprisonment, and was thereby induced to execute it.¹³⁹ An abuse of process against the person to compel

¹³¹ Judson v. Love, 35 Cal. 463; Shartzer v. Love, 40 Cal. 96; Taylor v. Western Pacific R. R. Co., 45 Cal. 323.

¹³² Warren v. Robison, 25 Utah, 205, 70 Pac. 989.

¹³³ Symes v. Charpiot, 17 Colo. App. 463, 69 Pac. 311.

¹³⁴ Hazelrigg v. Donaldson, 2 Metc. (Ky.) 445. See, generally, as to what constitutes duress, McClair v. Wilson, 18 Colo. 82, 31 Pac. 502; Joannin v. Ogilvie, 49 Minn. 564, 32 Am. St. Rep. 581, 52 N. W. 217, 16 L. R. A.

376; Barrett v. Weber, 125 N. Y. 18, 25 N. E. 1068.

¹³⁵ Craig v. Ward, 9 Johns. 201; Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373.

¹³⁶ Coke, 2 Inst. 482; Hollingsworth v. Napier, 3 Caine, 182, 2 Am. Dec. 268; Watkins v. Baird, 6 Mass. 511, 4 Am. Dec. 170; Eddy v. Herrin, 17 Me. 338, 35 Am. Dec. 261.

¹³⁷ 1 Bl. Com. 131.

¹³⁸ Coke, 2 Inst. 483.

¹³⁹ Knapp v. Hyde, 60 Barb. 80. See, also, Landa v. Obert, 45 Tex. 539.

a party to do any act against his will is a duress, and the act done may be avoided.¹⁴⁰ It is not legal duress to threaten to or actually take advantage of the usual remedy by suit for the enforcement of a debt or obligation, even if the claim be illegal.¹⁴¹ It has been held that a restraint of goods under circumstances of hardship will avoid a contract.¹⁴² In the case of violence or threats, the age, sex, state of health, etc., must be taken into consideration; and they are grounds of avoiding the contract not only when they are exercised on the contracting party in person, but when the wife, the husband, or the descendants or ancestors of the party are the object of them. Duress cannot be pleaded by a stranger.¹⁴³ An answer setting up duress must, in general, aver the facts constituting the duress. Thus, if a trust is executed by a deed made in pursuance thereof, the execution of which is admitted, it cannot be proved that it was made under duress, unless the duress is specially pleaded as affirmative matter in avoidance of the deed.¹⁴⁴ Duress, as defined by the California code, consists in—1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife; 2. Unlawful detention of the property of any such person; or confinement of such person, lawful in form, fraudulently obtained, or fraudulently made unjustly harassing or oppressive.¹⁴⁵

§ 507. Dismissal of suit.—A dismissal of the complaint upon the merits bars a fresh action, especially where the complaint is in equity.¹⁴⁶ Dismissal of suit to obtain probate of a will is no bar to introduction of evidence to show its fraudulent destruction, to establish title in partition.¹⁴⁷ But judgment of dismissal of premature suit is no bar to a fresh action on the demand, when matured.¹⁴⁸ So, also, dismissal on ground of want of capacity to sue is no bar to subsequent action legally

¹⁴⁰ Breck v. Blanchard, 22 N. H. 303.

¹⁴¹ Holt v. Thomas, 105 Cal. 273, 38 Pac. 891.

¹⁴² Craig v. Ward, 9 Johns. 201; Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373. But see Hazelrigg v. Donaldson, 2 Metc. (Ky.) 445; Maisonnaire v. Keating, 2 Gall. 337, Fed. Cas. No. 8978.

¹⁴³ McClintick v. Cummins, 3 McLean, 158, Fed. Cas. No. 8699.

¹⁴⁴ Nordholt v. Nordholt, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599.

¹⁴⁵ Cal. Civ. Code, § 1569. As to menace, see Cal. Civ. Code, § 1570.

¹⁴⁶ Bostwick v. Abbott, 40 Barb. 331, 16 Abb. Pr. 417; Weighley v. Coffman, 144 Pa. St. 489, 27 Am. St. Rep. 667, 22 Atl. 919.

¹⁴⁷ Harris v. Harris, 26 N. Y. 433.
¹⁴⁸ Wilcox v. Lee, 26 How. Pr. 418, 1 Abb. Pr. (N. S.) 250.

instituted.¹⁴⁹ And when dismissal of complaint is relied upon in bar, it must be shown that it was a judicial determination of the same point.¹⁵⁰ Ordinarily, when an action is dismissed without any judicial determination of the controversy, it is no bar to another suit.

§ 508. **Former judgment.**—Where a court in a former action between the same parties had jurisdiction over the subject and the parties, and the questions of fact were the same as in the subsequent action, and were necessary to its decision, and either were or might have been litigated in the suit, and the final hearing was upon its merits, the judgment is *res adjudicata* as to all those things that were, or under the pleadings might have been, controverted in that action whose adjudication was necessary to the final disposition of the case.¹⁵¹ A judgment in a former action is well pleaded as a bar in a second action, provided the cause of action is the same, though the form of action had been changed.¹⁵² The cause of action is said to be the same as that in a former suit, where the same evidence would support both actions.¹⁵³ Recovery of judgment against a firm upon a contract fraudulently induced by one member is no bar to an action against that member for the fraud.¹⁵⁴ If parties go to trial on a plea of former recovery in an attachment execution, with a replication, this does not amount to a confession of the truth of the facts stated in the plea.¹⁵⁵

§ 509. **Former judgment—Essential allegations.**—It is generally necessary to allege that the former judgment is in full force, but it may sufficiently appear by implication.¹⁵⁶ A plea of former adjudication need not state that the former judgment had not been appealed from, nor that it had become final.¹⁵⁷ In Iowa and Indiana, such a plea must be accompanied with an

¹⁴⁹ Robbins v. Wells, 26 How. Pr. 15, 18 Abb. Pr. 191.

¹⁵⁰ Smith v. Ferris, 1 Daly, 18. See Bell v. Merrifield, 109 N. Y. 202, 4 Am. St. Rep. 436, 16 N. E. 55; Gallagher v. Moundville, 34 W. Va. 730, 26 Am. St. Rep. 942, 12 S. E. 859; Solly v. Clayton, 12 Colo. 30, 20 Pac. 351.

¹⁵¹ Keene v. Clarke, 5 Robt. 38; Graham v. Culver, 3 Wyo. 639, 31 Am. St. Rep. 105, 29 Pac. 270, 30 Pac. 957.

¹⁵² Taylor v. Castle, 42 Cal. 367.

¹⁵³ Id.; Gayer v. Parker, 24 Neb. 643, 8 Am. St. Rep. 227, 39 Pac. 845.

¹⁵⁴ Goldberg v. Dougherty, 39 N. Y. Super. Ct. (7 J. & Sp.) 189. In actions ex delicto, see Atlantic Dock etc. Co. v. Mayor etc., 53 N. Y. 64.

¹⁵⁵ Tams v. Bullitt, 35 Pa. St. 308.

¹⁵⁶ Southern Life Ins. etc. Co. v. Davis, 4 Edw. Ch. 588.

¹⁵⁷ In re Baird, 84 Cal. 95, 24 Pac. 167.

exhibit of the record.¹⁵⁸ A plea cannot contradict the record of a former suit. Errors in the original suit should have been corrected as they occurred.¹⁵⁹ Where a judgment in a prior suit is set up in defense to an action, a complete record of all the pleadings and proceedings in the case in which it was rendered should be made part of the answer.¹⁶⁰ Either the term of the court at which the former judgment was recovered, or the exact date of the entry of the judgment, should be stated, and when taken in vacation, the time of its entry by the clerk should be stated.¹⁶¹ The rule that a decree must be enrolled before it can be pleaded in a bar of a second bill for the same matter is not applicable to a case where the bill is filed to impeach a decree on the ground of fraud.¹⁶² A judgment in a former suit between the same parties, for the same cause, and in the same form is a bar to any other suit.¹⁶³ But such judgment must be specially pleaded.¹⁶⁴ For evidence of a former recovery for the same cause of action cannot be given in any action whatever, under an answer containing only denials of the complaint, or an allegation of the pendency of another action.¹⁶⁵ The rule of the old practice, permitting such evidence to be given under the general issue in actions of ejectment and trover,¹⁶⁶ is abrogated by the code.¹⁶⁷ If there is no opportunity to plead it, it may be put in evidence.¹⁶⁸ It may be pleaded in an equity suit.¹⁶⁹ Under California practice, a decree in equity may be pleaded in bar of a subsequent action at law.¹⁷⁰ Whether pleaded or not, it must be proved in evidence.¹⁷¹ It may be waived.¹⁷²

¹⁵⁸ *Adkins v. Hudson*, 19 Ind. 392; *Lee v. Keister*, 11 Iowa, 480.

¹⁵⁹ *Hall v. Singer*, 3 McLean, 17, Fed. Cas. No. 5946.

¹⁶⁰ *Williamson v. Foreman*, 23 Ind. 540, 85 Am. Dec. 475; *Ringle v. Weston*, 23 Ind. 588.

¹⁶¹ *Mount v. Scholes*, 120 Ill. 394, 11 N. E. 401.

¹⁶² *Pearse v. Dobinson*, L. R., 1 Eq. 244.

¹⁶³ *McKnight v. Taylor*, 1 Mo. 282.

¹⁶⁴ *Love v. Waltz*, 7 Cal. 250; *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Vance v. Olinger*, 27 Cal. 358; *Marshall v. Shafter*, 32 Cal. 176; *Brazil v. Isham*, 12 N. Y. 17; *Richardson v. Hickman*, 22 Ind. 244.

See *Welsh v. Lindo*, 1 Cranch C. C. 508, Fed. Cas. No. 17409.

¹⁶⁵ N. Y. Code, 1877, § 500; *Hendricks v. Decker*, 35 Barb. 298.

¹⁶⁶ *Young v. Runnell*, 2 Hill, 478, 38 Am. Dec. 594, 5 Hill, 61; *Miller v. Manice*, 6 Hill, 125; *Wright v. Butler*, 6 Wend. 284, 21 Am. Dec. 323; *Denison v. Seymour*, 9 Wend. 9.

¹⁶⁷ *Hendricks v. Decker*, 35 Barb. 298.

¹⁶⁸ *Flandreau v. Downey*, 23 Cal. 358; *Clink v. Thurston*, 47 Cal. 29.

¹⁶⁹ *City & County of San Francisco v. Spring Valley W. W.*, 39 Cal. 482.

¹⁷⁰ *Wolverton v. Baker*, 86 Cal. 591, 25 Pac. 54.

¹⁷¹ *People v. De La Guerra*, 24 Cal. 78.

¹⁷² *Semple v. Ware*, 42 Cal. 621.

§ 510. Former judgment—Parties.—If the parties are not the same, allegations to show their privity with the present parties must be inserted.¹⁷³ A judgment is conclusive of the issues involved as between the parties thereto, though in the action in which it is pleaded only some of the parties are litigants.¹⁷⁴ Where the plaintiff assigned to S. and R. a certain promissory note given by the defendants for the purpose of bringing suit with other claims thereon, and S. and R. brought suit thereon and recovered judgment against one defendant, it was held that such recovery could be set up in answer to a suit on the note by the plaintiff against all the defendants.¹⁷⁵

§ 511. Foreign adjudication—Essential allegations.—If defendant relies upon proceedings under the statute of another state, he must set out the statute, that the court may see whether the proceedings were warranted by the statute or not; and the general allegation that the proceedings were pursuant to the statute is not sufficient.¹⁷⁶ A plea which sets up a foreign judgment must contain an allegation that the court had jurisdiction, or so much of the proceedings must be spread on the record as will show affirmatively that the court has jurisdiction.¹⁷⁷ Judgment of a foreign tribunal having full cognizance of the same controversy held conclusive upon the merits, and only impeachable for want of jurisdiction or fraud.¹⁷⁸ A plea which sets up in bar of an action upon a contract that property was attached in a previous suit to answer for the same demand, and was lost, should show how the loss occurred.¹⁷⁹

¹⁷³ *Goddard v. Benson*, 15 Abb. Pr. 191.

¹⁷⁴ *Nave v. Adams*, 107 Mo. 414, 28 Am. St. Rep. 421, 17 S. W. 958.

¹⁷⁵ *Anderson v. Yosemite Min. Co.*, 9 Utah, 420, 35 Pac. 502.

¹⁷⁶ *Walker v. Maxwell*, 1 Mass. 104; *Holmes v. Broughton*, 10 Wend. 75, 25 Am. Dec. 536.

¹⁷⁷ *Burnham v. Webster, Davies*, 236, Fed. Cas. No. 2178.

¹⁷⁸ *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Phillips v. Godfrey*, 7 Bosw. 150; *Jarvis v. Sewall*, 40 Barb. 449. See *Taylor v. Shew*, 39 Cal. 539, 2 Am. Rep. 478. For a

plea of adjudication that the assignment under which plaintiffs claimed was fraudulent and void, see *Southern Life Ins. etc. Co. v. Davis*, 4 Edw. Ch. 588. Under what plea former adjudication may be presented as a defense, see *Welsh v. Lindo*, 1 Cranch C. C. 508, Fed. Cas. No. 17409. For an insufficient plea of attachment in former action, see *New England Screw Co. v. Bliven*, 3 Blatchf. 240, Fed. Cas. No. 10156. Compare *Stone v. Stone*, 2 Cranch C. C. 119, Fed. Cas. No. 13488.

¹⁷⁹ *Starr v. Moore*, 3 McLean, 354, Fed. Cas. No. 13315.

§ 512. **Former judgment—Offer of testimony in.**—The judgment or decree of a court of competent jurisdiction is not only final as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided under the pleadings.¹⁸⁰ The rule is, however, more properly and less broadly stated by the New York court of errors in a case where the general declaration embraced several causes of action.^{180a} It was held that the plaintiff in a second suit may show that he “offered” no evidence as to one of the causes, and that the cause went to the jury upon a different part of his claim from that for which his second suit is brought, in which case the judgment in the first will be no bar for the second. But where he attempts to give evidence, and submits the question to the jury without withdrawing any part of his claim, the defendant may insist upon the first judgment as a bar.¹⁸¹

§ 513. **Former judgment—When a bar.**—A former judgment rendered in an action tried upon its merits, between the same parties, and upon the same subject-matter, is, if properly pleaded, an effectual bar to another action between the same parties on the same cause; but it is no defense to a cause of action accrued after the rendition of said judgment.¹⁸² Where the same subject-matter has been fairly put in issue and once tried upon the merits, it cannot be again litigated, and a former judgment is a bar so long as it remains unreversed.¹⁸³ The fact that a judgment in a former action between the same parties, which determined the same points as those raised in the latter action, was erroneous under the law as subsequently declared by the appellate court in other cases between other parties, does not affect its force as an adjudication of the rights of the parties thereto and those in privity with them.¹⁸⁴ The statutes upon finality of judgment are

¹⁸⁰ *La Guen v. Gouverneur*, 1 Johns. Cas. 436, 1 Am. Dec. 121; approved in *Bruen v. Hone*, 2 Barb. 586; *Southgate v. Montgomery*, 1 Paige, 47; *Simson v. Hart*, 14 Johns. 77.

^{180a} *Miller v. Manice*, 6 Hill, 121.

¹⁸¹ *Barnum v. Reynolds*, 38 Cal. 643.

¹⁸² *Jones v. City of Petaluma*, 36 Cal. 230; *Barnum v. Reynolds*, 38 Cal. 643, *White v. White*, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062.

¹⁸³ *McKnight v. Taylor*, 1 Mo. 282; *City and County of San Francisco v. Spring Valley W. W.*, 39 Cal. 473; *Etheborne v. Auzeais*, 45 Cal. 121; *Rahm v. Minis*, 40 Cal. 422; *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841.

¹⁸⁴ *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54; *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004.

merely declaratory of the common-law rule.¹⁸⁵ A judgment in a justice's court for damages caused by the alleged diversion of a stream of water is a bar to a subsequent action in the supreme [superior] court involving the same issues.¹⁸⁶ Adjudication in a former suit is conclusive as to the defense then existent, but not so as to another subsequently arising, and which could not then have been interposed.¹⁸⁷

§ 514. Former judgment—When not a bar.—A judgment in a former action is not a bar in a subsequent action, although the pleadings present the same matter, if it appears either by the record, or, it seems, by extraneous evidence, that the matter in question was not litigated, and actual evidence was not given as to it, and it was not submitted to the court, but that the trial and verdict proceeded upon other grounds.¹⁸⁸ The estoppel is created by the judgment, but not by preliminary determination of court or jury in findings or verdict.¹⁸⁹ A decree dismissing a bill for matters not involving merits is no bar to a subsequent suit.¹⁹⁰ A judgment against one of two several obligors without satisfaction is no bar to an action against the other.¹⁹¹ When parties to the second action are in privity with parties to the first action, and the same issue is presented for determination, the former adjudication is a bar.¹⁹² In an action against an infant for damages, a judgment of discontinuance in a former action for the same cause brought in the court of a justice of the peace, the judgment being rendered on the ground that the defendant was an infant and no guardian had been appointed, is no bar. A justice has no jurisdiction to proceed against an infant defendant, after the return of process, until a guardian has been appointed.¹⁹³ When the court rendering judgment has failed to acquire jurisdiction over the person or subject-matter in con-

¹⁸⁵ *Lamb v. Wahlenmaier*, 144 Cal. 91, 103 Am. St. Rep. 66, 77 Pac. 765.

¹⁸⁶ *Boyer v. Schofield*, 2 Keyes, 628.

¹⁸⁷ *Smith v. McCluskey*, 45 Barb. 610. See Cal. Code Civ. Proc., § 1908, declaring the effect of a judgment or final order in an action or special proceeding. Consult *Miller v. Van Tassel*, 24 Cal. 466; *Boggs v. Clark*, 37 Cal. 238; *Leese v. Sherwood*, 21 Cal. 164; *Ford v. Doyle*, 44 Cal. 635.

¹⁸⁸ *Burwell v. Knight*, 51 Barb. 267.

¹⁸⁹ *Bank of Visalia v. Smith*, 146 Cal. 398, 81 Pac. 542.

¹⁹⁰ *Hughes v. United States*, 4 Wall. 232, 18 L. Ed. 303. See, also, *Tutton v. Addams*, 45 Pa. St. 67.

¹⁹¹ *Armstrong v. Prewett*, 5 Mo. 476, 32 Am. Dec. 338; *Fitzgerald v. Burke*, 14 Colo. 559, 23 Pac. 993; *Hix v. Davis*, 68 N. C. 233.

¹⁹² *Lamb v. Wahlenmaier*, 144 Cal. 91, 106 Am. St. Rep. 66, 77 Pac. 765.

¹⁹³ *Harvey v. Large*, 51 Barb. 222.

troversy, its action is null, and no bar to future proceeding.¹⁹⁴ So, also, where such court has not exercised its jurisdiction within the limits imposed by statute.¹⁹⁵

§ 515. **Former judgment—When an estoppel.**—If on the case made by the complaint, the defendant is not called upon or has no opportunity to plead a former judgment as an estoppel, it may be received in evidence as matter of estoppel without having been pleaded.¹⁹⁶ A judgment to operate as an estoppel must be a judgment of a court of competent jurisdiction, upon the same subject-matter, in a cause regularly tried on its merits, upon issue duly joined by proper pleadings in such court, between the same parties or their privies.¹⁹⁷ Suffering judgment for whole amount claimed by plaintiff held to estop defendant from bringing subsequent suit for an omitted credit, which he might have set up as a defense;¹⁹⁸ and recovery of part of an entire demand estops any suit being brought for the residue.¹⁹⁹ Disallowance of claim, as set-off in one action, estops another being brought for it.²⁰⁰ A judgment obtained *pendente lite* in an action previously brought may operate as an estoppel.²⁰¹

§ 516. **Fraudulent misrepresentations.**—To set aside for fraud a decree signed and enrolled, actual, positive fraud must be shown. Mere constructive fraud is not sufficient, at all events after long delay.²⁰² An answer seeking to avoid a contract, by reason of fraudulent misrepresentations of the plaintiff in procuring it, must state in what the misrepresentations consisted, and they must be of matter of fact of which defendant was ignorant, and not of law.²⁰³ False representations in respect to the

¹⁹⁴ Sagendorph v. Shult, 41 Barb. 102; Gage v. Hill, 43 Barb. 44; Porter v. Bronson, 29 How. Pr. 292, 19 Abb. Pr. 236. See Hardy v. Beaty, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778.

¹⁹⁵ Bloomer v. Merrill, 29 How. Pr. 259.

¹⁹⁶ Jackson v. Lodge, 36 Cal. 28; Clink v. Thurston, 47 Cal. 29. See Wixson v. Devine, 67 Cal. 341, 7 Pac. 776.

¹⁹⁷ Boggs v. Clark, 37 Cal. 236.

¹⁹⁸ Binck v. Wood, 43 Barb. 315.

¹⁹⁹ Hopf v. Myers, 42 Barb. 270; Bancroft v. Winspear, 44 Barb. 209.

²⁰⁰ Rogers v. Rogers, 1 Daly, 194. See, also, as to similar effect of setting up demand by way of counterclaim, Collyer v. Collins, 17 Abb. Pr. 467.

²⁰¹ Bank of Beloit v. Beale, 7 Bosw. 611. See, on the other hand, as to course to be pursued when judgment relied upon as an estoppel is reversed *pendente lite*, Gilchrist v. Comfort, 26 How. Pr. 394.

²⁰² Patch v. Ward, L. R. 3 Ch. App. 203.

²⁰³ People v. Supervisors of San Francisco, 27 Cal. 656; Holdredge v. Webb, 64 Barb. 9.

profitable nature of a business carried on upon leased premises, whereby defendant was induced to guarantee the rent, may be set up as a defense to an action on his guarantee.²⁰⁴ The answer may be held fatally defective in not charging the representations to have been fraudulently made, or that there was a warranty of some particular quantity.²⁰⁵ Where an answer contains a general allegation of fraud, and plaintiffs go to trial upon the issue thus joined, without taking any exception to the answer on the ground of sufficiency, and there is no objection made by the plaintiffs to the testimony introduced by defendants in support of the issue of fraud, an objection to the answer on the ground that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud, cannot be entertained by the supreme court on appeal.²⁰⁶ Fraud must be specially pleaded, and the circumstances constituting fraud must be set up.²⁰⁷ An answer setting up fraud or deceit as a defense to an action on a promissory note should show damage therefrom and the extent thereof.²⁰⁸ So where a chattel mortgage, made the basis of an action, is fair upon its face, it cannot be impeached for fraud unless the facts relied on to constitute the fraud are pleaded in the answer.²⁰⁹ In an action to foreclose a chattel mortgage, a plea that the mortgage was obtained by fraud and misrepresentation, without specifying in what it consisted, is faulty.²¹⁰ An allegation in answer that conveyance was made with intent to delay

²⁰⁴ *Mendelson v. Stout*, 37 N. Y. Super. Ct. (5 J. & Sp.) 408. For other cases involving fraud and illegality, see *Dorris v. French*, 4 Hun, 292; *Kowing v. Manley*, 13 Abb. Pr. (N. S.) 276; *Swords v. Owen*, 43 How Pr. 176; *Donovan v. The Compagnie Generale*, 39 N. Y. Super. Ct. (7 J. & Sp.) 519; *Leszinsky v. White*, 45 Cal. 278. See, also, Cal. Civ. Code, §§ 1571 et seq.

²⁰⁵ *Kinney v. Osborne*, 14 Cal. 112.

²⁰⁶ *King v. Davis*, 34 Cal. 100; *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497. See *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386.

²⁰⁷ *People v. Supervisors of San Francisco*, 27 Cal. 656; *Gifford v. Carville*, 29 Cal. 589; *Lamott v. Butler*, 18 Cal. 32; *Rasmussen v. Mc-*

Knight, 3 Utah, 315, 3 Pac. 83, 4 Pac. 526; *Parley's Park S. Min. Co. v. Kerr*, 3 Utah, 235, 2 Pac. 709; *Albertoli v. Branham*, 80 Cal. 631, 13 Am. St. Rep. 200, 22 Pac. 404; *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111; *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923; *Jain v. Griffin*, 3 Colo. App. 90, 32 Pac. 80.

²⁰⁸ *Parker v. Jewett*, 52 Minn. 514, 55 N. W. 56.

²⁰⁹ *Brereton v. Bennett*, 15 Colo. 254, 25 Pac. 310; *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35. Title resting upon fraud how pleaded in answer, see *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923.

²¹⁰ *Bennett v. Reef*, 16 Colo. 430, 27 Pac. 252.

and defraud the grantor's creditors is sufficient.²¹¹ An answer alleging that a judgment relied on by the plaintiff was obtained by fraud and collusion between parties named is sufficiently definite and certain, without specifying the acts which show fraud and collusion.²¹² An answer presents a good defense to an action which is brought on the ground of fraud, if it states circumstances from which it can be reasonably inferred that the fraud charged could not have been practiced.²¹³

§ 517. **Fraud—Essential allegations.**—In all this class of actions, where the disability of defendant is claimed, such as infancy, lunacy, etc., the facts causing such disability should be in all cases specially pleaded; for, in general, such disability cannot be proven unless pleaded.²¹⁴

§ 518. **Wife as plaintiff—Effect of divorce.**—When the wife is living separate and apart from her husband by reason of his desertion of her, or by agreement, in writing, entered into between them, she may sue or be sued alone.²¹⁵ Where the disability of the plaintiff, who is a married woman, does not appear upon the face of the complaint, the defendant, if he intends to avail himself of the coverture as a defense to the action, should set it up in his answer. Such objection is waived by a general denial.²¹⁶ The objection that the husband is not a party plaintiff and the plaintiff is not living apart from her husband must be raised by demurrer or answer.²¹⁷ In an action on contract against a married woman, in those states in which she may enter into any contract the same as if she were *feme sole*, a plea of coverture, without more, is not sufficient in law as a defense.²¹⁸ In plea of coverture in abatement, the allegations recognized as necessary

²¹¹ See *Probert v. McDonald*, 2 S. Dak. 495, 39 Am. St. Rep. 796, 51 N. W. 212; *Reese v. Kinkead*, 20 Nev. 65, 14 Pac. 871.

²¹² *Culver v. Hollister*, 17 Abb. Pr. 405.

²¹³ *Burk v. Stewig*, 21 Tex. 418.

²¹⁴ See *Young v. Bell*, 1 Cranch C. C. 342, Fed. Cas. No. 18152; *Roe v. Angevine*, 7 Hun, 679; *Mott v. Burnett*, 2 E. D. Smith, 50; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142. As to disabilities of minors, their rights, the disaffirmance of contracts by them, their contracts for

necessaries, and obligations entered into under the express authority of a statute, see Cal. Civ. Code, §§ 33-37, 264 et seq.

²¹⁵ Cal. Code Civ. Proc., § 370, subd. 3; *Muller v. Hale*, 133 Cal. 163, 71 Pac. 81.

²¹⁶ *Dillaye v. Parks*, 31 Barb. 132; *Beville v. Cox*, 109 N. C. 265, 13 S. E. 800. See Cal. Code Civ. Proc., § 370.

²¹⁷ *Baldwin v. Second St. R. R. Co.*, 77 Cal. 390, 19 Pac. 644.

²¹⁸ *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493. See *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272; *Hanse v. Fiero*,

are that of coverture at the time of the commencement of the action and its continuance by the continued life of the husband up to the time of filing the plea.²¹⁹ An action brought in the names of husband and wife, to recover wife's separate estate, does not abate in consequence of divorce and subsequent marriage of wife with another.²²⁰ Where the husband and wife are joined as plaintiffs, and the contract sued on and set forth in the complaint was made between the husband only and the defendants, the name of the wife was mere surplusage, and not a defect of parties under the code, and might have been stricken out on notice, if insisted upon.²²¹

§ 519. **Marriage.**—The marriage of a female defendant does not abate an action.²²² But at common law the marriage of a female complainant abates the suit, and it must be revived either in favor of or against her husband.²²³

§ 520. **Arbitration and award.**—The plea of coverture, and that the defendant's husband did not consent to the arbitration upon the award in which a judgment was founded, is not sufficient in proceeding by *scire facias* to revive the judgment. Though this plea might be a good defense to an action on the judgment, yet, until such judgment is set aside, the defendant cannot resist the *scire facias*, the object of which is to enforce process upon such judgment.²²⁴ Negligence of the husband is imputable to the wife, and will prevent recovery for injuries to her.²²⁵

§ 521. **Wife's separate estate.**—In an action brought to charge the separate estate of a married woman, when the coverture is alleged in the complaint, a defense that the defendant is a married woman is bad on demurrer, for it sets up no new matter; and such an answer is insufficient.²²⁶ A married woman may answer separately, where homestead or her separate estate is involved.²²⁷

56 Hun, 463, 10 N. Y. Supp. 494;
Cook v. Walling, 117 Ind. 9, 10 Am.
St. Rep. 17, 19 N. E. 532, 2 L. R. A.
769; Snell v. Snell, 123 Ill. 403, 5
Am. St. Rep. 526, 14 N. E. 684.

²¹⁹ Atwood v. Higgins, 76 Me. 423.

²²⁰ Calderwood v. Pyser, 31 Cal. 333.

²²¹ Warner v. Steamship Uncle
Sam, 9 Cal. 697.

²²² Campbell v. Bowne, 5 Paige,
34.

²²³ Quackenbush v. Leonard, 10
Paige, 131.

²²⁴ Taylor v. Harris, 21 Tex. 438.

²²⁵ McFadden v. Santa Ana etc. St.
R. R. Co., 87 Cal. 464, 25 Pac. 681,
11 L. R. A. 252.

²²⁶ Aiken v. Clark, 16 Abb. Pr. 328,
note.

²²⁷ Moss v. Warner, 10 Cal. 296;
Phillips v. Burr, 4 Duer, 113. See,
also, Cal. Code Civ. Proc., §§ 370, 371.

§ 522. **Husband and wife—Impotence.**—Impotence does not render a marriage void, but only voidable, and the validity of a marriage cannot be impeached on that ground after the death of one of the parties. Therefore the right of a husband to administer his wife's estate cannot be disputed on the ground of the nullity of the marriage by reason of his impotence.²²⁸

§ 523. **The same—Promissory note.**—An answer upon a promissory note that the maker is a married woman is sufficient as a confession and avoidance.²²⁹

§ 524. **Misjoinder of parties.**—Where a misjoinder of parties plaintiff does not appear upon the face of the complaint, and the objection is not taken by answer, it is deemed waived.²³⁰ Misjoinder of parties plaintiff, owing to matters which have occurred pending the action, must be taken by supplemental answer, or it is waived.²³¹ Objection should be taken by demurrer or answer to the misjoinder of parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them.²³² The objection that there is a misjoinder of defendants must be raised by demurrer or answer; and if not so raised, the plaintiff will be entitled to recovery against all the defendants.²³³

²²⁸ *A. v. B.*, L. R., 1 Prob. & Div. 559.

²²⁹ *Scudder v. Gori*, 18 Abb. Pr. 223.

²³⁰ *Hastings v. Stark*, 36 Cal. 122; *Trenor v. Central Pacific R. R. Co.*, 50 Cal. 223. See *Minter v. Durham*, 13 Or. 470, 11 Pac. 231; *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024; *Asevedo v. Orr*, 100 Cal. 293, 34 Pac. 777. As to nonjoinder of parties plaintiff in partition, see *Sutter v. San Francisco*, 36 Cal. 112.

²³¹ *Calderwood v. Pyser*, 31 Cal. 333; *Barstow v. Newman*, 34 Cal. 90. As to joinder of plaintiffs, see Cal. Code Civ. Proc., §§ 378-384; *Frost v. Harford*, 40 Cal. 165; *Powell v. Powell*, 48 Cal. 234; *Andrews v. Pratt*, 44 Cal. 319. As to nonjoinder, see *McGilvery v. Morehead*, 3 Cal.

271; *Estell v. Chenery*, 3 Cal. 467; *Whitney v. Stark*, 8 Cal. 516, 68 Am. Dec. 360; *Conner v. Hutchinson*, 12 Cal. 126; *Barber v. Cazalis*, 30 Cal. 96; *Colman v. Clements*, 23 Cal. 245; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344; *Moss v. Wilson*, 40 Cal. 159; *Gates v. Lane*, 44 Cal. 396.

²³² *Warner v. Wilson*, 4 Cal. 310; *Dunn v. Tozer*, 10 Cal. 170.

²³³ *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Gilman v. Rives*, 10 Pet. 298, 9 L. Ed. 432; *Chandler v. Byrd*, Hempst. 222, Fed. Cas. No. 2591b; *Fosgate v. Herkimer Manf. etc. Co.*, 12 N. Y. 580. Compare *Bates v. Jaines*, 3 Duer, 45.

§ 525. **Misnomer must be pleaded.**—Misnomer of plaintiff or defendant must be pleaded in abatement.²³⁴ And this is so even in case of a corporation.²³⁵ In suits or proceedings by or against any corporation, a mistake in the name is waived if not pleaded in abatement. Misnomer of the plaintiff cannot be taken advantage of on the trial or by plea in bar, but must be pleaded in abatement.²³⁶ Where two or more persons associated in any business transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name. The judgment will bind the joint property of all the associates and the individual property of the party or parties served, in the same manner as if they had been named as defendants and sued upon their joint liability.²³⁷ And when the action is in the name of the individual partners, it binds only the interest of those made parties and served.²³⁸ It is a familiar rule that a person may be sued by a fictitious name, but a personal judgment against a fictitious person or against a person not the party to the suit would, of course, be worthless, assuming that such judgment could be obtained. This relates to defendant. A plaintiff ought to know his own name.²³⁹

§ 526. **Nonjoinder.**—A failure to join may be pleaded in abatement.²⁴⁰ An objection for a defect of parties—e. g. the nonjoinder of a copartner as plaintiff—which is not apparent upon the face of the complaint, must be taken by demurrer or answer.²⁴¹ The failure to join a dormant partner as defendant in an action

²³⁴ *Welsh v. Kirkpatrick*, 30 Cal. 204, 89 Am. Dec. 85; *King v. Randlett*, 33 Cal. 321; *Mann v. Carley*, 4 Cow. 148; *Collmann v. Collins*, 2 Hall, 569; *Miller v. Stettiner*, 7 Bosw. 692; *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37.

²³⁵ *Bank of Utica v. Smalley*, 2 Cow. 770, 14 Am. Dec. 526; *Methodist Episcopal Church v. Tryon*, 1 Denio, 451; *Alabama etc. R. R. Co. v. Bolding*, 69 Miss. 255, 30 Am. St. Rep. 541, 13 South. 844.

²³⁶ *Hanly v. Blanton*, 1 Mo. 49; *Boisse v. Langham*, 1 Mo. 572; *Thompson v. Elliott*, 5 Mo. 118.

²³⁷ Cal. Code Civ. Proc., § 388, as

amended 1907. As to effect of judgment in such cases, see *Id.*; *Mulliken v. Hull*, 5 Cal. 246.

²³⁸ *Feder v. Epstein*, 69 Cal. 456, 10 Pac. 785; *Davidson v. Knox*, 67 Cal. 143, 7 Pac. 413.

²³⁹ See Cal. Code Civ. Proc., § 474. Plea in abatement on ground of misnomer. See *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 23 N. E. 156, 7 L. R. A. 90; *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377.

²⁴⁰ *Whitney v. Stark*, 8 Cal. 514, 68 Am. Dec. 360. See *Newhall-House Stock Co. v. Railroad Co.*, 47 Wis. 516, 2 N. W. 1123.

²⁴¹ Cal. Code Civ. Proc., §§ 430, 433; N. Y. Code Civ. Proc. 1877,

against the partnership cannot be pleaded in abatement.²⁴² And if not thus interposed, the defendant must be held to have waived the objection.²⁴³ And an answer upon the merits waives all such defects.²⁴⁴

§ 527. **Tenants in common.**—In California, all persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.²⁴⁵ This rule extends to suit brought by an heir at law regarding subject-matter affecting the whole estate.²⁴⁶

§ 528. **Jointly liable.**—In an action on a joint contract, the omission to sue all the joint contractors may be specially pleaded.²⁴⁷ The same in an action against an attorney, one of a partnership composed of several attorneys.²⁴⁸ The plea must give the names truly, so that the plaintiff may proceed correctly the second time. If it appear on the trial that another not named by the plea was also a joint contractor, the proof fails.²⁴⁹ This rule is not changed by the code.²⁵⁰ The fact that other persons, jointly responsible, have not been made defendants, must be pleaded in abatement, or it cannot be taken advantage of on the trial. The rule applies to all joint contracts, as well as to those arising particularly from mercantile partnerships.²⁵¹ In a bill to set aside a conveyance, as made without consideration, and in fraud of creditors, the alleged fraudulent grantor is a necessary

§§ 488, 498; *Gilman v. Cosgrove*, 22 Cal. 356; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456.

²⁴² *Pinschower v. Hanks*, 18 Nev. 99, 1 Pac. 454.

²⁴³ Cal. Code Civ. Proc., § 434; N. Y. Code, § 499; *Trenor v. Central Pacific R. R. Co.*, 50 Cal. 223; *Conklin v. Barton*, 43 Barb. 435.

²⁴⁴ *Gillam v. Sigman*, 29 Cal. 637; *Wendt v. Ross*, 33 Cal. 650; *Seranton v. Farmers etc. Bank*, 33 Barb. 527; *Merritt v. Walsh*, 32 N. Y. 685. As to nonjoinder of parties plaintiff, see generally, *McGilvery v. Moorhead*, 3 Cal. 271; *Mayo v. Stansbury*, 3 Cal. 465; *Connor v. Hutchinson*, 12 Cal. 126; *Barber v. Cazallis*, 30 Cal. 96.

²⁴⁵ Cal. Code Civ. Proc., § 384. See, also, Cal. Code Civ. Proc., § 381.

²⁴⁶ *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428.

²⁴⁷ *Sweet v. Tuttle*, 14 N. Y. 465.

²⁴⁸ *Wooster v. Chamberlain*, 28 Barb. 602.

²⁴⁹ *Mechanics & Farmers' Bank v. Dakin*, 24 Wend. 411; *Hawks v. Munger*, 2 Hill, 200.

²⁵⁰ *Fowler v. Kennedy*, 2 Abb. Pr. 347.

²⁵¹ *Ziele v. Campbell's Exrs.*, 2 Johns. Cas. 382; *Williams v. Allen*, 7 Cow. 316; *Robertson v. Smith*, 13 Johns. 459, 9 Am. Dec. 227; *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469.

defendant in the bill.²⁵² The answer should allege that they are still living,²⁵³ or, if a corporation, that it is still in existence.²⁵⁴ But the omission to allege this is cured by proof on the trial that they were still living. Objection to such proof after it has been introduced should be disregarded, or the answer amended to conform to the proof.²⁵⁵ It sufficiently alleges that they are still living, if it alleges that they reside at a place named.²⁵⁶ After showing the facts which make it appear that other parties are necessary, and naming the parties, it is unnecessary to add a formal allegation that they are necessary parties.²⁵⁷

§ 529. **Payment—How and when must be pleaded.**—In all of the states, except California, payment or part payment²⁵⁸ may be set up in the answer as new matter, and must be specially pleaded.²⁵⁹ In California, payment may be proved by the defendant under a general denial, upon the ground that such denial makes it incumbent on the plaintiff to prove a subsisting indebtedness from the defendant to the plaintiff to the time of the commencement of the suit.²⁶⁰ So, if a complaint contains an allegation of non-payment as a necessary and material fact to constitute the cause of action, proof of payment is admissible under a general denial in the answer.²⁶¹

In Pennsylvania, payment with leave is a general issue plea, and with notice of special matter, admits anything which proves fraud, mistake, want, or failure of consideration, and shows that

²⁵² Gaylords v. Kelshaw, 1 Wall. 81, 17 L. Ed. 612.

²⁵³ Burgess v. Abbott, 6 Hill, 135; affirming 1 Hill, 476.

²⁵⁴ State of Indiana v. Woram, 6 Hill, 33; 40 Am. Dec. 378.

²⁵⁵ Wooster v. Chamberlain, 28 Barb. 602.

²⁵⁶ Taylor v. Richards, 9 Bosw. 679.

²⁵⁷ Cook v. Mancius, 3 Johns. Ch. 427.

²⁵⁸ McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696; Solary v. Stultz, 22 Fla. 263.

²⁵⁹ Fort v. Gooding, 9 Barb. 371; Texier v. Gouin, 5 Duer, 389; Morrell v. Irving Fire Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396; Field v. Mayor of New York, 6 N. Y. 179, 57 Am. Dec. 435; Henderson v. Henderson, 3 Denio, 314; Fellers v. Lee, 2 Barb.

489; Morey v. Farmers' Loan & Trust Co., 18 Barb. 406; Pattison v. Taylor, 1 Code Rep. (N. S.) 174; Martin v. Gage, 9 N. Y. 398; New York Life Ins. & Trust Co. v. Covert, 29 Barb. 436; St. Louis etc. R. R. Co. v. Grove, 39 Kan. 731, 18 Pac. 958; Lent v. New York etc. Ry. Co., 130 N. Y. 504, 29 N. E. 988; Hyde v. Hazel, 43 Mo. App. 668.

²⁶⁰ Wetmore v. San Francisco, 44 Cal. 300, and cases there cited. Payment can be shown under plea of the general issue in Illinois. Teuber v. Schumacher, 44 Ill. App. 577.

²⁶¹ Knapp v. Roche, 94 N. Y. 329; Hun v. Van Dyck, 26 Hun, 567, 92 N. Y. 660. And see Brown v. Forbes, 6 Dak. 273, 43 N. W. 93. But compare Ebensen v. Hover, 3 Colo. App. 467, 33 Pac. 1008.

ex aquo et bono a part or whole of the amount claimed should not be recovered.²⁶² A plea of payment admits all the allegations in the complaint essential to support the action,²⁶³ and throws the affirmative of the issue on the defendant.²⁶⁴ A plea of payment is new matter, which, not being denied by the reply, stands admitted.²⁶⁵ A plea of payment being an affirmative defense, must be supported by a preponderance of the evidence in order to be effective in favor of the party pleading it.²⁶⁶ In *assumpsit* payment may be proved under an answer denying that the defendant has not paid the plaintiff in full, or that there is now due from the defendant to the plaintiff any sum whatever, although the payment is not affirmatively averred.²⁶⁷ In pleading payment, it is not necessary that the answer should describe the particulars of the transaction relied on as constituting payment. Under the averment that the demand has been paid, it is competent to prove how it has been paid, whether in cash or otherwise.²⁶⁸ But where payment made to wife of plaintiff was pleaded, without alleging her authority to receive it, it was held bad on demurrer.²⁶⁹

So where payment was made by check,²⁷⁰ or by negotiable note,²⁷¹ it must be averred that such note was taken in payment.²⁷² So, also, a surety for rent may set up payment made by tenant for repairs, agreed to be done by the landlord, by way of reduction for the claim of rent.²⁷³ And under the plea of payment, a surety may show that the plaintiff has taken a draft of the principal debtor, payable at a future day, in payment of the debt.²⁷⁴ It would be bad pleading to allege evidence of the payment instead of averring the fact itself.²⁷⁵ Payment of a debt by a stranger can-

²⁶² Uhler v. Sanderson, 33 Pa. St. 128.

²⁶³ Archer v. Morehouse, Hempst. 184, Fed. Cas. No. 18225.

²⁶⁴ Gebhart v. Francis, 32 Pa. St. 78; North Penn. R. R. Co. v. Adams, 54 Pa. St. 94, 93 Am. Dec. 677.

²⁶⁵ Benicia Agricultural Works v. Creighton, 21 Or. 495, 28 Pac. 775, 30 Pac. 676; Clark v. Wick, 25 Or. 446, 36 Pac. 165; Adams v. Tuley, 1 Ind. App. 490, 27 N. E. 991.

²⁶⁶ Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391.

²⁶⁷ Mickle v. Heinlen, 92 Cal. 596, 28 Pac. 784.

²⁶⁸ Farmers etc. Bank v. Sherman,

33 N. Y. 69; Boyd v. Weeks, 2 Denio, 322; McLaughlin v. Webster, 141 N. Y. 76, 35 N. E. 1081.

²⁶⁹ Offley v. Clay, 2 Man. & G. 172; 2 Scott N. R. 372.

²⁷⁰ See Strong v. Stevens, 4 Duer, 668; Bradford v. Fox, 16 Abb. Pr. 51.

²⁷¹ Hoogland v. Wight, 7 Bosw. 394; Geller v. Seixas, 4 Abb. Pr. 103.

²⁷² See, also, Homas v. McConnell, 3 McLean, 381, Fed. Cas. No. 6656.

²⁷³ Rosenbaum v. Gunter, 3 E. D. Smith, 203.

²⁷⁴ Albany etc. Ins. Co. v. Devendorf, 43 Barb. 444.

²⁷⁵ Farmers etc. Bank v. Sherman, 33 N. Y. 69.

not be pleaded in bar of the defendant's own obligation.²⁷⁶ Part performance of an obligation, either before or after a breach thereof, where expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation.²⁷⁷

Where payment has been made to the sheriff, under an execution against the plaintiff, in accordance with statute, the particulars should be stated.²⁷⁸ An answer setting up payment after suit brought is good, although it demand that the complaint be dismissed, and judgment granted for costs. Under the code, no formal conclusion is required, and no judgment or relief is required to be prayed for, except where the defendant asks affirmative relief against the plaintiff.²⁷⁹ An answer alleging payment is the proper form in which to set up the defense of a presumption of payment arising from lapse of time, under New York statute.²⁸⁰ A receipt in full, given by the plaintiff after suit is brought, is a good defense by way of plea.²⁸¹ That the time of payment has been extended must be specially pleaded.²⁸² It is not essential to designate the time of payment, though it ought to appear to have been before suit.²⁸³ Alleging that the defendant paid the plaintiff the several, etc., pursuing the terms of the complaint, imports payment of interest as well as the principal, and it is therefore unnecessary to aver its receipt in full satisfaction.²⁸⁴ By the pleas of payment and payment with leave the defendant does not put in issue his original legal liability. Under such pleadings he can only show that he has paid the debt, or that he has an equitable defense to the action.²⁸⁵ Under a simple allegation of payment, evidence of any facts which amount to actual payment by the person alleged to have made it is admissible.²⁸⁶ In a plea of pay-

²⁷⁶ *Blum v. Hartman*, 3 Daly, 47.

²⁷⁷ Cal. Civ. Code, § 1524.

²⁷⁸ *Calkins v. Packer*, 21 Barb. 282.

²⁷⁹ *Bendit v. Annesley*, 42 Barb. 192, 27 How. Pr. 184. For another form of plea, see *Chitty's Forms*, 109.

²⁸⁰ *Henderson v. Henderson*, 3 Denio, 314; *Pattison v. Taylor*, 8 Barb. 250; *New York Life Ins. Co. v. Covert*, 29 Barb. 435.

²⁸¹ *Wade v. Emerson*, 17 Mo. 267; *Wade v. Goldsberry*, 17 Mo. 270. See

Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369.

²⁸² *Allen v. Bruesing*, 32 Ill. 505; *Newell v. Salmons*, 22 Barb. 647. See, also, *Goddard v. Fulton*, 21 Cal. 430.

²⁸³ *Bird v. Caritat*, 2 Johns. 342.

²⁸⁴ *Chew v. Woolley*, 7 Johns. 399.

²⁸⁵ *Loose v. Loose*, 36 Pa. St. 538.

²⁸⁶ *Farmers etc. Bank of Long Island v. Sherman*, 6 Bosw. 181, 33 N. Y. 69.

ment, it is sufficient to allege payment generally, without stating the amount paid, the date of payment, or the person to whom made.²⁸⁷ But where an answer alleges payment in goods and services, it must also be alleged that the plaintiff agreed to accept them as payment.²⁸⁸ An allegation of payment in answer upon information and belief is held sufficient.²⁸⁹

§ 530. Payment by note.—Under an answer averring payment by note, evidence of payment in money or by check is inadmissible.²⁹⁰ This rule is only to be applied to avoid surprise or prejudice to the plaintiff.²⁹¹

§ 531. Payment—Acceptance of negotiable paper—Check.—The acceptance of a negotiable promise of payment from a debtor suspends the remedy upon the original indebtedness, but acceptance of a non-negotiable promise does not, unless it is founded upon a new consideration.²⁹² An answer which states that defendant gave his check for the sum lent, and interest to the time it was given, and that the plaintiffs have not returned it, and that it is still outstanding, is insufficient, unless it also avers that plaintiffs have negotiated it to a third person, who holds or owns it.²⁹³

§ 532. Release—How pleaded, and effect of.—A release by one of several joint plaintiffs is a bar to the action.²⁹⁴ A sealed release to one of several joint obligors inures to the benefit of

²⁸⁷ *Johnson v. Breedlove*, 104 Ind. 521, 6 N. E. 906; *State v. Early*, 81 Ind. 540.

²⁸⁸ *Corbett v. Hughes*, 75 Iowa, 281, 39 N. W. 500.

²⁸⁹ *First Nat. Bank v. Roberts*, 2 N. Dak. 195, 49 N. W. 722. What amounts to an allegation in pleading, of impossibility to excuse non-payment. *O'Reily v. Mutual Life Ins. Co.*, 2 Abb. Pr. (N. S.) 167. For an answer by a defendant sued as factor under del credere commission, showing a remittance by instruction of his principal, see *Heubach v. Rother*, 2 Duer, 227.

²⁹⁰ *Canfield v. Miller*, 13 Gray, 274.

²⁹¹ *Farmers etc. Bank v. Sherman*, 6 Bosw. 181.

²⁹² *Geller v. Seixas*, 4 Abb. Pr. 103; *Ranken v. Deforest*, 18 Barb. 144. See *Combination etc. Co. v. St. Paul City R. R. Co.*, 47 Minn. 207, 49 N. W. 744.

²⁹³ *Strong v. Stevens*, 4 Duer, 668. Compare *Geller v. Seixas*, 4 Abb. Pr. 103; *Crowe v. Clay*, 25 Eng. L. & Eq. 451; *Thayer v. King*, 15 Ohio, 242, 45 Am. Dec. 571.

²⁹⁴ *Austin v. Hall*, 13 Johns. 286, 7 Am. Dec. 376. And see *Mott v. Burnett*, 2 E. D. Smith, 50; *Hawn v. Seventy-Six Land etc. Co.*, 74 Cal. 418, 16 Pac. 196. See *Clark v. Child*, 66 Cal. 87, 4 Pac. 1058.

all;²⁹⁵ otherwise in case of a covenant to not sue.²⁹⁶ In California, a release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their rights of contribution from him.²⁹⁷ An equitable discharge from judgment does not support a plea of payment, but should be specially pleaded as a release, and a defendant, being surety, having thus incorrectly pleaded, was allowed to amend, on the condition that he should recover no costs of action.²⁹⁸ A release under seal of one of several joint or joint and several debtors or obligors, is a release to all,²⁹⁹ and extinguishes the obligation.³⁰⁰ If any matter of defense has arisen after an issue in fact, it may be pleaded by the defendant; as that the plaintiff has given him a release, or, in an action by an administrator, that the plaintiff's letters of administration have been revoked.³⁰¹ A release by the plaintiff must be specially pleaded.³⁰² A release given after issue is joined in an action can properly only be the subject of a supplemental answer, and not of an amendment to that originally put in.³⁰³ The law implies the release and discharge of a right of action, where the creditor voluntarily delivers to his debtor the bond, note, or other evidence of his claim.³⁰⁴ The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all parties consenting to the act.³⁰⁵ The intentional destruction, cancellation, or material alteration of a written contract

²⁹⁵ Rowley v. Stoddard, 7 Johns. 207.

²⁹⁶ Tuckerman v. Newhall, 17 Mass. 583; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271. See, also, Harrison v. Close, 2 Johns. 448, 3 Am. Dec. 444.

²⁹⁷ Cal. Civ. Code, § 1543. As to release generally, see Cal. Civ. Code, §§ 1541, 1542.

²⁹⁸ Shelton v. Hurd, 7 R. I. 403, 84 Am. Dec. 564.

²⁹⁹ Armstrong v. Hayward, 6 Cal. 185; Rowley v. Stoddard, 7 Johns. 207; American Bank v. Doolittle, 14 Pick. 126; Tuckerman v. Newhall, 17 Mass. 583; Goodnow v. Smith, 18 Pick. 415, 29 Am. Dec. 600. And so, in the case of joint wrongdoers. Pogel v. Meilke, 60 Wis. 248, 18 N. W. 927; Ellis v. Esson, 50 Wis. 138,

36 Am. Rep. 830, 6 N. W. 518; Seither v. Philadelphia Traction Co., 125 Pa. St. 397, 11 Am. St. Rep. 905, 17 Atl. 338, 4 L. R. A. 54.

³⁰⁰ McCrea v. Purmort, 16 Wend. 474, 30 Am. Dec. 103; cited in Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427.

³⁰¹ Yeaton v. Lynn, 5 Pet. 223, 8 L. Ed. 105.

³⁰² 1 Van Santv. 403; Turner v. Caruthers, 17 Cal. 431; Coles v. Soulsby, 21 Cal. 50.

³⁰³ Matthews v. Chicopee Manuf. Co., 3 Robt. 711.

³⁰⁴ Poth. Obl., n. 608, 609; Bouv. Law. Dict., tit. Release; Albert's Exrs. v. Ziegler's Exrs., 29 Pa. St. 50; Beach v. Endress, 51 Barb. 579.

³⁰⁵ Cal. Civ. Code, § 1696.

by a party entitled to any benefit under it or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act.³⁰⁶ Where a contract is executed in duplicate, an alteration or destruction of one copy, while the other exists, is not within the provisions of the last section.³⁰⁷ Release of property from levy on execution discharges third parties who are liable collaterally, or as sureties therefor.³⁰⁸ To avoid circuity of action, a covenant may be pleaded as a release, but it must be a covenant between the parties to the original obligation, and must contain words that will give the covenantee a right of action, which will precisely countervail that to which he is liable.³⁰⁹

§ 533. Statute of frauds.—A plea of the statute of frauds should expressly aver that the contract concerning the lands sought to be enforced was not in writing.³¹⁰ In an action on a contract not in writing, but which to be binding on defendant should be in writing, under general denial the existence of the contract is in issue.³¹¹ Or defendant may deny that the contract is in writing or that it is subscribed.³¹² The rule under the former practice, that when the terms of a contract are in dispute, and the answer does not deny the contract, the terms of it cannot be proved by parol, is altered by the New York code, and now an answer is sufficient which admits the making of a contract and sets out its terms, although it omits to set up the statute of frauds as a bar.³¹³ In New York the rule now is that where a complaint on contract does not show the contract sued on to be invalid under the statute of frauds, the statute is waived by the defendant unless specially pleaded as a defense, and cannot be taken advantage of under a general denial.³¹⁴ Averments in pleadings in avoidance of the statute of frauds must not only

³⁰⁶ Cal. Civ. Code, § 1700.

³⁰⁷ Cal. Civ. Code, § 1701. As to release by novation, see Cal. Civ. Code, §§ 1530-1533.

³⁰⁸ Mulford v. Estudillo, 23 Cal. 94.

³⁰⁹ Garnett v. Macon, 2 Brock. Marsh. 185, Fed. Cas. No. 5245, 6 Cal. (Va.) 308.

³¹⁰ Bean v. Valle, 2 Mo. 126.

³¹¹ Livingston v. Smith, 14 How. Pr. 492; Amburger v. Marvin, 4 E. D. Smith, 393; Champlin v. Parish,

11 Paige, 408; Haight v. Child, 34 Barb. 191.

³¹² Id.; Cozine v. Graham, 2 Paige, 181; Ontario Bank v. Root, 3 Paige, 478; Harris v. Knickerbocker, 5 Wend. 638.

³¹³ Haight v. Child, 34 Barb. 186.

³¹⁴ Crane v. Powell, 30 Abb. N. C. 419, 139 N. Y. 379, 34 N. E. 911. And see Porter v. Wormser, 94 N. Y. 431; Wells v. Monihan, 129 N. Y. 161, 29 N. E. 232.

be direct and positive, but they must be clear and unequivocal or they will not be regarded as sufficient, either in form or substance.³¹⁵ When a sale of personal property above the value set in the statute of frauds is pleaded in an action at law, it is not necessary to plead facts in avoidance of the statute.³¹⁶ The title being no part of an act, it need not be recited.³¹⁷ That neither the defendant nor any person by him lawfully authorized did ever make or sign any contract or agreement in writing, for making or executing any lease to the said plaintiff, of the same premises, or any of them, or of any part thereof, or to any such effect as is alleged; or any memorandum or note in writing of any agreement whatsoever, for or concerning the demising or leasing, or making or executing any lease of the said premises, or any of them, or any part thereof, to the plaintiff, is a sufficient allegation.³¹⁸ A plaintiff's recovery cannot be barred by the statute of frauds, unless the statute be pleaded.³¹⁹ When the defendant is charged as an original debtor under the common counts in *assumpsit*, without intimation as to a guaranty, it is not necessary for him to plead specially that the contract was one of guaranty, and was void under the statute of frauds, because not in writing, but he may in such case avail himself of the statute under the general denial.³²⁰ Where a contract is void *ab initio*, a general plea of *non est factum* is proper. Where it is merely voidable, a special plea setting forth the special circumstances is necessary.³²¹

³¹⁵ Von Trotha v. Bamberger, 15 Colo. 1, 24 Pac. 883.

³¹⁶ Shelton v. Conant, 10 Wash. St. 193, 38 Pac. 1013.

³¹⁷ Eckert v. Head, 1 Mo. 593.

³¹⁸ Equity Draftsman, 654.

³¹⁹ Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Maynard v. Johnson, 2 Nev. 16; Benjamin v. Mattler, 3 Colo. App. 227, 32 Pac. 837; Hamill v. Hall, 4 Colo. App. 290, 35 Pac. 927; Broder v. Conklin, 77 Cal. 330, 19 Pac. 513; Cruse v. Findlay, 38 N. Y. Supp. 741; Hogan v. Easterday, 58 Ill. App. 45. Compare McCann v. Pennie, 100 Cal. 547, 35 Pac. 158; Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826; Smith v. Taylor, 82 Cal. 533.

³²⁰ Harris v. Frank, 81 Cal. 280, 22 Pac. 856.

³²¹ Rex v. Ellis, 2 Stra. 1104; Bull.

N. P. 172; *Somes v. Skinner*, 16 Mass. 348; *Anthony v. Wilson*, 14 Pick. 303; *Bottomley v. United States*, 1 Story C. C. 135, Fed. Cas. No. 1688; *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206, 3 L. Ed. 200; *Greathouse v. Dunlap*, 3 McLean, 303, Fed. Cas. No. 5742. As to what contracts are required to be in writing, see Cal. Civ. Code, §§ 1624, 1739, 1741, 2794. For cases held to be within the statute, see *Fuller v. Reed*, 38 Cal. 99; *Patten v. Hicks*, 43 Cal. 509; *Swift v. Swift*, 46 Cal. 266; *Pratalongo v. Larco*, 47 Cal. 378; *Gray v. Corey*, 48 Cal. 208; *Hagar v. Spect*, 48 Cal. 406; *Gallagher v. Mars*, 50 Cal. 23; *Stewart v. Jerome*, 71 Mich. 201, 15 Am. St. Rep. 252, 38 N. W. 895. For cases held not to be within the statute, see *Heyn v. Phillips*, 37 Cal. 529; *Murphy v. Rooney*, 45 Cal. 78; *Brennan v.*

§ 534. *Ultra vires*.—*Ultra vires* is a matter of defense, and the power of a corporation to make the contract need not be pleaded in the complaint.³²² Assuming that the corporation under some circumstances was authorized to take and transfer real estate by deed, it rests with the defendant to show by allegation and proof that the plaintiff did not take or transfer the title to the premises in question for any purpose, and in the form authorized by law.³²³ Under an answer of general denial only, the defense of *ultra vires* cannot be maintained, unless the incapacity appears from the pleadings.³²⁴ The term *ultra vires*, when used in reference to corporations, is employed in different senses. An act is said to be *ultra vires* when it is not in the power of the corporation to perform it under any circumstances; and an act is also said to be *ultra vires*, with reference to the rights of certain parties, when the corporation cannot perform it without their consent; and it may also be *ultra vires*, with reference to some specific purpose, when the corporation cannot perform it for that purpose.³²⁵ When the act is *ultra vires* in the sense first mentioned, it is void *in toto*, and the corporation may avail itself of the plea; but when it is *ultra vires* in the second and third senses, the right of the corporation to avail itself of the plea will depend on the circumstances of the case. It devolves upon the party contesting the validity of such act to overcome the presumption that it was regularly done, and for a rightful purpose.³²⁶ In an action against a corporation the plea of *ultra vires* is not to be entertained when its allowance will do great wrong to innocent third persons.³²⁷ And courts are inclined to treat the corporation as estopped from setting up such defense in all cases where it has received and retains the benefit of the transaction, and seeks by this plea to avoid its correlative obligation.³²⁸ Where a contract with a corporation is not only *ultra vires*, but also void as against public policy, the

Ford, 46 Cal. 7; Hoffman etc. v. Fett, 39 Cal. 109; Price v. Sturgess, 44 Cal. 591; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; McCarger v. Rood, 47 Cal. 138; Welch v. Kenney, 49 Cal. 49.

³²² United States Mtge. Co. v. McClure, 42 Or. 190, 70 Pac. 543.

³²³ Farmers' Loan & Trust Co. v. Curtis, 7 N. Y. 466.

³²⁴ Royal Fraternal Union v. Crozier, 70 Kan. 85, 78 Pac. 162.

³²⁵ Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

³²⁶ Id.

³²⁷ Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771.

³²⁸ Kennedy v. California Savings Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039. And see Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

court will not give relief to either party, and the fact that the contract is performed on one part does not estop the other party to plead the invalidity of the contract.³²⁹ Corporations for the construction of turnpike roads can hold only such real estate as the purposes of the corporation may require.³³⁰

§ 535. Limitations of action.—The term “action” as used in the California Code of Civil Procedure, in reference to the limitation of actions, includes a special proceeding of a civil nature,³³¹ such as *mandamus*;³³² and defendant need not set out the facts upon which he relies, to show that the cause of action arose in another state and by the law of that state it was barred; but it is sufficient if he states the cause is barred by the foregoing section 363. Actions for relief in respect to which no other limitation is provided must be brought within four years after the cause of action shall have accrued.³³³ To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan society, there is no limitation,³³⁴ but as to this liability extending to the stockholders it is undecided.³³⁵

§ 536. Statute of limitations.—In California, the statute of limitations applies equally to actions at law and to suits in equity. It is directed to the subject-matter, and not to the form of the action, nor to the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties.³³⁶ Distinct forms of civil actions have been abolished in Colorado, yet, in order to determine the application of the statute of limitations in a given case, the court will consider the nature of the cause of action, and, in some instances, its appropriate form under former practice.³³⁷

³²⁹ *Visalia etc. Light Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

³³⁰ *Coleman v. San Rafael T. R. Co.*, 49 Cal. 518. See, also, *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83.

³³¹ Cal. Code Civ. Proc., § 363. For the limitations of actions for the recovery of real property, see Cal. Code Civ. Proc., §§ 315-328. For the limitation of actions other than for the recovery of real property, see Cal. Code Civ. Proc., §§ 335-363.

³³² *Barnes v. Glide*, 117 Cal. 1, 48 Pac. 804.

³³³ Cal. Code Civ. Proc., § 343.

³³⁴ Cal. Code Civ. Proc., § 348.

³³⁵ *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

³³⁶ *Lord v. Morris*, 18 Cal. 482; *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146; *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804; *Hancock v. Plummer*, 66 Cal. 337, 5 Pac. 514.

³³⁷ *Toothaker v. City of Boulder*, 13 Colo. 219, 22 Pac. 463.

§ 537. **Limitations—Construction of answer.**—An answer stating that the cause of action has not accrued within five years is sufficient for five years, and for any period of limitation named in the statute less than five years.³³⁸ The words “preceding the commencement of this action,” in such answer, are equivalent to the words “preceding the filing of this complaint.”³³⁹ The defense must point to the time of filing the original complaint, and not an amended one.³⁴⁰

§ 538. **Statute of limitations—Construed.**—Statutes of limitations do not act retrospectively; they do not begin to run until they are passed, and consequently cannot be pleaded until the period fixed by them has fully run since their passage.³⁴¹ The statute runs not from the time of the promise, but from the time of the breach.³⁴² The mere statement in the complaint that the claim was due at a certain time does not conclude the plaintiff under the statute of limitations, if it appears from the facts stated that the right of action did not accrue till a later date.³⁴³ It is not necessary that the defense of the statute of limitations should be accompanied by a denial of the allegations of the complaint intended to avoid or head off the defense, to prevent the court taking them as true.³⁴⁴ The statute of limitations does not have the effect to extinguish a debt, nor raise a presumption of its payment; it only bars the remedy and thus becomes a statute of repose.³⁴⁵ The defendant is not bound to negative the exceptions from the general rule that the statute establishes. It lies upon the plaintiff to aver and prove the facts that create the exception;³⁴⁶ and if so averred, a pure plea of the statute is no bar, unless accompanied with an answer destroying the force of those circumstances by issuable averments.³⁴⁷ Where a defendant pleads the statute of limitations, matters upon which

³³⁸ *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146.

³³⁹ *Adams v. Patterson*, 35 Cal. 122.

³⁴⁰ *Lorenzana v. Camarillo*, 45 Cal. 128.

³⁴¹ *Nelson v. Nelson*, 6 Cal. 430.

³⁴² *Stilwell v. Hasbrouck*, 1 Hill, 561; *United States v. White*, 2 Hill, 59; *Tracy v. Rathbun*, 3 Barb. 543.

³⁴³ *Walden v. Crafts*, 2 Abb. Pr. 301.

³⁴⁴ *Sands v. St. John*, 36 Barb. 628.

³⁴⁵ *McCormick v. Brown*, 36 Cal.

180, 95 Am. Dec. 170; *Cooper v. Cooper*, 61 Miss. 676. The rule held in this case, as to what constitutes a sufficient acknowledgment of a debt to take it out of the statute, affirmed in *Farrell v. Palmer*, 36 Cal. 187.

³⁴⁶ *Ford v. Babcock*, 2 Sandf. 518; *Huntington v. Brinckhoff*, 10 Wend. 278.

³⁴⁷ *Beames' Pl.* 169; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Goodrich v. Pendleton*, 3 Johns. 334; *Story's Eq. Pl.* 672, § 754.

the plaintiff relies to relieve him from the bar of the statute are deemed to have been pleaded in reply to the answer.³⁴⁸ But it has been held also that such allegations are immaterial, and need not be answered.³⁴⁹

§ 539. **Limitations — Essential allegations.** — The statute of limitations must be specially pleaded.³⁵⁰ If the demand be in truth barred, but the fact does not appear on the face of the complaint, the defense must be made in the answer.³⁵¹ In New York, it seems it can only be taken by answer, and not by demurrer,³⁵² and is not favored unless in aid of justice.³⁵³ A defendant who claims the benefit of an act for the limitation of actions which applies only to a particular class of cases must plead it specially.³⁵⁴ Pleading the statute of limitations is a personal privilege which the defendant may assert or waive at his option, but must be set up in some form, either by demurrer or answer, and if not so set up is deemed waived.³⁵⁵ The statute of limitations may be allowed to be pleaded at any time when in furtherance of justice.³⁵⁶ So in case of the allowance of a several plea after a joint plea is filed.³⁵⁷ Or the court may refuse permission

³⁴⁸ *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897. See *Giles v. Rosenheimer*, 64 Tex. 243.

³⁴⁹ *Sands v. St. John*, 36 Barb. 628, 23 How. Pr. 140. But see Cal. Code Civ. Proc., § 458.

³⁵⁰ *Steamer Senorita v. Simonds*, 1 Or. 274; *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847; *Bihin v. Bihin*, 17 Abb. Pr. 19; *Fogal v. Pirro*, 10 Bosw. 100, 17 Abb. Pr. 113; *Sands v. St. John*, 36 Barb. 628. Otherwise it will be deemed waived. *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; *Jennings v. Rickard*, 10 Colo. 395, 15 Pac. 677; *Atchison etc. R. R. Co. v. Tanner*, 19 Colo. 559, 36 Pac. 541; *Osment v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731; *Smith v. Hutchinson*, 78 Va. 683.

³⁵¹ *Smith v. Richmond*, 19 Cal. 476; *Scott v. Christenson*, 46 Or. 417, 80 Pac. 731.

³⁵² *N. Y. Code*, ed. 1877, § 413; *Löfferts v. Hollister*, 10 How. Pr. 383. And see *Butler v. Mason*, 5 Abb. Pr.

40; *Sands v. St. John*, 36 Barb. 628; *Budd v. Walker*, 29 Hun, 344; *Irvin v. Smith*, 60 Wis. 175, 18 N. W. 724; *Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211.

³⁵³ *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348.

³⁵⁴ *Howell v. Rogers*, 47 Cal. 293. See as to absolute right to interpose this defense, where existent, *Sheldon v. Adams*, 41 Barb. 54, 27 How. Pr. 179, 18 Abb. Pr. 405; *Harriott v. Wells*, 9 Bosw. 631.

³⁵⁵ *Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553; *Grattan v. Wiggins*, 23 Cal. 16; *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. 129; *Reagan v. Justice's Court*, 75 Cal. 253, 17 Pac. 195; *Wise v. Williams*, 72 Cal. 544, 14 Pac. 204; *Cameron v. San Francisco*, 68 Cal. 390, 9 Pac. 430; *Kramer v. Halsey*, 82 Cal. 209, 22 Pac. 1137; *Cross v. Moffatt*, 11 Colo. 210, 17 Pac. 771; *Davis v. Davis*, 20 Or. 78, 25 Pac. 140.

³⁵⁶ *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348.

³⁵⁷ *Robinson v. Smith*, 14 Cal. 254.

to set up the statute after pleading to the merits.³⁵⁸ If the statute of limitations is pleaded, and the plea is overruled, it cannot be put in again by the same parties or their privies.³⁵⁹ A defendant relying on the statute of limitations should not allege matter of law, but the facts which bring him within the statute.³⁶⁰ But the California code has provided that "in pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally, that the cause of action is barred by the provisions of the section . . . (giving the number of the section and the subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred."³⁶¹

To rely upon the presumption of payment from lapse of time, the defendant should plead, not the statute, but payment, and if he cannot swear to this, his affidavit may state the facts which raise the presumption of payment.³⁶² The statute should not be pleaded as a bar to the whole demand, if it is a good defense to a part only.³⁶³ An allegation of lapse of time was held not to amount to a plea of the statute of limitations in a case where leave to plead the statute had been refused.³⁶⁴ A general allegation in an answer that the action is barred by the statute prescribing two or any other number of years as the limitation for bringing the action is not the correct method of pleading the statute of limitations.³⁶⁵ The defense of limitations must be specially

³⁵⁸ *Stuart v. Landers*, 16 Cal. 372, 76 Am. Dec. 538.

³⁵⁹ *Fisher v. Rutherford*, Baldw. 188, Fed. Cas. No. 4823. How pleaded, see *Bank of Columbia v. Ott*, 2 Cranch C. C. 575, Fed. Cas. No. 879; *Union Bank of Georgetown v. Eliason*, 2 Cranch C. C. 667, Fed. Cas. No. 14355. For form of answer, see *Angell on Limitations*, §§ 287, 309, and case there cited. See, also, *Soulden v. Van Rensselaer*, 3 Wend. 472; *Fisher v. Pond*, 2 Hill, 338; *Bell v. Yates*, 33 Barb. 627.

³⁶⁰ *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146.

³⁶¹ Cal. Code Civ. Proc., § 458; *Packard v. Johnson*, 57 Cal. 180; *Packard v. Moss*, 68 Cal. 123, 8 Pac.

818; *Manning v. Dallas*, 73 Cal. 420, 15 Pac. 34. Reference to explanatory sections is unnecessary. *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Bank v. Wickersham*, 99 Cal. 655, 34 Pac. 444.

³⁶² *Giles v. Baremore*, 5 Johns. Ch. 545.

³⁶³ *Wood v. Riker's Exrs.*, 1 Paige, 616.

³⁶⁴ *People v. Rensselaer Ins. Co.*, 38 Barb. 323.

³⁶⁵ *Schroeder v. Jahns*, 27 Cal. 273. See, also, *McKay v. Petaluma Lodge*, Cal. Sup. Ct., April Term, 1866. Such allegation is an insufficient plea and raises no issues under the statute requiring the section of the code relied upon to be stated. *Cochrane v.*

pleaded, and if the wrong statute is pleaded, it is of no avail.³⁶⁶ A court of equity will refuse to entertain a suit brought after an unreasonable delay, regardless of the question whether there has been a plea of the statute of limitations.³⁶⁷ The statute of limitations is pleadable to any one or all of several distinct causes of action, though embraced in a single count.³⁶⁸ But when the statute is pleaded only as to two counts, and not as to the third count, the question as to the bar of the statute cannot be raised upon motion for a nonsuit upon the ground that the claim of the plaintiff is barred. The word "claim," as thus used in the grounds of the motion, includes the whole claim set forth in the three counts, and the action in its entirety could not be held to have been barred.³⁶⁹ Where the statute of limitations imposes a bar upon certain species of contracts after three years, and upon others after two years, and the plea did not show that the contract in question was of the latter class, the plea was bad.³⁷⁰ An action on a new promise to pay a judgment, so as to avoid the bar of the statute, must be brought within four years from the making of the new promise.³⁷¹ In California, since 1863 the statute runs against a married woman in all those actions to which her husband is not a necessary party plaintiff with her.³⁷²

§ 540. **Limitations—Statutes of different states.**—Where the cause of action accrued in one state, and suit was brought upon it in another state, a plea of the statute of limitations of the former state was not a good plea; but the same was demurrable, and the court sustained the demurrer. The rule is that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the rule of *lex loci contractus* cannot prevail.³⁷³ When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action

Bussche, 7 Utah, 235, 26 Pac. 294;
Howell v. Rogers, 47 Cal. 291; and
cases cited above.

³⁶⁶ Blakley v. Ft. Lyon Canal Co.,
31 Colo. 224, 73 Pac. 249.

³⁶⁷ Chapman v. Bank of California,
97 Cal. 155, 31 Pac. 896; Harris v.
Hillegass, 66 Cal. 79, 4 Pac. 987.

³⁶⁸ Gilpin v. Adams, 14 Colo. 512,
24 Pac. 566.

³⁶⁹ Castagnino v. Balletta, 82 Cal.
250, 23 Pac. 127.

³⁷⁰ Lyon v. Bertram, 20 How. 150,
15 L. Ed. 847.

³⁷¹ McCormick v. Brown, 36 Cal.
180, 95 Am. Dec. 170.

³⁷² Wilson v. Wilson, 36 Cal. 447,
95 Am. Dec. 194; Code Civ. Proc.,
§ 328, subd. 4.

³⁷³ Townsend v. Jamison, 9 How.
407, 13 L. Ed. 194.

thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued.³⁷⁴ It is a universally accepted rule that statutes of limitations are to be strictly construed. General words in the statute must receive general construction, and if there be no express exception the court can make none.³⁷⁵ In some southern states the statutes of limitations are not strictly construed.³⁷⁶

§ 541. **Limitations—Suspension of remedy.**—If the mortgagee, after obtaining a judgment foreclosing his mortgage, by an agreement with the mortgagor enters into possession of the mortgaged property, and receives the rents and profits, and applies them towards the satisfaction of the amount due, and the mortgagee further agrees not to issue an order of sale, the statute of limitations does not run against either party, so long as the debt remains unpaid, and they acquiesce in the arrangement.³⁷⁷

§ 542. **When action commenced.**—Filing the complaint is the commencement of the action.³⁷⁸ The position that the filing of the complaint without the issuance of the summons does not prevent the statute running is not tenable.³⁷⁹ But it seems the plaintiff should issue his summons within a year.³⁸⁰ In some states the action commences with service of process.

§ 543. **When cause of action accrues.**—The clause, “after the cause of action shall have accrued,” does not imply in addition the existence of a person legally competent to enforce it by suit. It runs in all cases not expressly excepted from its operation.³⁸¹

§ 544. **Statute of limitations—Continued.**—Where the statute of limitations is pleaded by the defendant, a finding as to matter

³⁷⁴ Cal. Code Civ. Proc., § 361. See *Allen v. Allen*, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646.

³⁷⁵ *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

³⁷⁶ *Martin v. Tally*, 72 Ala. 24; *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48.

³⁷⁷ *Frink v. Le Roy*, 49 Cal. 315.

³⁷⁸ Cal. Code Civ. Proc., § 350.

³⁷⁹ *Sharp v. Maguire*, 19 Cal. 577;

Pimental v. City of San Francisco, 21 Cal. 367.

³⁸⁰ See Cal. Code Civ. Proc., § 406; *Allen v. Marshall*, 34 Cal. 166.

³⁸¹ *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152. See *O'Neil v. Magner*, 81 Cal. 631, 15 Am. St. Rep. 88, 22 Pac. 876; *Board of Commrs. Wabash Co. v. Pearson*, 120 Ind. 426; 16 Am. St. Rep. 325, 22 N. E. 134; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767.

which takes the case out of the statute is within the issues. The statute does not run between partners until the accounts are settled and a balance agreed upon.³⁸² In an action for money had and received, where the complaint avers receipt of the money within two years, and the answer denies all the material allegations of the complaint, and alleges that the cause of action is barred by the statute of limitations, the plaintiff may prove and the jury may take into consideration any evidence of concealment of facts, misrepresentations, deceit, or other facts constituting fraud on the part of the defendant which would take the case out of the statute, though the complaint contains no averment as to those matters.³⁸³ A plea of the statute of limitations in an unverified answer to a complaint of foreclosure of a mortgage is properly stricken out as sham, where it appears from the copies of the notes and mortgage set out in the complaint that the action was commenced within four years after the maturity of the note.³⁸⁴ The statute of limitations to be available as a bar to the prosecution of a writ of error in the supreme court must be specially interposed at a preliminary stage of the proceeding, and before issue joined upon the merits; and if the protection of the statute be not thus invoked by the party entitled to it, it will be deemed waived.³⁸⁵ The courts will in some cases allow the statute of limitations to be set up by amendment.³⁸⁶ And where the nature of the answer interposed to a complaint and the proof thereunder clearly indicate that it was the intention of the defendant to plead a three-year statute of limitations as a bar, and by a mistake the defendant in pleading such statute had specified two years instead of three, it is not an abuse of discretion for the court, after the hearing of the cause, to allow an amendment correcting the mistake, although the equities of the case may be in favor of the plaintiff.³⁸⁷ Plaintiff cannot avoid the statute of limitations by alleging a trust and then proving a cause based on fraud; and defendant should be allowed in such a case to amend his answer to set up the statute as a defense.³⁸⁸

³⁸² *Hendy v. March*, 75 Cal. 567, 17 Pac. 702.

³⁸³ *Williams v. Dennison*, 94 Cal. 540, 29 Pac. 946.

³⁸⁴ *Bank of Shasta v. Boyd*, 99 Cal. 604, 34 Pac. 337.

³⁸⁵ *Haley v. Elliott*, 20 Colo. 199, 37 Pac. 27.

³⁸⁶ See *Gormeley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086, 11 Sup. Ct. 453.

³⁸⁷ *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054.

³⁸⁸ *Nichols v. Randall*, 136 Cal. 426, 69 Pac. 26.

§ 545. **Tender—How made, and effect of.**—Payment, tender, and readiness to pay are affirmative pleas, and cast the burden of proof on the defendant.³⁸⁹ And the plea of tender must be specially stated;³⁹⁰ and that the defendant has always been and still is ready to pay the sum tendered, and the money must be brought into court.³⁹¹ An offer of ten dollars is not a “due” offer of payment of a claim of twenty thousand dollars, within section 1500 of the California Civil Code, providing that an obligation for payment of money is extinguished by due offer of payment, if the amount is immediately deposited in a bank in the name of the creditor, with notice to him.³⁹² And it is essential in setting up tender to aver that the money has been actually brought into court.³⁹³ Where the defendant pleads tender before suit, and pays the amount of his tender into court, and the plaintiff fails to show himself entitled to a larger sum, it is proper to render judgment for the defendant for his costs, and in favor of the plaintiff for the amount due at the time of the tender.³⁹⁴ In such case the plaintiff shall not recover costs, but shall pay the costs of suit to the defendant.³⁹⁵ A tender does not extinguish or satisfy the obligation, and an offer to comply with the demand of judgment does not amount to a satisfaction thereof.³⁹⁶ Upon a tender being made by a vendee of realty, he need not produce the money or allow it to be counted, if the vendor does not accept the offer.³⁹⁷ All objections to the mode of an offer of performance, which could at the time be obviated by the debtor, are waived if not stated at the time of the tender.³⁹⁸ So an offer in writing to pay a particu-

³⁸⁹ North Penn. R. R. v. Adams, 54 Pa. St. 94, 93 Am. Dec. 677. See Halpin v. Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482.

³⁹⁰ Bryan v. Maume, 28 Cal. 238; Duff v. Fisher, 15 Cal. 375; Hegler v. Eddy, 53 Cal. 597.

³⁹¹ Bryan v. Maume, 28 Cal. 238. And see Henderson v. Cass County, 107 Mo. 50, 18 S. W. 992; Levan v. Sternfeld, 55 N. J. L. 41, 25 Atl. 854.

³⁹² Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225.

³⁹³ Hill v. Place, 5 Abb. Pr. (N. S.) 18. As to this defense generally, see Wilder v. Seelye, 8 Barb. 408; People v. Banker's Admr. etc., 8 How. Pr. 258; Livingston v. Harrison, 2 E.

D. Smith, 197; Brickett v. Wallace, 98 Mass. 528; Grover v. Smith, 165 Mass. 132, 52 Am. St. Rep. 506, 42 N. E. 555.

³⁹⁴ Curia v. Abadie, 25 Cal. 502; Logue v. Gillick, 1 E. D. Smith, 398.

³⁹⁵ Cal. Code Civ. Proc., § 1030.

³⁹⁶ Redington v. Chase, 34 Cal. 666. Legal effect of plea of tender: See Supply Ditch Co. v. Elliott, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691; Phenix Ins. Co. v. Readinger, 28 Neb. 587, 44 N. W. 864.

³⁹⁷ Cal. Civ. Code, § 1496; Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82.

³⁹⁸ Cal. Civ. Code, § 1501; Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225.

lar sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.³⁹⁹ In an action by a landlord against a tenant to recover possession of property for failure to pay rent, a plea of tender by the defendant is insufficient under Washington code of 1881, section 548, unless it alleges that the defendant offered to pay interest on the rent due, or that he brings into court the amount of rent in arrear, with interest and costs of action.⁴⁰⁰ A plea of tender never goes to the whole of the plaintiff's demand, but is an admission to the extent of the amount tendered, and is a denial only of the balance of the plaintiff's claim.⁴⁰¹ The plea, if defective, should be demurred to.⁴⁰²

§ 546. Tender—Issue joined.—Where the plaintiff joins issue on such a plea, without questioning its sufficiency, he cannot afterwards object that it was not duly filed, or that the money was not paid into court at the first term.⁴⁰³ If, by the laws of the United States, more than one kind of lawful money is a legal tender in payment of debts, and the plaintiff in an action is entitled to a judgment payable in a particular kind of money, a plea of tender which avers the tender to have been made in lawful money of the United States is insufficient. The plea should aver that the tender was made in the kind of money the plaintiff is entitled to receive.⁴⁰⁴ The legal tender act is held constitutional.⁴⁰⁵ It is competent for the state legislature to enact that all tolls, dockage, and wharfage charges payable into the public treasury shall be due and collectible exclusively in gold and silver money of the United States.⁴⁰⁶

§ 547. Real party in interest—Allegations.—An answer setting up that another party than the plaintiff is the real party in

³⁹⁹ Cal. Code Civ. Proc., § 2074.

⁴⁰⁰ *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760. Insufficient tender of purchase price of land by lessee under a lease giving him the privilege of purchasing the demised premises at any time during the term. See *Heine v. Treadwell*, 72 Cal. 217, 13 Pac. 503.

⁴⁰¹ *Gardner v. Black*, 98 Ala. 638, 12 South. 813.

⁴⁰² *Id.*; *Hanson v. Todd*, 95 Ala. 328, 10 South. 354.

⁴⁰³ *Rudolph v. Wagner*, 36 Ala. 698.

⁴⁰⁴ *Magraw v. McGlynn*, 26 Cal. 428.

⁴⁰⁵ *Belloc v. Davis*, 38 Cal. 254, and cases cited.

⁴⁰⁶ *People v. Steamer America*, 34 Cal. 676.

interest should allege facts which would show as a matter of law that another person should have brought the suit.⁴⁰⁷ An answer should allege the facts, showing why the plaintiff is not a real party in interest.⁴⁰⁸ But it is not necessarily frivolous if it does not.⁴⁰⁹ The answer is not frivolous for neglecting to name the assignee, or designating him as John Doe.⁴¹⁰ If it appears by the pleadings that the assignment was in trust, it should be also alleged that the assignee accepted it.⁴¹¹ A plea entirely addressed to the right to recover of a third person for whose use the suit is brought is bad on demurrer.⁴¹² So on the ground that the title of the plaintiff is merely colorable.⁴¹³ A plea to the jurisdiction on the ground that a demand has been colorably assigned, in order to evade a discharge under the insolvent law, is not to be treated as dilatory and captious.⁴¹⁴ The objection that the plaintiff is not the real party in interest must be set up in the answer, to enable defendant to rely upon it, or it will be unavailing on the trial, even if the fact should appear from the examination of witnesses.⁴¹⁵ But if it appear from the face of the complaint that defendant is not the real or true party plaintiff, then the objection should be made by demurrer.

§ 548. **Assignee—Substitution of.**—It is optional with the court, on death of plaintiff, in case of a transfer of his interest, to allow assignee of plaintiff's interest to be substituted, and the action to continue in his name.⁴¹⁶ Upon the death of an assignee for the benefit of creditors, pending an action in the nature of replevin, brought by him to recover damages from a sheriff for the tortious taking of assets, the proper parties to be substituted are

⁴⁰⁷ *Raymond v. Pritchard*, 24 Ind. 318.

⁴⁰⁸ *Russell v. Clapp*, 7 Barb. 482; *Fosdick v. Groff*, 22 How. Pr. 158.

⁴⁰⁹ *Tamisler v. Cassard*, 17 Abb. Pr. 187.

⁴¹⁰ *Smith v. Mead*, 14 Abb. Pr. 262; *Metropolitan Bank v. Lord*, 1 Abb. Pr. 185.

⁴¹¹ *Whitlock v. Fiske*, 3 Edw. 131.

⁴¹² *Sydam v. Cannon*, 1 Houst. 431.

⁴¹³ *Boyreau v. Campbell*, 1 McAll. 119, Fed. Cas. No. 1760.

⁴¹⁴ *Wallace v. Clark*, 3 Woodb. & M. 359, Fed. Cas. No. 17098.

⁴¹⁵ *Jackson v. Whedon*, 1 E. D. Smith, 141; *Savage v. Corn Exchange etc. Ins. Co.*, 4 Bosw. 1. But see *Swift v. Swift*, 46 Cal. 266.

⁴¹⁶ *Barstow v. Newman*, 34 Cal. 90; *Sheldon v. Havens*, 7 How. Pr. 268; *Harris v. Bennett*, 1 Code Rep. (N. S.) 203, 6 How. Pr. 220; *Murray v. General Mut. Ins. Co.*, 2 Duer, 607; *Ford v. David*, 1 Bosw. 571; *Howard v. Taylor*, 11 How. Pr. 380, 5 Duer, 604; *Banks v. Maher*, 2 Bosw. 690; *Terry v. Roberts*, 15 How. Pr. 65. But see *Barribeau v. Brant*, 17 How. 43, 15 L. Ed. 34.

the personal representatives of the deceased, since the action relates to personal property.⁴¹⁷

§ 549. **Set-off.**—In an action by the assignee of a claim, a demand existing prior to the assignment, in favor of defendants and against the assignor, is unavailable as a counterclaim, and if so pleaded no reply is necessary.⁴¹⁸ To render it available as an equitable defense, it must be pleaded as a defense.⁴¹⁹ In an action brought by an assignee of a demand, an answer interposing as a set-off a claim subsisting in favor of the defendant against the assignor is not to be regarded as setting up a counterclaim; and the plaintiff need not put in a reply of the statute of limitations in order to avail himself of such statute against the claim so set up.⁴²⁰ A demand against the plaintiff's assignor, who is not a party, is not generally available.⁴²¹ But when a creditor having a debt due him by mortgage assigns the debt and mortgage, a judgment in favor of a third person against the creditor purchased by the debtor after the assignment, but before notice to him, constitutes an offset *pro tanto* to the debt in an action upon it by the assignee.⁴²²

§ 550. **Consolidated corporation.**—Where by state statute power is given to connecting railway corporations to merge and consolidate their stock, and such merger and consolidation has been judicially decided by the supreme court of the state to be a dissolution in law of the previous companies, and the creation of a new corporation with new liabilities; in such case, where the declaration avers that the defendant had agreed that stocks of one of the connecting railroads should be worth a certain price at a certain time and in a certain place, and the plea sets up that under the statute the stock of the railway named was merged and consolidated by the consent of the party suing, with a second railway named, so forming "one joint-stock company of the said two corporations," under a corporate name stated, such plea is good, though it do not aver that the consolidation was done without the consent of the defendants. Such a plea contains two points only which the plaintiff can traverse, the fact of consoli-

⁴¹⁷ Emerson v. Bleakley, 5 Abb. Pr. (N. S.) 350.

⁴¹⁸ Dillaye v. Niles, 4 Abb. Pr. 253; Ferreira v. Depew, 4 Abb. Pr. 131.

⁴¹⁹ Ferreira v. Depew, 4 Abb. Pr. 131; Wolfe v. H., 13 How. Pr. 84.

⁴²⁰ Thompson v. Sickles, 46 Barb. 49.

⁴²¹ Cummings v. Morris, 25 N. Y. 625; Dillaye v. Niles, 4 Abb. Pr. 253; Ferreira v. Depew, 4 Abb. Pr. 131; Spencer v. Babcock, 22 Barb. 326.

⁴²² McCabe v. Grey, 20 Cal. 509.

dation, and the fact of consent; and these must be denied separately. If denied together, the replication is double and bad.⁴²³

§ 551. **Incorporation, denial of.**—The want of capacity to sue or be sued must be specially alleged.⁴²⁴ The words, “a corporation” appearing in the title of a case after the name of the plaintiff are descriptive of the plaintiff, and cannot be construed to be an allegation of incorporation.⁴²⁵ By pleading to the merits the objection is waived.⁴²⁶ While under the statutes of California⁴²⁷ the due incorporation of a corporation cannot be inquired into collaterally, yet a private person is not thereby precluded from denying that it is a corporation *de jure* or *de facto*.⁴²⁸ An answer denying any incorporation of plaintiff in California admits the allegation of incorporation in the state of New Jersey.⁴²⁹ An averment of the existence of a *de facto* corporation is as issuable as an averment of the existence of a corporation *de jure*.⁴³⁰

Where the defendants are sued by a corporate name, though the complaint does not allege that the defendants are incorporated, still plaintiff must prove the fact if denied, and a denial that defendants are a corporation is not new matter.⁴³¹ M. being made defendant in an action to quiet title, and appearing under that name by attorney, the complaint is good, and the proceedings valid as to M., whether the name be that of a corporation or a person, and though the complaint says nothing as to this.⁴³² Where a complaint against a corporation does not allege the corporate character of the defendant, objection thereto is waived by the defendant's plea of counterclaim as though it were in fact

⁴²³ *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604.

⁴²⁴ *California Steam Nav. Co. v. Wright*, 8 Cal. 585; *White v. Moses*, 11 Cal. 69; *Society for Prop. of Gospel v. Town of Pawlet*, 4 Pet. 480, 7 L. Ed. 927; *Philadelphia R. R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 72; *Dillaye v. Parks*, 31 Barb. 132.

⁴²⁵ *Boyce v. Augusta Camp*, M. W. A., 14 Okla. 642, 78 Pac. 322.

⁴²⁶ *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189; *Society for Prop. of Gospel v. Town of Pawlet*, 4 Pet. 480, 7 L. Ed. 927; *Yeaton v. Lynn*, 5 Pet. 224, 8 L. Ed. 105.

⁴²⁷ 1862, p. 110, Cal. Civil Code,

§ 358; see *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

⁴²⁸ *Oroville & Virginia City R. R. Co. v. Plumas County*, 37 Cal. 360; *Dean v. Davis*, 51 Cal. 407; *Zion M. E. C. v. Hillery*, 51 Cal. 155; *Roman C. O. A. v. Abrams*, 49 Cal. 456.

⁴²⁹ *Herrin-Hall-Marvin Co. v. Smith*, 43 Or. 315, 72 Pac. 704, 73 Pac. 340.
⁴³⁰ *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

⁴³¹ *Stoddard v. Onondaga Ann. Conf.*, 12 Barb. 573.

⁴³² *Butterfield v. Graves*, 138 Cal. 155, 71 Pac. 510.

a corporation.⁴³³ The want of allegation of the incorporation of defendant cannot be raised by demurrer.^{433a} Before the revised statutes of New York, the denial of incorporation amounted only to the general issue.⁴³⁴ And it was equally bad when applied to foreign corporations.⁴³⁵ But under the revised statutes, to require a domestic corporation plaintiff to prove its corporate organization, the defendant must specially plead the non-existence of such corporation; and this plea was a good plea in bar.⁴³⁶ Plea of the general issue at common law does not put in issue the averment of a declaration that the plaintiff is a corporation.⁴³⁷ To put the plaintiff to proof of his corporate capacity in this case, a general denial is not sufficient, but the answer must deny the existence of such a corporation.⁴³⁸ If evidence is required on that point, it must be because that is a point in issue; and it cannot be in issue unless it is affirmed in the pleadings on one side and denied on the other.⁴³⁹

§ 552. **Municipal corporations.**—The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint which are presumptively within his own knowledge applies to municipal corporations. The statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons.⁴⁴⁰ There may exist the best reasons for a different rule of pleading when a municipal corporation is a defendant; but this court can make no distinction, because the code makes none. It is a matter for the legislature, and not for the court.⁴⁴¹ Where the complaint averred a contract between plaintiff and the board of super-

⁴³³ *Frost v. Ainslie Lumber Co.*, 3 Wash. St. 241, 28 Pac. 354, 915.

^{433a} *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485, 68 Pac. 871.

⁴³⁴ *Hartford Bank v. Murrell*, 1 Wend. 87; *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 24 Am. Dec. 51; *Wood v. Jefferson County Bank*, 9 Cow. 194.

⁴³⁵ *Farmers etc. Bank v. Rayner*, 2 Hall, 195.

⁴³⁶ *Methodist Episcopal Church v. Tyron*, 1 Denio 451. See, also, *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Park Bank v. Tilton*, 15 Abb. Pr. 384.

⁴³⁷ *Steamboat Co. v. Sewall*, 78 Me. 167, 3 Atl. 181; *Arnau v. First Nat. Bank*, 36 Fla. 398, 18 South. 786. *West Winsted Sav. Bank v. Ford*, 27 Conn. 282, 71 Am. Dec. 66.

⁴³⁸ *Park Bank v. Tilton*, 15 Abb. Pr. 384; *Bank of Havana v. Wickham*, 7 Abb. Pr. 134.

⁴³⁹ See *Ang. & Ames on Corp.* 631, and cases cited; *Oroville etc. R. R. Co. v. Supervisors of Plumas County*, 37 Cal. 362.

⁴⁴⁰ *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453.

⁴⁴¹ *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453.

visors, on behalf of the county, and the answer admitted a contract between the plaintiff and another on the one side, and the county on the other, and averred that this was the only contract made by the county in relation to the matter, and denied that any other was made by the board of supervisors, it was held that this denial was sufficient to put the plaintiff on proof of the contract.⁴⁴² In an action against a corporation to recover dividends which have accrued on its stock, if the plaintiff avers "that from a date named she was, has been, and still is the owner in her own right, and as her separate property, of the stock," the answer raises an issue, if it denies that at the date named "the plaintiff was, has since been, or still is the owner in her own right, and as her separate property," of the stock. The qualifications of the denial by the words "in her own right and as her separate property" are mere surplusage.⁴⁴³ Where the answer in a suit against a corporation, on its note, relies simply on the want of power of the corporation to issue notes, the defendant cannot afterwards object that the plaintiff has not shown that the officers executing the note were empowered by the corporation to do so.⁴⁴⁴ Non-compliance with the statutory provision (Cal. Civ. Code, § 299), that unless a corporation files a copy of its articles in the county where the property is situated, it "cannot maintain or defend any action or proceeding in relation to such property," is a matter to be set up by the defendant in an action of ejectment brought by the corporation for the property. A denial of the existence of the corporation does not raise the question.⁴⁴⁵ Such failure on the part of the corporation can only be made available by specially pleading it in the answer as matter of abatement to the action. This provision of the statute applies only to domestic corporations.⁴⁴⁶ Where the defendant was sued as a corporation when it was in fact a limited copartnership, a denial that "defendant is or ever was a corporation, organized and existing under the laws of England," is pregnant with the admission that the defendant is a corporation, and raises no issue.⁴⁴⁷ Where an answer denies the authority of the president of a corporation to execute a certain mortgage,

⁴⁴² *Murphy v. Napa Co.*, 20 Cal. 497.

⁴⁴³ *Dow v. Gould & Curry Mining Co.*, 31 Cal. 630.

⁴⁴⁴ *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1.

⁴⁴⁵ *Southern Pacific R. R. Co. v. Purell*, 77 Cal. 69, 18 Pac. 886.

⁴⁴⁶ *South Yuba Water etc. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222.

⁴⁴⁷ *Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211.

but does not deny the facts constituting a ratification of his acts, the plaintiffs are entitled to judgment without proof of the president's original authority.⁴⁴⁸

§ 553. **Dissolution of corporation.**—An action by a corporation is not abated by dissolution, but may be continued in the corporate name.⁴⁴⁹ Suits for or against a corporation abate upon its dissolution at common law.⁴⁵⁰

§ 554. **Corporations—Estoppel.**—As a general rule, corporations have power to waive their rights, and are bound by estoppels *in pais* like natural persons.⁴⁵¹ When an association assumes a name and exercises the powers of a corporation it is estopped from denying its corporate liabilities.⁴⁵² A corporation which has entered into contracts in its corporate capacity is estopped, when sued thereon, from denying its corporate existence.⁴⁵³ Where defendant accepted the office of treasurer of an incorporation, and served for several years as such, he was estopped from denying its corporate existence.⁴⁵⁴ One entering into a contract with a corporation is estopped from setting up in an action upon such contract that the corporation was not legally formed.⁴⁵⁵

§ 555. **Estoppel—How pleaded.**—An estoppel *in pais* is new matter, and cannot be relied upon in evidence as a defense without being specially pleaded.⁴⁵⁶ The party claiming an estoppel

⁴⁴⁸ Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527.

⁴⁴⁹ New York Marbled Iron Works v. Smith, 4 Duer, 362; Talmage v. Pell, 9 Paige, 410. See Pendleton v. Russell, 144 U. S. 640, 36 L. Ed. 574, 12 Sup. Ct. 743.

⁴⁵⁰ Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; and see Matter of Norwood, 32 Hun, 196.

⁴⁵¹ Hale v. Union Ins. Co., 32 N. H. 295, 64 Am. Dec. 370.

⁴⁵² United States Express Co. v. Bedbury, 34 Ill. 459.

⁴⁵³ Callender v. Painesville & Hudson River R. R. Co., 11 Ohio St. 516; Snider etc. Co. v. Troy, 91 Ala. 224, 24 Am. St. Rep. 887, 8 South. 658, 11 L. R. A. 515.

⁴⁵⁴ Parrott v. Byers, 40 Cal. 614;

Dutchess Cotton Mfy. v. Davis, 14 Johns. 238, 7 Am. Dec. 459; All Saints' Church, v. Lovett, 1 Hall, 191.

⁴⁵⁵ Palmer v. Lawrence, 3 Sandf. 170; Steam Nav. Co. v. Weed, 17 Barb. 378; White v. Coventry, 29 Barb. 305. To same effect, White v. Ross, 15 Abb. Pr. 66; Hyatt v. Esmond, 37 Barb. 601; Hyatt v. Whipple, 37 Barb. 595; Cooper v. Shaver, 41 Barb. 151. But compare Welland Canal Co. v. Hathaway, 8 Wend. 480; 24 Am. Dec. 51.

⁴⁵⁶ Prewitt v. Lambert, 19 Colo. 7, 34 Pac. 684; Gaynor v. Clements, 16 Colo. 209, 26 Pac. 324; De Votie v. McGerr, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923; Bruce v. Phoenix Ins. Co., 24 Or. 486, 34 Pac. 16.

in pais, and relying upon it as a defense, should set out the matters constituting it in his answer.⁴⁵⁷ Such is the rule generally in those states which have adopted the reformed procedure.⁴⁵⁸ So an estoppel by deed or record must be pleaded to be available either as a cause of action or as a defense.⁴⁵⁹ But it is not true that in all cases to be available an estoppel must be strictly pleaded as such. If the facts constituting the estoppel are in any way sufficiently pleaded, the party is entitled to the benefit of the law arising therefrom.⁴⁶⁰ And the sufficiency of the manner in which an estoppel is pleaded will not be reviewed on appeal, where the plea was treated at the trial as properly made and sufficient.⁴⁶¹ In replevin, evidence of matter in estoppel may be given and used as a defense under a general denial and without being pleaded specially.⁴⁶²

§ 556. Corporations—Stockholder's answer.—Stockholders of a corporation who have been allowed to put in answers in the name of the corporation cannot be regarded as answering for the corporation itself. In a special case, however, a stockholder may be allowed to become party defendant, for the purpose of protecting his own interests, and the interest of such stockholders as choose to join in with him in the defense.⁴⁶³

§ 557. Nonjoinder of stockholders.—Stockholders of insolvent corporations in Pennsylvania, when sued by creditors, may, under the plea of payment with leave, take advantage of nonjoinder of proper parties, and need not plead specially in abatement.⁴⁶⁴

§ 558. Failure of consideration—Essential and sufficient allegations.—In pleading failure of consideration, an issue of law must

⁴⁵⁷ *McKeen v. Naughton*, 88 Cal. 462, 26 Pac. 354; *Troyer v. Dyer*, 102 Ind. 396, 1 N. E. 728.

⁴⁵⁸ See *Walker v. Baxter*, 6 Wash. St. 244, 33 Pac. 426; *Knudsen v. Omanson*, 10 Utah, 124, 37 Pac. 250; *Tyler v. Hall*, 106 Mo. 313, 27 Am. St. Rep. 327, 17 S. W. 319, and note; *Central National Bank v. Doran*, 109 Mo. 40, 18 S. W. 836; *Churchill v. Baumann*, 95 Cal. 541, 30 Pac. 770; *Warder v. Baldwin*, 51 Wis. 450, 8 N. W. 257; *Independent Dist. Burlington v. Merchants' Bank*, 68 Iowa, 343, 27 N. W. 255.

⁴⁵⁹ *Bays v. Trulson*, 25 Or. 109, 35 Pac. 26.

⁴⁶⁰ *City Nat. Bank v. Thomas*, 46 Neb. 861, 65 N. W. 895; and see *Wachter v. Phoenix Assoc. Co.*, 132 Pa. St. 428, 19 Am. St. Rep. 600, 19 Atl. 289; *Meiss v. Gill*, 44 Ohio St. 253, 6 N. W. 656.

⁴⁶¹ *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386.

⁴⁶² *Towne v. Sparks*, 23 Neb. 142, 36 N. W. 375.

⁴⁶³ *Bronson v. La Crosse R. R. Co.*, 2 Wall. 283, 17 L. Ed. 725.

⁴⁶⁴ *Hoard v. Wilcox*, 47 Pa. St. 51.

not be tendered.⁴⁶⁵ An answer of an entire or partial failure of consideration which does not set out the facts showing the failure, or how much the whole consideration for the property was, and gives no data by which the court can determine what deduction, if any, should be made, is bad.⁴⁶⁶ As against a *bona fide* purchaser for value before maturity of negotiable paper, failure of consideration without notice constitutes no defense to the action.⁴⁶⁷ An answer setting up in defense a failure to perform an agreement to execute an indemnifying bond is bad when it does not set forth an injury resulting from such failure, but shows that injury can never happen.⁴⁶⁸ All matters in confession and avoidance showing that the contract sued upon was void or voidable in point of law must be affirmatively pleaded.⁴⁶⁹ It seems that illegality in a contract sued on, though shown by the testimony, cannot avail the defendant, unless it is alleged in the pleadings; and that an allegation in the answer that the contract was illegal, coupled with an enumeration in the same paragraph of specific grounds of illegality, does not entitle the defendant to prove any grounds of illegality not so specified.⁴⁷⁰ The facts showing illegality must be specially pleaded in the answer, if the complaint does not disclose the illegality.⁴⁷¹ If it should appear from the testimony of plaintiff's witnesses that the contract in question is illegal or immoral, the court ought to dismiss the proceedings of its own motion on grounds of public policy, even though no such defense has been pleaded.⁴⁷² A plea seeking to avoid the bond for being illegally taken should specially state all the facts which show that illegality.⁴⁷³ If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire

⁴⁶⁵ Bennett v. Martin, 6 Mo. 460; and see Hammond v. Earle, 58 How. Pr. 426.

⁴⁶⁶ Billan v. Hecklebrath, 23 Ind. 71; Carmelich v. Mims, 88 Ala. 335, 6 South. 913; Nixon v. Beard, 111 Ind. 137, 12 N. E. 131.

⁴⁶⁷ Rand v. Pantagraph Co., 1 Colo. App. 270, 28 Pac. 661.

⁴⁶⁸ Billan v. Hecklebrath, 23 Ind. 71.

⁴⁶⁹ Finley v. Quirk, 9 Minn. 194, 86 Am. Dec. 93.

⁴⁷⁰ Gushee v. Leavitt, 5 Cal. 161, 63 Am. Dec. 116; Dingeldein v. Third Ave. R. R. Co., 9 Bosw. 79.

⁴⁷¹ Buchtel v. Evans, 21 Or. 315, 28 Pac. 67; Jameson v. Coldwell, 23 Or. 144, 31 Pac. 279; Lyts v. Keevey, 5 Wash. 606, 32 Pac. 534; Sharon v. Sharon, 68 Cal. 29, 8 Pac. 614; Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165; see Morrill v. Nightingale, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068.

⁴⁷² Ah Doon v. Smith, 25 Or. 89, 34 Pac. 1093; Irving v. McWilliams, 1 N. B. Eq. 217.

⁴⁷³ United States v. Sawyer, 1 Gall. 86, Fed. Cas. No. 16227.

contract is void.⁴⁷⁴ That is not lawful which is contrary to an express provision of law, or contrary to the policy of express law, though not expressly prohibited or otherwise contrary to good morals.⁴⁷⁵ An answer setting up for defense a failure of consideration must show whether it is a partial or total failure.⁴⁷⁶ A partial failure of consideration cannot be pleaded in bar of an action upon a note given for the purchase money of land.⁴⁷⁷ It is generally no defense to a promissory note.⁴⁷⁸ Partial failure of consideration could not be given in evidence, unless specially pleaded.⁴⁷⁹ Where the obligor of a single bill was sued by an assignee, and pleaded that the bill was given for the purchase of horses which were not as sound nor of as high a pedigree as had been represented by the seller, such a plea was admissible.⁴⁸⁰

§ 559. **Jurisdiction—Essential allegations.**—Defenses in abatement of the suit, or going to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue.⁴⁸¹ The fact that a corporation aggregate appears and pleads by attorney to the jurisdiction is not a waiver of the objection.⁴⁸² The question of jurisdiction arising in a case where a mortgagor and mortgagee were citizens of the same state, and the mortgagee had assigned the mortgage to a citizen of another state, should have been raised by a plea in abatement. Upon a trial of the merits it is too late.⁴⁸³ A plea to the jurisdiction in equity is like a plea in abatement at law, which cannot be put in after a general imparlance, or be received when it does not give the plaintiff a better writ.⁴⁸⁴ The objection that a court of equity has not jurisdiction of the suit, because complainant has an

⁴⁷⁴ Cal. Civ. Code, § 1608.

⁴⁷⁵ Cal. Civ. Code, § 1667. For certain contracts declared to be unlawful and void, see Cal. Civ. Code, §§ 1668-1676.

⁴⁷⁶ *Clough v. Murray*, 19 Abb. Pr. 97

⁴⁷⁷ *Reese v. Gordon*, 19 Cal. 147.

⁴⁷⁸ *Varnum v. Mauro*, 2 Cranch C. 425, Fed. Cas. No. 16889.

⁴⁷⁹ *Wallace v. Boston*, 10 Mo. 660. Under New Mexico practice, in a suit on a promissory note, a partial failure of consideration may be proved under

the general issue, and is a good defense pro tanto. *Staab v. Ortiz*, 3 N. Mex. 53, 1 Pac. 857.

⁴⁸⁰ *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

⁴⁸¹ *Livingston v. Story*, 11 Pet. 351, 9 L. Ed. 746.

⁴⁸² *Commercial etc. Bank v. Slocomb*, 14 Pet. 60, 10 L. Ed. 354.

⁴⁸³ *Smith v. Kernochen*, 7 How. 198, 12 L. Ed. 666.

⁴⁸⁴ *Baker v. Biddle*, Baldw. 394, Fed. Cas. No. 764.

adequate remedy at law, should be taken by plea or answer. It is too late to raise it for the first time upon appeal, unless the want of jurisdiction is apparent on the face of the bill.⁴⁸⁵ But section 434 of the California Code of Civil Procedure provides that objection to the jurisdiction of the court, or that the complaint does not state facts sufficient to constitute a cause of action, may be made at any time. All merely technical objections to the complaint are waived by failure to interpose demurrer.⁴⁸⁶ A defendant who is sued out of his district may plead his personal privilege.⁴⁸⁷ The exemption of a foreign consul from any action against him in a state court is not a personal privilege, but a matter of jurisdiction, and is not waived by the failure of the defendant to plead it.⁴⁸⁸

A plea in abatement, denying the truth of the averments as to residence, etc., in the present tense instead of in the past tense, so as to make issue with reference to the time of the commencement of the suit, is not so clearly frivolous as to require the court to set it aside or disregard it.⁴⁸⁹ Where the jurisdiction of the circuit court of the United States appears by proper averments upon the record, the defendant can only impugn it on a special plea; the objection cannot be taken by answer.⁴⁹⁰ This defense is sustainable only where the person is not subject to the jurisdiction of the court, and not where the objection is merely that original process has not been duly served.⁴⁹¹ If a plea to the jurisdiction and a plea *non assumpsit* be put in, and the issue be made upon the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on trial, the plea to the jurisdiction is considered as waived.⁴⁹² A party waives all objections to the jurisdiction of the court by reason of the manner in which the cause was brought before it, by entering upon the trial and contesting the cause upon its merits.⁴⁹³

⁴⁸⁵ *Wylie v. Coxe*, 15 How. 415, 14 L. Ed. 753.

⁴⁸⁶ *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61.

⁴⁸⁷ *Teese v. Phelps*, 1 McAll. 17, Fed. Cas. No. 13818.

⁴⁸⁸ *Miller v. van Loben Sels*, 66 Cal. 341, 5 Pac. 512.

⁴⁸⁹ *Horner v. Keppel*, 10 Ad. & El. 17; *Eberly v. Moore*, 24 How. 147, 16 L. Ed. 612.

⁴⁹⁰ Rule 29 in Equity; *Wickliffe v. Owings*, 17 How. 47, 15 L. Ed. 44.

⁴⁹¹ *Nones v. Hope Mutual Life Ins. Co.*, 5 How. Pr. 96; *Bridge v. Payson*, 1 Duer, 612.

⁴⁹² *Bailey v. Dozier*, 6 How. 23, 12 L. Ed. 328. But see Cal. Code Civ. Proc., § 434.

⁴⁹³ *Colorado Cent. R. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542; *Schoolfield v. Brunton*, 20 Colo. 139,

§ 560. **Jurisdiction—Allegations, effect of.**—In Massachusetts, a plea to the jurisdiction should show that some other court in the same state has jurisdiction.⁴⁹⁴ A plea to the jurisdiction, on account of limited jurisdiction, is a plea in bar.⁴⁹⁵ A question as to the jurisdiction of the court cannot be raised under the general issue, but must be specially pleaded.⁴⁹⁶ But where the subject-matter is not within the jurisdiction of the court, the exception may be taken under the general issue.⁴⁹⁷ Although a plea in bar admits the jurisdiction, the district court has power, after such a plea has been put in, to permit the defendant to withdraw it, and plead in abatement a denial that the averments relied on to show jurisdiction were true. It is proper to give leave to amend, thus, where the defendant shows by affidavit that the averments as to jurisdiction were false and fraudulent.⁴⁹⁸

FORMS OF DEFENSES IN ABATEMENT.

§ 561. No jurisdiction of the subject or person.

Form No. 132.

[TITLE.]

The defendant, further answering, alleges that this court has no jurisdiction of said supposed cause of action set forth in the complaint (or, of the person of this defendant), for the reason that [here state the facts showing lack of jurisdiction of subject-matter or person, fully and exactly].

§ 562. The same—By foreign consul.

Form No. 133.

[TITLE.]

The defendant, further answering, alleges that this court has no jurisdiction of said supposed cause of action set forth in the

36 Pac. 1103; *Potter v. Neal*, 62 How. Pr. 158.

⁴⁹⁴ *Lawrence v. Smith*, 5 Mass. 362; *Otis v. Wakeman*, 1 Hill, 604; *The King v. Johnson*, 6 East, 583, 600.

⁴⁹⁵ *Smith v. McLeod*, 1 Cranch C. C. 43, Fed. Cas. No. 13073.

⁴⁹⁶ *Eberly v. Moore*, 24 How. 147, 16 L. Ed. 612; *Teese v. Phelps*, 1 McAll. 17, Fed. Cas. No. 13818; *The Ab-*

by, 1 Mason, 360, Fed. Cas. No. 14.

⁴⁹⁷ *Maissonaire v. Keating*, 2 Gall. 325, Fed. Cas. No. 8978.

⁴⁹⁸ *Eberly v. Moore*, 24 How. 147, 16 L. Ed. 612. Pleas to the jurisdiction must be direct and certain, and set up the facts which go to show a want of it. *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380.

complaint [or, of the person of this defendant], for the reason that this defendant was at the commencement of this action, and is now, consul of the king of Italy for the city of . . . , duly accredited to the president of the United States, and by him received and acknowledged as such.

§ 563. That a court of the United States possesses exclusive jurisdiction.

Form No. 134.

[TITLE.]

I. That said county is within the . . . district, in which there is and was a court of the United States, called the district court, holden for said . . . district.

II. That all suits or penalties and forfeitures incurred under the laws of the United States, to which the United States are parties, arising within said district, ought to be brought in said court and not elsewhere.

III. That said A. B., at the commencement of this suit, was and still is resident within said district and at . . .

§ 564. Accord and satisfaction.

Form No. 135.

[TITLE.]

The defendant answers to the complaint:

I. That on the . . . day of . . . , 19.., at . . . , he delivered to plaintiff the promissory note of B. C. for . . . dollars.

II. That the plaintiff accepted the same in full satisfaction and discharge of the claim [or demand] set up in the complaint.

§ 565. Alteration of contract, releasing guarantor.

Form No. 136.

[TITLE.]

The defendant answers to the complaint:

I. That on the . . . day of . . . , 19.., at . . . , the plaintiff agreed with C. D. in the complaint mentioned, in consideration of . . . dollars, to extend the time of payment of the rent guaranteed by the defendant . . . days.

II. That the defendant had no knowledge of the said extension, and did not then, nor has he since, assented thereto.

§ 566. Another action pending.

Form No. 137.

[TITLE.]

The defendant answers to the complaint, and alleges:

That there was at the commencement of this action, and still is, another action pending in the . . . court of the [describe the court], between the same parties, and for the same cause of action as that in the complaint herein stated and alleged.

§ 567. Arbitration and award.

Form No. 138.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That on the . . . day of . . . , 19.., the plaintiff and defendant [in writing] mutually submitted the demand set forth in the complaint to the arbitration of A. B. and C. D., and which said submission has never been revoked.

II. That on the . . . day of . . . , 19.., at . . . , the said A. B. and C. D. made and published their award [by which they declared the plaintiff not entitled to any part of said demand].

III. [A copy of said submission and of said award is hereto attached, marked "Exhibit A," and made part hereof.]

§ 568. Bankruptcy.

Form No. 139.

[TITLE.]

The defendant answers to the complaint:

I. That on the . . . day of . . . , 19.., at . . . , the United States district court, of the . . . district of . . . , made and granted to the defendant a decree of discharge from his debts as a bankrupt, of which decree of discharge a copy is annexed [annex copy of decree] and made a part hereof.

§ 569. The same—By composition deed.

Form No. 140.

[TITLE.]

The defendant answers to the complaint:

I. That he admits that on the . . . day of . . . , 19.., he was indebted to the plaintiffs, as alleged in the complaint.

II. That afterwards on the . . . day of . . . , 19.., at . . . , the plaintiffs, by their deed under seal, agreed with the defendant

that they would accept . . . dollars, then and there paid them by the defendant, and by the plaintiffs then and there accepted and received in full satisfaction of said indebtedness; and divers other creditors of the defendant then and there also, by the same deed, agreed to accept, and did accept, the sum currently with the said plaintiffs, in full satisfaction of the several debts of defendant to such creditors respectively, and covenanted with the defendant not to sue the defendant for such respective debts; a copy of which deed is hereto annexed as a part hereof. [Insert copy.]

§ 570. Compromise.

Form No. 141.

[TITLE.]

The defendant answers to the complaint:

I. [State demand set up by plaintiff.]

II. That afterwards, on the . . . day of . . . , 19.., at . . . , the defendant agreed to pay and the plaintiff agreed in writing to accept . . . dollars, in full satisfaction of said claim, as a compromise thereof.

III. That on the . . . day of . . . , 19.., at . . . , the defendant paid and the plaintiff so accepted said sum.

§ 571. Credit unexpired.

Form No. 142.

[TITLE.]

The defendant answers to the complaint:

I. That the goods mentioned therein were sold to him upon a credit of . . . months from the . . . day of . . . , 19..

II. That such period had not elapsed before the commencement of this action.

§ 572. Former judgment.

Form No. 143.

[TITLE.]

The defendant answers to the complaint:

That on the . . . day of . . . , 19.., at . . . , in an action then pending in the . . . court, between A. B., plaintiff, and C. D., defendant, and for the same cause of action as that set forth in the complaint herein, judgment was duly given and made. [Describe the judgment.]

§ 573. Death of defendant before suit.

Form No. 144.

[TITLE.]

The defendant C. D. answers to the complaint:

That A. B., one of the defendants in this action, died at . . . , before this action, and on or about the . . . day of . . .

§ 574. Duress.

Form No. 145.

[TITLE.]

The defendant answers to the complaint:

I. That the [bond] mentioned therein was extorted from him by threats of personal violence, and was executed by him under fear of the same [or from fear while in prison, etc.; state force, etc.].

II. That the said [bond] was executed by him without any consideration therefor.

§ 575. Fraud.

Form No. 146.

[TITLE.]

The defendant answers to the complaint:

I. That the plaintiff induced him to make the note mentioned in the complaint by representing that he was authorized by one A. B., to whom the defendant owed the amount of the same, to take a note to himself in satisfaction of such debt [or otherwise state the fraudulent misrepresentations, etc.]

II. That the said representations were false.

III. That the defendant received no consideration for the said note.

§ 576. Infancy of plaintiff.

Form No. 147.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff is not of the age of twenty-one years [if a female, eighteen years]; or that at the commencement of this action the plaintiff was not the age of [twenty-one] years, and has no guardian appointed herein.

§ 577. Infancy of defendant.

Form No. 148.

[TITLE.]

The defendant answers to the complaint:

That at the time of making the supposed agreement [or of the delivery of the goods] mentioned therein, he was under the age of [twenty-one] years, to wit, of the age of . . . years and said agreement did not relate to personal property in the immediate possession and control of this defendant, nor for things necessary for his support.

§ 578. Marriage of plaintiff.

Form No. 149.

[TITLE.]

The defendant answers to the complaint:

I. That the plaintiff was, at the commencement of this action, and still is the wife of one A. B., who is still living at . . . with this plaintiff.

II. That this action does not concern her separate property, or her right or claim to a homestead.

§ 579. Marriage of defendant.

Form No. 150.

[TITLE.]

The defendant answers to the complaint:

That at the time of making the agreement [or of the delivery of the goods mentioned therein] she was the wife of J. K.

§ 580. Defendant an Indian.

Form No. 151.

[TITLE.]

The defendant answers to the complaint:

That the defendant, at the time of making the said writing obligatory, was, ever since has been, and still is, an Indian, residing on lands reserved to the . . . Indians, within the purview of the act [title], passed [date of enactment].

§ 581. Marriage of defendant after the contract and before the action.

Form No. 152.

[TITLE.]

The defendant answers to the complaint:

I. That she was, at the commencement of this action, and still is the wife of A. B., who now resides at . . . with this defendant.

II. That this action does not concern her separate property, or her right or claim to the homestead property.

§ 582. Misjoinder of parties.

Form No. 153.

[TITLE.]

The defendant answers to the complaint:

I. That A. B. is improperly joined as a plaintiff [or defendant] in this: that he has no interest in the subject-matter in controversy [or otherwise state reasons].

§ 583. Misnomer.

Form No. 154.

[TITLE.]

The defendant answers to the complaint:

I. That the true name of the plaintiff [or of defendant] is and ever has been . . . , and not . . . , in which name he sues [or is sued].

§ 584. Mistake.

Form No. 155.

[TITLE.]

The defendant answers to the complaint:

I. That when he signed the note therein mentioned, he supposed it to be for [one thousand] dollars, but by mistake it was drawn for [ten thousand] dollars.

II. That he received no consideration for more than [one thousand] dollars.

§ 585. Nonjoinder of a necessary party plaintiff.

Form No. 156.

[TITLE.]

The defendant answers to the complaint:

I. That the goods, wares, and merchandises described in the complaint were sold by plaintiff and one C. D., as partners, under the name of A. B. & C. D.

II. That the said C. D. is still living.

§ 586. Nonjoinder of owners in action between tenants in common.

Form No. 157.

[TITLE.]

The defendant answers to the complaint:

I. That . . . and . . . , residing at . . . , are tenants in common with the plaintiff in said lands, and necessary parties to this action.

§ 587. Nonjoinder of a co-administrator.

Form No. 158.

[TITLE.]

The defendant answers to the complaint:

I. That after the death of said A. B., and on or about the . . . day of . . . , 19.., letters of administration were duly issued to one C. D., together with the plaintiff, by the superior court of the county of . . . , and said C. D. thereupon duly qualified as administrator, and as such entered upon the duties of his trust, and still is such administrator.

§ 588. Nonjoinder of one who was a party to the contract.

Form No. 159.

[TITLE.]

The defendant answers to the complaint:

I. That the supposed contract [or other cause of action] mentioned in the complaint was made with said . . . , plaintiff [or defendant], and one A. B., jointly.

II. That the said A. B. is still living.

§ 589. Payment.

Form No. 160.

[TITLE.]

The defendant answers to the complaint:

That on the . . . day of . . . , 19.., at . . . , he paid to the plaintiff the money demanded in the complaint [or . . . dollars, on account of the demand in the complaint].

§ 590. Payment by note.

Form No. 161.

[TITLE.]

The defendant answers to the complaint:

That on the . . . day of . . . , 19.., at . . . , at the request of the plaintiff, he made his promissory note to one C. D. for . . . dollars, in discharge of the indebtedness stated in the complaint.

§ 591. Payment by bill accepted in discharge, which plaintiff has lost.

Form No. 162.

[TITLE.]

The defendant answers to the complaint:

I. That before this action the plaintiff drew his bill on the defendant for the amount of said account [or other indebtedness alleged], dated on the . . . day of . . . , 19.., and payable to the order of the plaintiff . . . months after said date; which the defendant then accepted.

II. That the plaintiff received said acceptance on account of said indebtedness, and afterwards, and before the same became due and payable, lost the same, and cannot produce it to the defendant.

§ 592. Payment in services.

Form No. 163.

[TITLE.]

The defendant answers to the complaint:

I. That after the said promissory note became payable, and before this action, to wit, on the . . . day of . . . , 19.., the plaintiff agreed to receive and the defendant agreed to render to the said plaintiff his services as a [teamster] to the amount of said note.

II. The defendant afterwards, according to the said agreement, rendered such services to the plaintiff, to the full amount due and payable on the said note.

§ 593. Release.

Form No. 164.

[TITLE.]

The defendant answers to the complaint:

That on the . . . day of . . . , 19.., at . . . , the plaintiff, by deed, released the defendant from the claim set up in the complaint.

§ 594. Statute of frauds.

Form No. 165.

[TITLE.]

The defendant answers to the complaint:

I. That no note or memorandum in writing, expressing the consideration, was ever made of any such contract as is alleged in the complaint, or of any contract whatever [or state other facts as they exist].

II. That he did not receive any part of the goods, wares, or merchandise mentioned in the complaint.

III. That he did not pay any part of the purchase money.

§ 595. Statute of frauds—Another form.

Form No. 166.

[TITLE.]

The defendant answers to the complaint:

That plaintiff ought not to have his said action; because neither defendant, nor any person by him legally authorized, did ever make or sign any contract or agreement in writing, binding this defendant to make any such conveyance of the said premises to the plaintiff as he has in said complaint demanded.

§ 596. Agreement not to be performed within a year.

Form No. 167.

[TITLE.]

That although the said agreement by its terms was not to be performed within one year from the making thereof, neither said agreement nor any note or memorandum thereof was or is in writing and subscribed by the said . . . , who is sought to be charged therewith, or by his lawful agent, or by any other person.

§ 597. Statute of frauds—Another form.

Form No. 168.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. Etc.

II. Defendant, for a further defense, alleges that the promise set forth in the complaint was a special promise to answer for the debt, default, or miscarriage of A. B. [or as the case may be], in the complaint named.

III. That no note or memorandum of said promise or agreement was made in writing, and signed by defendant or any other person by his authority, or at all.

§ 598. Statute of frauds—Agreement in consideration of marriage.

Form No. 169.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the said alleged agreement was made upon consideration of marriage, and that neither said agreement nor any note or memorandum thereof was ever in writing, and subscribed by said . . . , who is sought to be charged therewith, or by his lawful agent, or at all.

§ 599. Statute of frauds—Ultra vires corporation.

Form No. 170.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the plaintiff was not and is not authorized by law to take, hold, and convey real property, except for the following purposes, and in the following manner [here set forth the power of the corporation].

II. That the deed alleged in the complaint was executed and accepted on the part of said corporation, for the purpose of [here state purpose not within the power].

§ 600. Statute of limitations.

Form No. 171.

[TITLE.]

The defendant answers to the complaint:

That the cause of action set forth therein did not accrue within . . . years before the commencement of this action.

§ 601. Statute of limitations, California Code of Civil Procedure, section 458.

Form No. 172.

[TITLE.]

The defendant, answering the complaint, alleges:

That the cause of action stated in the complaint of the plaintiff herein is barred by the provisions of the first subdivision of section 339 of the Code of Civil Procedure of this state [insert whatever section and subdivision may be applicable to the cause of action].

§ 602. Foreign statute of limitations in tort action.

Form No. 173.

[TITLE.]

For a further and separate defense, the defendant alleges that the said personal injury described in the complaint occurred in the state of . . . and that at the time of the occurrence thereof, to wit, on the . . . day of . . . , 19.., and at all times thereafter to the present time both the plaintiff and this defendant were and still are citizens and residents of the state of . . . , and that at the time of said injury there was, ever since has been, and still is a statute of the state of . . . known as section . . . of chapter . . . of the revised statutes of said state which provides as follows [give copy of section, or state its substance]. That no action was begun by the plaintiff to recover, on account of said alleged injury in the said state of . . . within . . . years next after the cause of action alleged in said complaint accrued, nor was this action commenced within said period of two years. Wherefore this defendant alleges that the said cause of action has become and is by virtue of the operation of said statute completely barred.

§ 603. Specific denial of demand.

Form No. 174.

[TITLE.]

The defendant denies that the plaintiff at any time demanded the (proceeds of the goods) in said complaint mentioned at any time prior to the commencement of this action.

§ 604. Assignment of cause of action, by plaintiff, to third person.

Form No. 175.

[TITLE.]

That after the sale and delivery [or accruing of other cause of action] in the complaint alleged, and before this action, the plaintiff duly assigned his cause of action against this defendant arising therefrom [or, said judgment, etc., or other thing in action] to one M. N., who then became, and still is, the lawful owner and holder thereof.

§ 605. Tender.

Form No. 176.

[TITLE.]

The defendant answers to the complaint:

I. That on the . . . day of . . . , 19.., at . . . , before the commencement of this action, he tendered to the plaintiff . . . dollars [in gold and silver coin of the United States], in payment of the contract, [note, or indebtedness] in the complaint set forth.

II. That the defendant has always been and still is ready and willing to pay the same to the plaintiff, and now pays the same into this court [or state the facts].

§ 606. Payment as to part, and tender as to residue.

Form No. 177.

[TITLE.]

The defendant answers to the complaint:

I. [Allege payment of part.]

II. That on the . . . day of . . . , 19.., at . . . , he tendered to the plaintiff the residue of said claim, to wit, the amount of . . . dollars, etc. [as in preceding form].

§ 607. Denial as to part, and tender as to residue.

Form No. 178.

[TITLE.]

The defendant answers to the complaint:

I. That he agreed to pay to the plaintiff . . . dollars only [or that the goods or services mentioned therein were reasonably worth no more than . . . dollars].

II. That before this action, on the . . . day of . . . , 19.., at . . . , he tendered to the plaintiff, in gold and silver coin of the United States . . . dollars in payment of said sum. [Continue as in preceding form.]

§ 608. Want of capacity—Alien enemy.

Form No. 179.

[TITLE.]

The defendant answers to the complaint:

I. That the plaintiff was not at the commencement of this action, and is not now, a citizen of the United States, but was and is an alien, born in . . . , out of the allegiance of the United States, and within the kingdom of . . .

II. That at the commencement of this action the government of said . . . was and still is at war with and is an enemy of the United States.

III. That the plaintiff then was and still is an alien enemy, abiding without the United States, and at . . . , within said . . . , and adhering to the said enemies of the United States.

§ 609. Want of capacity—Assignment.

Form No. 180.

[TITLE.]

The defendant answers to the complaint:

That before the commencement of this action, on or about the . . . day of . . . , 19.., at . . . , the plaintiff duly assigned the subject-matter and cause of action set forth in the complaint to one R. S., who then was and has been ever since the holder thereof.

§ 610. Want of capacity—Denial of plaintiff's corporation.

Form No. 181.

[TITLE.]

The defendant answers to the complaint:

I. That there was not at the commencement of this action, nor is there now, any such corporation as the . . . Mining Company, named as plaintiff in this action.

II. That the plaintiff was not a *de facto* corporation, nor did the persons claiming to compose the said alleged corporation, at the commencement of this action, nor at any of the times mentioned in the complaint, claim in good faith to be a corporation.

§ 611. Want of capacity—Denial of trusteeship.

Form No. 182.

[TITLE.]

The defendant answers to the complaint:

That since the expiration of said first year [or after the . . . day of . . . , 19..], he has not been a trustee of said company, and has not in any way managed the affairs or concerns of said company as such.

§ 612. Denial of subscription of stock.

Form No. 183.

[TITLE.]

The defendant answers to the complaint:

That he never subscribed for any stock of the corporation mentioned in the complaint, and never became a stockholder in or the holder or owner of any stock of the said corporation, in his own right, or in trust for others.

§ 613. Denial of interest—Stock sold.

Form No. 184.

[TITLE.]

The defendant answers to the complaint:

That on or about the . . . day of . . . , 19.., he sold and transferred all his stock and interest in the said company; and that he had not then, nor has he had since that time, nor has he now, any property or interest of any nature or kind whatsoever in the said company, as stockholder or trustee, or otherwise.

§ 614. Want of capacity—Denial of official capacity.

Form No. 185.

[TITLE.]

The defendant answers to the complaint, and denies that the plaintiff is [executor or administrator of the said deceased, or otherwise], as alleged, or at all.

§ 615. Want of Capacity—Partnership of plaintiff.

Form No. 186.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the cause of action set forth in the complaint did not accrue to the plaintiff individually, but to the plaintiff and one R. S., under the firm name [giving name of firm], and that said

partners, as such, when this action was brought, held and owned the said cause of action jointly.

II. That the said R. S. is still living.

§ 616. Pendency of partnership cause, in answer to partition suit.

Form No. 187.

I. That the premises of which the plaintiff seeks partition belong to the parties to the action as tenants in common.

II. That the parties were partners in trade, and carried on business on said premises, and that the said premises were owned by them as such copartners.

III. That in the month of . . . , 19.., the partnership was dissolved by the retirement of one of the defendants therefrom; and in . . . 19.., and before this action, the defendant D. commenced an action in the . . . court of . . . against the plaintiff in this action and the defendant R. demanding judgment that the defendants therein be decreed to render an account of the stock, fixtures, machinery and effects, and that the plaintiff's interest be adjusted and stated, and that he have judgment for the amount of his interest therein, or that a receiver be appointed to take and sell the property, and distribute it among the partners according to their respective interests; which action is still pending and undetermined.

§ 617. Estoppel.

Form No. 188.

For a further and separate defense the defendant alleges that the plaintiff ought not to be admitted to say [here state the matter to which the estoppel is interposed; e. g., that said premises belonged to M. N.], for the reason that [here state the facts showing the estoppel; e. g. that the plaintiff, on or about the . . . day of . . . , 19.., conveyed said premises to the defendant by deed, containing a full covenant of warranty].

§ 618. Estoppel by former judgment—Pleading foreign judgment in detail.

Form No. 189.

[TITLE.]

Answering plaintiff's complaint, defendant denies and alleges as follows:

I. That an equity suit was heretofore brought by H. J. (the person mentioned in the complaint herein as receiver of the . . . Railway Company), as such receiver, against this defendant, in the . . . court of . . . county, state of . . . , the complaint wherein prayed for a decree by which it might be adjudged and decreed, among other things, that this defendant give no consideration for the . . . shares of stock mentioned in the contract, "Exhibit A" annexed to the complaint herein, and had no legal or equitable right or title in or to the same; that the actual title to the . . . shares of stock of M. N. (mentioned in the complaint herein) in the . . . company, remained in said . . . Railway Company; that this defendant acquired no title to the . . . shares of stock allotted to him (mentioned in the complaint herein) and that the actual title remained in the . . . Railway Company; that the agreement, a copy whereof is annexed to the complaint herein, was induced by false and fraudulent representations of said defendant, and that the same should be canceled and annulled; that defendant should be required to pay to said H. J., as such receiver, the sum of . . . dollars, with interest thereon, and for such further and other order of relief as the nature of the case might require and as might be agreeable to equity and good conscience.

II. That the said bill of complaint was personally subscribed by said H. J., and verified by him upon oath on . . . 19.., and contains all the allegations material to the present action which are contained in the amended complaint herein, except that [if it be a material allegation] said receiver and said . . . Railway Company were induced to make said contract ["Exhibit A" annexed to the complaint herein] by reason of the statements of this defendant that his title to said stock was a good and clear title, and that no other person had a lawful claim thereto; but that this matter might have been also litigated in the aforesaid suit. The paper hereto annexed as a part hereof and marked "Exhibit A," is a true copy of the bill of complaint in said suit.

III. That the plaintiff hereon, on or about . . . , 19.., became a party complainant to the suit mentioned in said paragraph, and filed a supplemental bill of complaint therein by leave of said court; that answers were duly filed to the said bill and supplemental bill therein by this defendant, denying the equities set up in said bills; that a replication was duly filed by the complainant, and said suit duly came on to be heard by said court in chancery,

and each party introduced evidence upon said hearing, and the taking of evidence therein was closed, and thereafter, and on or about the . . . day of . . . , 19.., the said bill and supplemental bill in said suit were dismissed by order of the said court, a copy of which order is hereto annexed as a part hereof and marked "Exhibit B," and that the recitals in said order were and are true.

IV. That by said order the matters in this action were finally adjudicated and settled, and that the plaintiff is thereby barred from prosecuting or maintaining this action.

§ 619. Want of capacity—Partnership of the defendant.

Form No. 190.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the contract set forth in the complaint was not made by him individually, but by him and one R. S. jointly as partners, under the firm name [give the firm name].

II. That the said R. S. is still living.

§ 620. Want of consideration—Common form.

Form No. 191.

[TITLE.]

The defendant answers to the complaint:

That he received no consideration for the [promissory note] mentioned therein. [Mistake or any fact showing fraud should be alleged.]

§ 621. The same—That the debt was for money lost at play.

Form No. 192.

[TITLE.]

The defendant answers to the complaint:

I. That the defendant and the plaintiff played together at a game of chance called . . . , for stakes, upon credit, and not for ready money; and at said games the plaintiff won . . . dollars of the defendant, which he did not pay.

II. That thereafter the defendant gave the plaintiff the note mentioned in the complaint for said money so staked and lost.

§ 622. The same—That the note was given to compound a felony.

Form No. 193.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That heretofore, on, etc., at, etc., one C. R., the son of the

said defendant, had feloniously [here designate the crime—e. g. thus: stolen, taken and carried away . . . , the property of the plaintiff].

II. That the said defendant, in order to compound and settle said felony, gave the said note; in consideration of which the plaintiff and others desisted from informing and prosecuting upon said felony.

III. That there was no other consideration for said note.

§ 623. Want of jurisdiction of the person.

Form No. 194.

[TITLE.]

The defendant answers to the complaint:

That he was at the commencement of this action, and is now, counsel of . . . , for the city of . . . , duly accredited to the President of the United States, and by him received and acknowledged as such [or otherwise].

§ 624. The same—By foreign corporation.

Form No. 195.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the defendant [foreign corporation] is a corporation created by the laws of the state of . . . [or other foreign government or country], and not by the laws of this state.

II. That the plaintiff is not a resident of this state, but resides at . . . , in the state of . . .

III. That the said [here state the facts showing that the cause of action arose without the state, and is not upon a contract made, executed, or delivered in this state].

§ 625. Want of jurisdiction of the subject.

Form No. 196.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the supposed cause of action accrued to the said plaintiff, if at all, out of the jurisdiction of this court; that is to say, at . . . , in the county of . . . , and not at . . . , in the county of . . . , or elsewhere within the jurisdiction of this court, or within the said last-named county.

CHAPTER XXV.

COUNTERCLAIM.

§ 626. Distinction between counterclaim and cross-complaint.

—A cross-complaint bears such close resemblance to a counterclaim that the effort to distinguish between them has resulted in almost numberless decisions; indeed, many of these decisions themselves seem almost irreconcilable without close study. The distinction is subtle, but none the less definite, however.

A cross-complaint, as it is employed under the reform procedure, is in its nature and object practically the counterpart of the cross-bill in equity, so far as the cross-bill sought affirmative relief. It is therefore a complaint filed by the defendant against the plaintiff, or one or more of his co-defendants. As in the case of the old cross-bill, however, the relief sought must relate to or be dependent upon the contract or transaction upon which the action is brought, or must affect the property to which the action relates.

A counterclaim, on the other hand, must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action. It must set forth—1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action; or 2. In an action arising upon contract, any other cause of action arising also upon contract, and existing upon the commencement of the action.¹

Thus it will be seen that in one respect the counterclaim is more comprehensive than the cross-complaint, while, in another view, the reverse is true. Without going into an extended discussion of this feature at this place, we may say generally that a counterclaim allows a wider range, in that it permits a defendant in an action upon contract to set up matters in no wise connected with the transaction or subject-matter set out in the original complaint; but it is narrower in its scope than the cross-complaint, in that it must show a cause of action existing only in favor of a defendant and against a plaintiff.

¹ Cal. Code Civ. Proc., § 438.

These may be said to constitute the chief distinctions between the counterclaim and the cross-complaint, distinctions which, upon closer study, will be seen to be vital. An extended discussion of the two pleadings will disclose other distinctions subsidiary to but no less important than the main ones pointed out.

§ 627. **Essential features of the counterclaim.**—The counterclaim provided for in most of the codes must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action.² The term is of recent origin, and seems to be intended to take the place of both “set-off” and “recoupment,” both of which terms are generally unknown to the codes. A set-off was unknown to the common-law, according to which mutual debts were distinct and extinguishable except by actual payment or release.³ It was first provided for by statute 2, Geo. II. (c. 22), which has been generally adopted in the United States, with some few modifications. Under this statute, set-off could be resorted to only in actions of contract for the payment of money, and the matters which might be set off were mutual liquidated debts or damages. The statute in regard to set-off referred only to mutual, unconnected debts; for at common law, when the nature of the employment, transaction, or dealings necessarily constitutes an account consisting of payments, debts, and credits, the balance only is considered to be the debt, and, therefore, in an action in such cases it was not necessary either to plead or to give notice of set-off.⁴ The whole theory of the law with reference to counterclaims is to prevent multiplicity of suits.

Set-off differs from recoupment, in that it is more properly applicable to demands independent in their nature and origin, while recoupment implies a cutting down of a demand by deductions arising out of the same transaction; and “counterclaim” includes both recoupment and set-off.⁵ Recoupment may be said to be somewhat similar in its scope to the cross-complaint, in that it is confined to matters arising out of and connected with the transaction upon which the suit is brought, has no regard to

² Cal. Code Civ. Proc., § 433; Mont. Rev. Codes, § 4184; Bliss Code Pl., §§ 367, 390.

³ *Otty v. Ferguson*, 1 Rawle, 293.

⁴ *Green v. Farmer*, 4 Burr. 2221.

⁵ *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 35 Pac. 876; *Haskins v. Jordan*, 123 Cal. 161, 56 Pac. 786; *Stadler v. First Nat. Bank*, 22 Mont. 210, 70 Am. St. Rep. 592, 56 Pac. 111.

whether such matters are liquidated or unliquidated, and is not created by statute, but by the common law.⁶ A claim of recoupment itself springs out of the contract or transaction on which the action is founded.⁷ And when the plaintiff counts upon a contract which the defendant denies altogether, the doctrine of recoupment has no application.⁸

A counterclaim is a cause of action in which a several judgment might be obtained against a plaintiff in favor of a defendant in an action arising out of the transaction set forth in the complaint or connected with the subject of the action.⁹ And in an action arising upon contract it is any other cause of action arising also upon contract and existing at the commencement of the action.¹⁰ When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal one another, and neither be deprived of the benefit thereof by the assignment or death of the other.¹¹ The statute relates to the situation of the parties at the commencement of the action; and the death of one of the parties to the demand, though such death occur before the maturity of the demand, will not change the relative rights of the parties in pleading a counterclaim or in compensating cross-demands, so far as they equal each other; provided, the set-off be due when the action is commenced by the executor of the deceased party.¹² The demand of a counterclaim must operate in whole or in part to defeat the plaintiff's right of recovery in the action.¹³

§ 628. Must be an existing claim.—It is essential to the validity of a counterclaim that it be one existing in favor of the defendant and against the plaintiff;¹⁴ and it must exist at the time of the

⁶ Ward v. Fellers, 3 Mich. 281; Greene's New Pr. 229.

⁷ Washington v. Timberlake, 74 Ala. 259.

⁸ Morehouse v. Baker, 48 Mich. 335, 12 N. W. 170.

⁹ Richardson v. Penny, 10 Okla. 32, 61 Pac. 584; Story v. Story, 100 Cal. 30, 34 Pac. 671; Marks v. Tompkins, 7 Utah, 421, 27 Pac. 6; Allison v. Shinner, 7 Okla. 272, 54 Pac. 471.

¹⁰ Cal. Code Civ. Proc., § 438;

Mont. Rev. Codes, § 4184; Miller v. Hunt, 6 Idaho, 523, 57 Pac. 315; Schuster v. Thompson, 6 Dak. 10, 50 N. W. 125; McGuire v. Edsall, 14 Mont. 359, 36 Pac. 453.

¹¹ Cal. Code Civ. Proc., § 440.

¹² Ainsworth v. Bank of California, 119 Cal. 470, 63 Am. St. Rep. 135, 51 Pac. 952, 39 L. R. A. 686.

¹³ National Fire Ins. Co. v. McKay, 21 N. Y. 191; Mattoon v. Baker, 24 How. Pr. 329.

¹⁴ King v. Wise, 43 Cal. 628.

action,¹⁵ and at the time belong to the defendant.¹⁶ Whatever the basis of the defendant's claim, it must be one *in presenti*, and not one to arise *in futuro*.¹⁷ It follows that items of counterclaim accruing after the commencement of the action cannot be given in the evidence.¹⁸

Where an answer setting up counterclaims in the nature of a promissory note and for work and labor performed failed to show when the note was due or the work and labor performed, it was held that it did not appear that the counterclaims relied on existed in favor of the defendant at the commencement of the action, and that a demurrer on the ground that there was a failure to state facts sufficient to constitute good counterclaims was properly sustained.¹⁹

It is immaterial that a cause for counterclaim may have existed before the time of commencement of the suit; it must appear that the counterclaim is still due and subsisting.²⁰ If a claim is barred at the time of the commencement of the action, such claim cannot be asserted by counterclaim.²¹ So far, however, as a counterclaim which exists at the time of the commencement of the action is concerned, the filing of the complaint suspends the running of the statute of limitations, although, if standing alone, the statute would have run against it before the answer was filed.²²

§ 629. **Assignment of ground of claim.**—A debtor may fortify himself against the coming suit of his creditor by the purchase of any cross-demands which may be counterclaimed when that suit shall come, and between them an assignee has no standing until he shall have given notice of the assignment.²³ And one who buys a set-off to a claim against him without notice of a prior assignment of such claim may use the set-off as a defense, as though the

¹⁵ *Gannon v. Dougherty*, 41 Cal. 661; *Wood v. Brush*, 72 Cal. 227, 13 Pac. 627; *McGuire v. Edsall*, 14 Mont. 359, 36 Pac. 453.

¹⁶ *McGuire v. Lamb*, 2 Idaho, 378, 17 Pac. 749.

¹⁷ *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; *Lyon v. Petty*, 65 Cal. 325, 4 Pac. 103.

¹⁸ *Paige v. Carter*, 64 Cal. 489, 2 Pac. 260; *Collins v. Driscoll*, 69 Cal. 551, 11 Pac. 244.

¹⁹ *Gannon v. Dougherty*, 41 Cal. 661.

²⁰ *Gannon v. Dougherty*, 41 Cal. 661; *McGuire v. Lamb*, 2 Idaho, 378, 17 Pac. 749; *Rumsey v. Robinson*, 58 Iowa, 225, 12 N. W. 243.

²¹ *Lyon v. Petty*, 65 Cal. 325, 4 Pac. 103; *Collins v. Driscoll*, 69 Cal. 551, 11 Pac. 244.

²² *Perkins v. West Coast Lumber Co.*, 120 Cal. 28, 52 Pac. 118; *McDougald v. Hulet*, 132 Cal. 161, 64 Pac. 278.

²³ *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 35 Pac. 876.

claim against him had not been assigned.²⁴ But a defendant cannot avail himself, by way of set-off, of a demand against the plaintiff which he has purchased for the purpose of so using it after the commencement of the plaintiff's action.²⁵ A debtor may purchase cross-demands against a partnership and set them up as a defense against a debt due by him to the partnership.²⁶ And the fact that the defendant gave verbal directions to a member of a firm which was indebted to him for his share of certain profits, to apply such profits to the payment of a debt due from defendant to such member and of a note due to plaintiff's assignor, also a member of the firm, does not affect the right of defendant to set off his share of such profits against a claim prosecuted against him by an assignee of the note who purchased after maturity and after the right to such set-off had accrued, nothing having ever been done in pursuance of the defendant's verbal directions.²⁷

§ 630. **Mutuality of demands.**—In order to be set off, demands must be mutual as between the parties of the action;²⁸ that is, they must be due to and from the same persons in the same capacity.²⁹ Thus, in an action against joint defendants, an answer setting up a counterclaim which does not appear to be available to all of the defendants is demurrable.³⁰ A separate demand cannot be set off against a joint demand, nor can a joint debt be set off against a separate debt.³¹ The individual indebtedness of a partnership cannot be set off against the debt of the firm, except by special contract or consent of all the partners.³² But a surety jointly bound with his principal may offset against such joint indebtedness his individual claim against the creditor in such joint indebtedness, where both the creditor and the principal are insolvent.³³ Where, however, two defendants are sued on a joint

²⁴ *Clark v. Sullivan*, 3 N. Dak. 280, 55 N. W. 733.

²⁵ *Todd v. Crutsinger*, 30 Mo. App. 145.

²⁶ *Naglee v. Minturn*, 8 Cal. 540; *Marye v. Jones*, 9 Cal. 335.

²⁷ *Davies v. Stevenson*, 59 Kan. 648, 54 Pac. 679.

²⁸ *Woolman v. Capital National Bank*, 2 Colo. App. 454, 31 Pac. 235; *Murphy v. Colton*, 4 Okla. 181, 44 Pac. 208.

²⁹ *Murray v. Toland*, 3 Johns. Ch. 569.

³⁰ *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; *Stockton etc. Soc. v. Giddings*, 96 Cal. 90, 31 Am. St. Rep. 186, 30 Pac. 1016, 21 L. R. A. 406.

³¹ *Burgwin v. Babcock*, 11 Ill. 28; *Ingols v. Plimpton*, 10 Colo. 535, 16 Pac. 155.

³² *Morganthau v. King*, 15 Colo. 413, 24 Pac. 1048.

³³ *Clark v. Sullivan*, 2 N. Dak. 103, 49 N. W. 416, 13 L. R. A. 233.

indebtedness, an individual claim due to one of them cannot be set up as a counterclaim without alleging that the plaintiff is insolvent.³⁴ And although there exists an agreement to allow the set-off of an individual claim to one of several parties who are jointly liable, such agreement must be alleged.³⁵

In an action for the partition of lands, the defendants may set off moneys paid out at the request of the plaintiffs in defending the title; and if necessary improvements were made upon the lands by the defendants, such improvements may be equitably considered in connection with the claim for use and occupation, the one offsetting the other.³⁶

§ 631. Unliquidated demands.—A counterclaim is shown to be more comprehensive than the old set-off, in that the latter could not be resorted to in an action to recover unliquidated damages,—that is, damages which could not be ascertained by mere calculation without the intervention of a jury.³⁷ But in order to be available as a counterclaim, however, damages need not be liquidated. The code provision that a counterclaim may embrace a cause of action arising out of the transaction set forth in the complaint or connected with the subject of the action, or in an action upon contract, any other cause of action arising also upon contract is all-inclusive, and is immaterial that the cause of action may be for an unliquidated debt. Claims not liquidated and debts absolutely due, although payable in the future, are to be included.³⁸ While, however, a counterclaim, whether filed in a legal or in an equitable action, may consist of a demand for either legal or equitable relief, or both,³⁹ it is not to be concluded from the above that all unliquidated demands may be thus counterclaimed for. For instance, in an action on a promissory note the defendant cannot set up by way of counterclaim any

³⁴ Collier v. Ervin, 3 Mont. 142.

³⁵ Davis v. Notware, 13 Nev. 421.

³⁶ Blackwell v. McLean, 9 Wash. 301, 37 Pac. 317.

³⁷ Collins v. Groseclose, 40 Ind. 414; Tracey v. Grant, 137 Mass. 181.

³⁸ Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Wheelock v. Pacific Pneumatic Gas Co., 51 Cal. 226; Ainsworth v. Bank of California, 119 Cal. 476, 63 Am. St. Rep. 135, 51 Pac. 952, 39 L. R. A. 868; Sheafe v. Hastie, 16 Wash. 563, 48 Pac. 246;

Corlett v. Mutual Benefit Life Ins. Co., 60 Kan. 134, 55 Pac. 844. Under the early decisions in California with reference to set-off, it was necessary that the demand be liquidated. Ricketson v. Richardson, 19 Cal. 330; Hook v. White, 36 Cal. 299.

³⁹ Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881; Wyman v. Herard, 9 Okla. 64, 59 Pac. 1009; Dunham v. Travis, 25 Utah, 65, 69 Pac. 468.

cause of action in his favor against a plaintiff and other persons, arising out of a partnership relation existing between them, until an accounting has been had and a balance struck.⁴⁰ In Oregon, an unliquidated demand triable before a jury, and bearing no relation to the subject of the suit, cannot be used as a set-off to a suit in equity;⁴¹ and in Oklahoma, an unadjudicated sum due on an open account cannot be set off against a judgment.⁴²

§ 632. **Equitable defenses and set-off.**—The defendant may set up an equitable defense in an action at law; but he relies on an equitable right of action as a defense, and must plead the same as fully as if he was bringing an action in equity.⁴³ As already stated, equitable as well as legal demands may be set up as counterclaims.⁴⁴ Thus a mistake in a contract and a claim to have it reformed may be set up as a counterclaim.⁴⁵ But even when an equitable defense is made to an action at law, jurisdiction is to be determined by presuming everything to be of common-law cognizance until the necessity of making equity jurisdiction appears.⁴⁶ In cases of an equitable nature, substantially the same limitation is applied as in respect to filing cross-bills in chancery, which were allowed only as to matters in the original bill.⁴⁷ Thus matters of purely legal cognizance in no way connected with the suit, and not arising out of the transaction upon which the plaintiff bases his claim for relief, cannot be pleaded as counterclaims in a suit in equity.⁴⁸

A court of equity will compel an equitable set-off when the parties have mutual demands against each other;⁴⁹ and this, as between the real parties in interest, regardless of any nominal parties.⁵⁰ But equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment; and if the judgment be partnership assets, the individual creditor

⁴⁰ *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627.

⁴¹ *Burrage v. Bonanza Gold Mining Co.*, 12 Or. 169, 6 Pac. 766.

⁴² *Colcord v. Conger*, 10 Okla. 458, 62 Pac. 276.

⁴³ *Carpentier v. City of Oakland*, 30 Cal. 439; *Bruck v. Tucker*, 42 Cal. 346; *Miller v. Fulton*, 47 Cal. 147; *Swasey v. Adair*, 88 Cal. 182, 25 Pac. 1119; *Hatcher v. Briggs*, 6 Or. 31; *Dale v. Hunneman*, 12 Neb. 224, 11 N. W. 711.

⁴⁴ *Currie v. Cowles*, 6 Bosw. 452; *Lemon v. Trull*, 13 How. Pr. 248.

⁴⁵ *Wemple v. Stewart*, 22 Barb. 154.

⁴⁶ *Brown v. Hazard*, 2 Wash. T. 464, 8 Pac. 494.

⁴⁷ *Burns v. Nevins*, 27 Barb. 493.

⁴⁸ *Sears v. Martin*, 22 Or. 311, 29 Pac. 890.

⁴⁹ *Russell v. Conway*, 11 Cal. 93; *Hobbs v. Duff*, 23 Cal. 627; *Burton v. Willin*, 6 Houst. 522, 22 Am. St. Rep. 363.

⁵⁰ *Hobbs v. Duff*, 23 Cal. 627, 629.

can make no claim to any part of it until adjustment of the firm accounts.⁵¹

§ 633. "Same transaction."—The first class of demands contemplated by the codes as the subjects of counterclaim are those arising out of the same transaction as that set forth in the complaint as the foundation of the plaintiff's claim.⁵² "What constitutes the same transaction" is often the subject of much difficulty. The term, as employed in the statute, is broader than the term "contract," and authorizes matters to be counterclaimed which could not be counterclaimed as arising out of the *contract* sued upon by the plaintiff.⁵³ This is obvious, for, while a contract is a transaction, a transaction is not necessarily a contract.⁵⁴ One of the definitions of the term "transaction" is, "a matter or affair either completed or in course of completion." Mr. Pomeroy⁵⁵ defines the term as, "That combination of acts and events, circumstances and defaults which viewed in one aspect results in the plaintiff's right of action, and viewed in another aspect results in the defendant's right of action. . . . As these two opposing rights cannot be the same, it follows that there may be, and generally must be, acts, facts, events, and defaults in the transaction as a whole which do not enter into each cause of action." Every transaction is more or less complex, consisting of various facts and acts done by the respective parties, and it frequently happens that one or more of these acts, if viewed by itself, may be such a violation of duty as to give to the other a right of action; but the obligation thus created may be so counterbalanced by other matters growing out of the same transaction that no compensation ought to be made therefor. In such a case, the rights of the one are so dependent upon the rights of the other that simple equity requires that the respective causes of action in behalf of each be adjusted in a single suit.⁵⁶

Undoubtedly the legislature, in drawing and adopting the code provision authorizing counterclaims on demands arising out of

⁵¹ Collins v. Butler, 14 Cal. 227.

⁵² Cal. Code Civ. Proc., § 438; Story etc. Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671; Warren v. Hall, 20 Colo. 508, 38 Pac. 767; Esbensen v. Hover, 3 Colo. App. 467, 33 Pac. 1008; Murphy v. Russell, 8 Idaho, 151, 67 Pac. 427.

⁵³ Wyman v. Herard, 9 Okla. 64, 59 Pac. 1009; Loewenberg v. Rosenthal, 18 Or. 178, 22 Pac. 601.

⁵⁴ Roberts v. Donovan, 70 Cal. 113, 9 Pac. 180, 11 Pac. 599.

⁵⁵ Remedies and Remedial Rights, § 774.

⁵⁶ Story etc. Commercial Co. v. Story, 100 Cal. 35, 34 Pac. 671.

the same transaction, had in mind the doctrine of recoupment and all others, legal and equitable.⁵⁷ It follows that the transaction is not necessarily limited by the facts stated in the complaint. The defendant in his counterclaim may set up new facts, and show the entire transaction and counterclaim upon that state of facts as the transaction upon which the plaintiff's claim is really founded,⁵⁸ the other facts in the transaction being so connected with those set forth as to defeat their legal effect. The defendant is not precluded from setting them up by reason of the form which the plaintiff may have chosen for presenting his own side of the case.⁵⁹

§ 634. "Subject of the action."—The code provision that causes of action connected with the subject of the action may be counterclaimed has not always been fully understood; a great deal of confusion has resulted from the failure of pleaders to comprehend the scope of the term "subject of the action." When once the meaning of this term is fixed, however, there should be little difficulty in determining whether a particular demand is a proper subject of counterclaim under this part of the statute.

It has been said that the subject of the action is a claim asserted by the plaintiff.⁶⁰ But while this is strictly true in one sense, it limits rather too much the right of the defendant in determining the propriety of his counterclaim. Almost equally misleading is the definition of the subject of the action as the facts constituting the cause of action.⁶¹ The term "subject of action" is broader than the term "cause of action."⁶² For this purpose, the term should be construed to refer to the origin and ground of the plaintiff's right to recover rather than to the thing itself about which the controversy has arisen.⁶³ But even within this definition the subject may be the property which is sought to be re-

⁵⁷ Pomeroy's Remedies and Remedial Rights, § 802; Brosnan v. Kramer, 135 Cal. 40, 66 Pac. 979.

⁵⁸ Xenia Branch Bank v. Lee, 7 Abb. Pr. 372; Ritchie v. Hayward, 71 Mo. 560; Judah v. Trustees, 16 Ind. 60.

⁵⁹ Story etc. Commercial Co. v. Story, 100 Cal. 36, 34 Pac. 671; Gordon v. Bruner, 49 Mo. 570; Thompson v. Kessel, 30 N. Y. 383.

⁶⁰ Hartzell v. Vigen, 6 N. Dak.

117, 66 Am. St. Rep. 594, 69 N. W. 203, 35 L. R. A. 451.

⁶¹ Chamboret v. Cagney, 2 Sweeny, 378; Rothschild v. Whitman, 132 N. Y. 472, 30 N. E. 858; Mulberger v. Koenig, 62 Wis. 564, N. W. 745.

⁶² Deagan v. Weeks, 67 App. Div. 412, 73 N. Y. Supp. 641.

⁶³ O'Brien v. Garniss, 25 Hun, 446; Edgerton v. Page, 20 N. Y. 281; Collier v. Ervin, 3 Mont. 142; Burrage

covered or alleged to be injured.⁶⁴ Thus, in an action to set aside a deed, the real property involved is the subject of the action;⁶⁵ and in replevin the subject-matter of the action is the property described in the complaint;⁶⁶ and in conversion the property alleged to be converted is the subject of the action.⁶⁷ But in an action to enforce a vendor's lien, the debt, and not the lien, is the subject of the action;⁶⁸ and in ejectment the subject-matter of the action is the right of possession alleged.⁶⁹ The subject of the action may be the right which is asserted or which is sought to be enforced in the plaintiff's complaint.⁷⁰ Thus, in an action of trover to cover bills of exchange, the subject of the action is either the right to the possession of the bills or the bills themselves.⁷¹ In a suit against a contractor and the owner of a building to enforce a lien for materials, the subject of the action as between the plaintiff and the contractor is the material furnished, but as between the plaintiff and the owner it is the lien asserted against the building.⁷²

The connection of the cause of action asserted in the counterclaim and the subject of the action must be immediate and direct, and such as may be assumed to have been contemplated by the parties in their dealings with each other.⁷³ The fact that the parties are the same, or that the transactions were had approximately at the same time, is not sufficient.⁷⁴ A counterclaim may properly embrace a violation of the same or reciprocal rights,⁷⁵ or a distinct breach of the contract sued upon,⁷⁶ or of contract provisions collateral to but inseparably connected with the con-

v. Bonanza Gold etc. Mining Co., 12 Or. 169, 6 Pac. 766.

⁶⁴ Edgerton v. Page, 20 N. Y. 281; New York v. Parker Vein S. S. Co., 12 Abb. Pr. 300; Davis v. Davis, 9 Mont. 267, 23 Pac. 715; Wyman v. Herard, 9 Okla. 35, 59 Pac. 1009; First Nat. Bank v. Parker, 28 Wash. 234, 92 Am. St. Rep. 828, 68 Pac. 756.

⁶⁵ Barnes v. Gilmore, 6 N. Y. Civ. Proc. Rep. 286.

⁶⁶ Lovensohn v. Ward, 45 Cal. 8.

⁶⁷ Carpenter v. Manhattan Life Ins. Co., 93 N. Y. 552.

⁶⁸ Borst v. Corey, 15 N. Y. 505.

⁶⁹ Dinan v. Coneys, 143 N. Y. 544, 38 N. E. 715.

⁷⁰ Pomeroy's Remedies and Remedial Rights, § 775.

⁷¹ Xenia Branch Bank v. Lee, 7 Abb. Pr. 396.

⁷² McAdow v. Ross, 53 Mo. 204.

⁷³ Pomeroy's Remedies and Remedial Rights, § 794; O'Brien v. Garniss, 25 Hun, 446; Braithwaite v. Akin, 3 N. Dak. 365, 56 N. W. 133; Blue v. Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655; Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881.

⁷⁴ Burrage v. Bonanza etc. Mining Co., 12 Or. 169, 6 Pac. 766; Standley v. Northwestern Mutual Life Ins. Co., 95 Ind. 254.

⁷⁵ Snow v. Holmes, 71 Cal. 142, 11 Pac. 856; Vose v. Galpen, 18 Abb. Pr. 96; Dale v. Hall, 64 Ark. 221, 41 S. W. 761.

⁷⁶ Wheelock v. Pacific Pneumatic

tract set out in the plaintiff's complaint;⁷⁷ or it may embrace a claim to the same thing for which the plaintiff sues.⁷⁸ The connection between the defendant's cause of counterclaim and the plaintiff's cause of action must, however, be a legal connection, and where the causes exist independently of each other, and the only connection between them is that one caused the other,⁷⁹ or where the demands arise out of transactions concerning the same property, but are had at different times and under different circumstances,⁸⁰ there is no such legal connection between them as will furnish a basis for counterclaim.

§ 635. **Tort as subject of counterclaim.**—The fact that torts are so infrequently set out as the cause of counterclaim has doubtless led to the incorrect general statement that matters *ex delicto* cannot in general be pleaded to matters *ex contractu*, and *vice versa*.⁸¹ There is no reason why a cause of action in tort or upon contract may not be counterclaimed in a suit either upon tort or contract, if both causes of action arise out of the same transaction, or are connected with the subject of the action.⁸² In some cases it has been held that counterclaims involving torts are improper;⁸³ and this is especially true in cases which seem to involve the assumption that contrary causes of action for tort cannot be said to arise out of the same transaction,⁸⁴ or that a personal tort does not constitute a transaction.⁸⁵ Of course, distinct torts cannot

Gas Co., 51 Cal. 223; Mills v. Rosenbaum, 103 Ind. 152, 2 N. E. 313.

⁷⁷ Mullendore v. Scott, 45 Ind. 113; Howe Machine Co. v. Reber, 66 Ind. 498.

⁷⁸ Gossard v. Ferguson, 54 Ind. 520; Hampson v. Fall, 64 Ind. 382; Allison v. Shinner, 7 Okla. 272, 54 Pac. 472; Driver v. Salt Lake etc. Co., 22 Utah, 143, 61 Pac. 733.

⁷⁹ Wrege v. Jones, 13 N. Dak. 267, 112 Am. St. Rep. 679, 100 N. W. 705; Slayback v. Jones, 9 Ind. 470; Blue v. Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655; Fellerman v. Dolan, 7 Abb. Pr. 395, note.

⁸⁰ Bradhurst v. Townsend, 11 Hun, 104; Meeks v. Berry, 51 Hun, 640, 3 N. Y. Supp. 840; Akerly v. Vilas, 21 Wis. 88.

⁸¹ Estee's Pl. & Pr., § 3367a;

Braithwaite v. Akin, 3 N. Dak. 365, 56 N. W. 133; Davis v. Frederick, 6 Mont. 301, 12 Pac. 664.

⁸² Le Clare v. Thibault, 41 Or. 604, 69 Pac. 552; Story etc. Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671.

⁸³ Ebensen v. Hover, 3 Colo. App. 467, 33 Pac. 1008; Watts v. Gantt, 42 Neb. 869, 61 N. W. 104; Braithwaite v. Akin, 3 N. Dak. 365, 56 N. W. 133.

⁸⁴ Macdougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98; Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881; Loewenberg v. Rosenthal, 18 Or. 178, 22 Pac. 601.

⁸⁵ Macdougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98; Waugenheim v. Graham, 39 Cal. 169; Marks v. Tompkins, 7 Utah, 421, 27 Pac. 6.

be the subject of counterclaim;⁸⁶ but cases may and do arise where a counterclaim for tort is proper in an action for tort, upon the ground that it arises out of the same transaction upon which the plaintiff's claim is based.⁸⁷

In an action for an assault the defendant may plead as a counterclaim that the assault alleged was in fact upon him by the plaintiff, instead of upon the plaintiff by him; in such case the transaction which is the basis of each claim is necessarily the same.⁸⁸ But the mere fact that one tort may be consequent upon another does not connect them as subjects of the action.⁸⁹ Thus, in an action for assault and battery committed upon a servant, damages for wrongful conduct by the servant during his employment, and for failure to leave when discharged, are not properly subjects of counterclaim.⁹⁰ Nor does the statute authorize one slander to be set up against another; although both are uttered at the same time and place, and in the same conversation, each slander constitutes a separate transaction. In such a case there is no single transaction which, "viewed in one aspect," gives plaintiff's right of action, and, in another aspect, defendant's right of action.⁹¹

A counterclaim in an action for tort which is founded on the converse of the same cause of action as that alleged by the plaintiff, is proper; e. g. mutual charges of negligence as the cause of a fire.⁹² But in an action against a railway company for killing stock damages cannot be counterclaimed for the wrecking of the train by reason of plaintiff's neglect to keep his stock from the track.⁹³ Nor is it permissible in an action for unlawful detainer to set up a counterclaim for damages on account of loss of business, for deterioration in the value of furni-

⁸⁶ *Wigmore v. Buell*, 116 Cal. 97, 58 Am. St. Rep. 140, 47 Pac. 927, 38 L. R. A. 71; *De Martin v. Albert*, 68 Cal. 277, 9 Pac. 157; *Misceer v. O'Shea*, 37 Or. 231, 82 Am. St. Rep. 751, 62 Pac. 491.

⁸⁷ *Story etc. Commercial Co. v. Story*, 100 Cal. 30, 34 Pac. 671.

⁸⁸ *Deagan v. Weeks*, 67 App. Div. 410, 73 N. Y. Supp. 641; *Gutzman v. Clancy*, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744.

⁸⁹ *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98; *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41.

⁹⁰ *Barr v. Post*, 56 Neb. 698, 77 N. W. 123.

⁹¹ *Wrege v. Jones*, 13 N. Dak. 267, 112 Am. St. Rep. 679, 100 N. W. 705; *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98.

⁹² *Heigle v. Willis*, 50 Hun, 588, 3 N. Y. Supp. 497; *Pacific Express Co. v. Malin*, 132 U. S. 531, 33 L. Ed. 450, 10 Sup. Ct. 166; *McArthur v. Green Bay Canal Co.*, 34 Wis. 139.

⁹³ *Lake Shore etc. R. R. Co. v. Van Auken*, 1 Ind. App. 492, 27 N. E. 119; *Louisville etc. R. R. Co. v. Simmons*, 85 Ky. 151, 3 S. W. 10.

ture purchased for use on the leased premises, and for repairs which are alleged as the result of acts on the part of the plaintiff.⁹⁴ But in an action for waste the tenant may counterclaim for the value of personal property which he placed on the premises during the tenancy, and which the landlord has converted.⁹⁵

§ 636. **Contracts and torts.**—Cases are frequently found which contain the broad general statement that a counterclaim cannot set up a tort in an action on contract;⁹⁶ and in some cases the courts have even gone so far as to hold that a tort can never be the subject of a counterclaim.⁹⁷ In nearly all of these cases, however, it will be found that such a statement was wholly unnecessary, because of the fact that the matter counterclaimed did not arise out of the transaction set forth in the plaintiff's complaint, or was not connected with the subject of the action. It goes without saying, that in an action on contract a counterclaim for a tort cannot be set up when the tort is not connected with the subject-matter of the plaintiff's claim or involved in the original transaction.⁹⁸ There may be cases, however, where the tort may be waived and recovery sought upon the implied contract. Such a case falls within the second subdivision of the statute limiting the subjects of counterclaim, and the counterclaim becomes one for a contract in an action on a contract.⁹⁹ Whenever the facts are such that the plaintiff may elect to sue either in contract or in tort, if he sues on contract, and the defendant is entitled to counterclaim for the breach of a contract, it follows that he may set up the same counterclaim when the suit is in tort,¹⁰⁰ for, as has already been said, the mere form in

⁹⁴ *Ralph v. Lomer*, 3 Wash. 402, 28 Pac. 760.

⁹⁵ *Gilbert v. Loberg*, 86 Wis. 661, 57 N. W. 982.

⁹⁶ *Poly v. Williams*, 101 Cal. 650, 36 Pac. 102; *Pattison v. Richards*, 22 Barb. 143; *Hess v. Young*, 59 Ind. 379; *People v. Dennison*, 84 N. Y. 272.

⁹⁷ *Harris v. Randolph County Bank*, 157 Ind. 120, 60 N. E. 1025; *Blue v. Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655; *Gantt v. Duffy*, 71 Mo. App. 91; *Barhyte v. Hughes*, 33 Barb. 320; *Avery v. Dougherty*, 102 Ind. 446, 52 Am. Rep. 680, 2 N. E. 123.

⁹⁸ *Jeffreys v. Hancock*, 57 Cal. 646; *Ebensen v. Hover*, 3 Colo. App. 467, 33 Pac. 1008; *Collier v. Ervin*, 3 Mont. 142; *Braithwaite v. Akin*, 3 N. Dak. 365, 56 N. W. 133.

⁹⁹ *Poly v. Williams*, 101 Cal. 648, 36 Pac. 102; *Braithwaite v. Akin*, 3 N. Dak. 365, 56 N. W. 133; *Harris v. Simpson*, 50 Ark. 422, 8 S. W. 177.

¹⁰⁰ *Harris v. Curet*, 9 Abb. Pr. (N. S.) 199; *Gopen v. Crawford*, 53 How. Pr. 278; *Thompson v. Kessel*, 30 N. Y. 383; *Austin v. Rawdon*, 44 N. Y. 63; *Folsom v. Carli*, 6 Minn. 420, 80 Am. Dec. 456; *St. Louis Public Schools v. Broadway Sav. Bank*, 84 Mo. 56.

which the plaintiff may set out his cause of action cannot determine the right of the defendant to set forth his counterclaim in his answer. If the facts in the transaction are so connected with those set forth as to defeat their legal effect, the defendant is not precluded from setting them up by reason of the form which the plaintiff may have chosen for presenting his own side of the case.¹⁰¹ On this theory, a counterclaim may frequently be based upon a breach of contract, although such breach amounts also to a tort.¹⁰² In Oregon, the rule is that a tort cannot be pleaded as a counterclaim in an action on a contract unless it constitutes a breach of the contract.¹⁰³ A counterclaim for fraud in inducing a contract arises out of the transaction set forth in the complaint in an action on the contract;¹⁰⁴ and damages for the negligent performance of a contract may be counterclaimed in an action to recover damages for a breach of the contract;¹⁰⁵ and conversely, in an action for the negligent performance of a contract, the defendant may counterclaim a demand for services in performing the contract.¹⁰⁶ Thus, in an action upon a contract for money expended by a tenant in repairing a building, the owner may defend by showing that the building was burned in consequence of the carelessness of the tenant;¹⁰⁷ and in an action for rent the defendant may counterclaim for damages for failure to repair.¹⁰⁸ A fraudulent representation as to the number of acres of land leased is a proper subject of counterclaim to reduce the stipulated rent by the amount of damage actually sustained.¹⁰⁹

§ 637. Construction of statute.—Where the question is whether the demand counterclaimed arises out of the transaction set out in the plaintiff's complaint, or is connected with the subject-matter of the suit, the entire transaction between the parties, and the rights resulting therefrom, are to be determined by the court

¹⁰¹ Story etc. Commercial Co. v. Story, 100 Cal. 35, 34 Pac. 671.

¹⁰² Schwinger v. Raymond, 83 N. Y. 192, 38 Am. Rep. 415; Thompson v. Kessel, 30 N. Y. 383; Le Clare v. Thibault, 41 Or. 601, 69 Pac. 552.

¹⁰³ Zigler v. McClellan, 15 Or. 499, 16 Pac. 179.

¹⁰⁴ Warren v. Hall, 20 Colo. 508, 38 Pac. 767.

¹⁰⁵ Wheelock v. Pacific Pneumatic Gas Co., 51 Cal. 223; Stoddard v. Treadwell, 26 Cal. 294; Zigler v.

McClellan, 15 Or. 499, 16 Pac. 179; Niver v. Nash, 7 Wash. 558, 35 Pac. 380; Farmers' etc. Nat. Bank v. Woodell, 38 Or. 294, 61 Pac. 837, 65 Pac. 520.

¹⁰⁶ Griffin v. Moore, 52 Ind. 295; Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881.

¹⁰⁷ Zigler v. McClellan, 15 Or. 499, 16 Pac. 179.

¹⁰⁸ Cook v. Soule, 56 N. Y. 420.

¹⁰⁹ Holton v. Noble, 83 Cal. 8, 23 Pac. 58.

upon the proof relative to the transaction, and consistently with the case as presented by both parties.¹¹⁰ In Oregon, it is held that a counterclaim is allowable only when the subject thereof arises out of, and is legally connected with, the contract which is the subject of the original complaint; but at the same time the court held that the statute ought to be liberally construed, to the end that all controversies coming fairly within the terms of the statute may be settled in a single action between the parties.¹¹¹

§ 638. Counterclaims arising upon contract.—The application of the second subdivision of the statute—viz. counterclaims upon contracts in actions upon contracts—seldom presents any difficulty, for the general rule is that in actions upon contracts any other cause of action arising also upon contract and existing at the commencement of the action may be set up in a counterclaim.¹¹² It is the universal rule that a defendant may counterclaim on a demand arising out of the same contract sued upon by the plaintiff;¹¹³ and most of the codes contain a provision, similar to that in California, permitting counterclaims for causes of action arising out of distinct contracts.¹¹⁴ In some states, however, the right to counterclaim is limited to demands arising out of contract in suit.¹¹⁵ In Oklahoma, however, it is held not to be necessary that a counterclaim be founded or arise out of the contract set forth in a petition, if it arises out of the transaction or is connected with the subject of the action.¹¹⁶

The chief difficulty under this subdivision, forms of action being abolished by the codes, is to determine whether a particular de-

¹¹⁰ *Story etc. Commercial Co. v. Story*, 100 Cal. 30, 34 Pac. 671; *Carpen-ter v. Manhattan Life Ins. Co.*, 93 N. Y. 552.

¹¹¹ *Wait v. Wheeler etc. Mfg. Co.*, 23 Or. 298, 31 Pac. 661.

¹¹² Cal. Code Civ. Proc., § 438.

¹¹³ *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278; *Allison v. Shinner*, 7 Okla. 272, 54 Pac. 471; *Wait v. Wheeler etc. Mfg. Co.*, 23 Or. 297, 31 Pac. 661; *Le Clare v. Thibault*, 41 Or. 601, 69 Pac. 552; *Hofius v. Stimson Mill Co.*, 21 Wash. 113, 57 Pac. 342.

¹¹⁴ *Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684; *Arapahoe County v. Denver*, 30 Colo. 13, 69 Pac. 586;

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Miller v. Hunt, 6 Idaho, 523, 57 Pac. 315; *Orr v. Gerrold*, 8 Kan. App. 441, 57 Pac. 48; *Driver v. Salt Lake etc. Co.*, 22 Utah, 143, 61 Pac. 733; *Davis v. Frederick*, 6 Mont. 300, 12 Pac. 664; *Foulks v. Rhodes*, 12 Nev. 225; *Braithwaite v. Akin*, 3 N. Dak. 365, 56 N. W. 133; *Sheafe v. Hastie*, 16 Wash. 563, 48 Pac. 246; *Shelton v. Conant*, 10 Wash. 193, 38 Pac. 1013.

¹¹⁵ *Bloch Queensware Co. v. Metzger*, 70 Ark. 232, 65 S. W. 929; *Citizens' Bank v. Carey*, 2 Ind. Ter. 84, 48 S. W. 1012; *Allison v. Shinner*, 7 Okla. 272, 54 Pac. 471.

¹¹⁶ *Wyman v. Herard*, 9 Okla. 35, 59 Pac. 1009.

mand arises on contract or from a tort. The following rule has been laid down for a test in such cases: "The test by which to determine whether a particular demand arises on contract within the meaning of the statute of counterclaims is this: if the demand could have been redressed at common law by any of the forms of action which might be resorted to to recover damages for breaches of contract, then it is the proper subject of a counterclaim under this provision, otherwise not."¹¹⁷

If the plaintiff's cause of action is for damages for a breach on the part of the defendant, the defendant may interpose a counterclaim for a breach of the same contract by the plaintiff.¹¹⁸ But damages which do not legally result from the breach of the contract cannot be recovered unless they are specially claimed and set forth in the pleading. Thus damages sustained by the vendee on goods, by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him; and in an action by his vendor against him, such damages cannot be recouped, unless they are specially alleged and set forth in the answer.¹¹⁹ Damages arising from the plaintiff's breach of a contract entirely disconnected with the note in suit are a proper element of counterclaim.¹²⁰

§ 639. Jurisdiction.—It may be laid down as a general rule, that where the jurisdiction of a court is limited to a certain amount the demand of the defendant in his counterclaim must be within that amount; the entire claim of the defendant must be within the jurisdictional amount, so that, if a separate action were brought upon it, the court could take cognizance of it.¹²¹ Thus, in an action on contract in a superior court, in which the jurisdictional amount is three hundred dollars or over, a counterclaim, arising upon a different contract from that pleaded by the plaintiff, not set up as a defense, but as a ground for affirmative relief, is not within the jurisdiction of the court where the demand is less than three hundred dollars; any action thereon must be by independent suit in a justice's court.¹²² An important distinction

¹¹⁷ St. Louis Public Schools v. Broadway Savings Bank, 12 Mo. App. 108.

¹¹⁸ Dennis v. Belt, 30 Cal. 247.

¹¹⁹ Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288.

¹²⁰ Halfpenny v. Bell, 82 Pa. St. 128.

¹²¹ Maxfield v. Johnson, 30 Cal. 545; Griswold v. Pieratt, 110 Cal. 265, 42 Pac. 820.

¹²² Griswold v. Pieratt, 110 Cal. 265, 42 Pac. 820.

is to be drawn, however, between counterclaims arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, and those arising upon contract in which distinct contracts are the subject of the counterclaim; it is in the latter class of cases that this rule with reference to jurisdictional amount is to be applied. The amount of cross-demand under the first subdivision of the statute is of no moment for jurisdictional purposes; the rule is to be limited to the unconnected causes of action mentioned in the second subdivision. If a set-off less than three hundred dollars in amount, exclusive of interest, held by a defendant is pleaded by him as purely defensive matter in the reduction or extinguishment of the claim of the plaintiff in an action triable by the superior court, the court can properly entertain it.¹²³ Where, however, a defendant shows by his pleading that the plaintiff's action arising on contract is wholly unfounded, it is clear that he cannot also set up a cause of action on a different contract, as the foundation for an affirmative judgment against the plaintiff, unless his demand is within the jurisdiction of the court.¹²⁴

§ 640. **Necessity to plead.**—In the preceding sections we discussed the right to assert demands by way of counterclaim. The mode of pleading the demand is of no less importance than the right to plead it. In order to thus avail himself of a cross-demand, the defendant must plead it. Evidence to support the demand is not admissible under the general issue or under an answer containing merely a denial of the plaintiff's cause of action.¹²⁵ Such matter should be specially pleaded.¹²⁶ It is not enough to allege in general terms that the demand is a counterclaim; it must be stated specifically,¹²⁷ and, if the complaint is based on a written contract by the terms of which the plaintiff is to do certain things, and the complaint avers a faithful per-

¹²³ *Freeman v. Seitz*, 126 Cal. 293, 58 Pac. 690; *Hart v. Cooper*, 47 Cal. 77.

¹²⁴ *Griswold v. Pieratt*, 110 Cal. 266, 42 Pac. 820.

¹²⁵ *Hicks v. Green*, 9 Cal. 74; *Stoddard v. Treadwell*, 26 Cal. 294; *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280. *Matter of Coutts*, 100 Cal. 400, 34 Pac. 865;

Babcock v. Maxwell, 21 Mont. 507, 54 Pac. 943; *Union Mercantile Co. v. Jacobs*, 20 Mont. 554, 52 Pac. 357; *Parker v. Cochrane*, 11 Colo. 363, 18 Pac. 209.

¹²⁶ *Hicks v. Green*, 9 Cal. 75; *Quinn v. Smith*, 49 Cal. 165; *Reese v. Gordon*, 19 Cal. 150.

¹²⁷ *Van Valen v. Lapham*, 5 Duer, 689.

formance on his part, and the answer denies the performance, the defendant cannot under this allegation and denial introduce evidence of a counterclaim.¹²⁸ To entitle a defendant to set off a claim against a demand of the plaintiff, he must set forth in his answer the nature of the claim which he intends to set off, and when this is not done the court may properly reject evidence of the claim proposed to be set off.¹²⁹

It is enough if the answer states a cause of action against the plaintiff arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action.¹³⁰ But the pleading must show the existence of the right of counterclaim at the commencement of the action; if it does not, it is demurrable.¹³¹ Thus a counterclaim which fails to allege that the debt existed at the commencement of the action, but alleges that it is now due, is bad, and a demurrer thereto is properly sustained.¹³² It is error for the court to permit the defendant by amendment to plead a counterclaim maturing after the cause of action.¹³³

If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of the California statute,—i. e. in a cause of action arising out of the transaction set forth in the plaintiff's complaint or connected with the subject of the action,—neither he nor his assignee can afterward maintain an action against plaintiff therefor.¹³⁴

§ 641. **Form of pleading.**—The general rules of pleading are applicable to counterclaims. Facts must be stated which constitute a cause of action against the plaintiff, and the sufficiency of the counterclaim must be governed by the same rules as if the defendant had brought suit against the plaintiff;¹³⁵ and where the defendant sets up facts which would make his pleading good as a complaint, no more is necessary.¹³⁶ Under the general rules

¹²⁸ Stoddard v. Treadwell, 26 Cal. 294.

¹²⁹ Bernard v. Mullo, 1 Cal. 368.

¹³⁰ Allen v. Haskins, 5 Duer, 332.

¹³¹ Gannon v. Dougherty, 41 Cal. 661; Wood v. Brush, 72 Cal. 224, 13 Pac. 627.

¹³² McGuire v. Lamb, 2 Idaho, 378, 17 Pac. 749; Swanholme v. Reeser, 3 Idaho, 476, 31 Pac. 804.

¹³³ McGuire v. Edsall, 14 Mont. 359, 36 Pac. 453.

¹³⁴ Cal. Code Civ. Proc., § 439.

¹³⁵ Quinn v. Smith, 49 Cal. 163; Clay v. Caroll, 67 Cal. 21, 6 Pac. 874; Daggs v. Phoenix Nat. Bank, 5 Ariz. 409, 53 Pac. 201; McKinney v. Sundback, 3 S. Dak. 106, 52 N. W. 322; Staab v. Garcia, 3 N. Mex. 53, 1 Pac. 857.

¹³⁶ Clay v. Caroll, 67 Cal. 19, 6 Pac. 874; Meagher v. Morgan, 3 Kan. 372, 87 Am. Dec. 476; Staab v. Garcia, 3 N. Mex. 53, 1 Pac. 857.

of pleading, the defendant must allege the facts constituting his right of counterclaim in such a manner that the court can determine from the facts averred whether or not his claim is allowable, in other words, the defendant shall state, and his pleading shall consist of, a plain statement of the facts constituting his cause of counterclaim.¹³⁷ The defendant, however, is not required to use any greater definiteness and certainty than is a plaintiff in stating his cause of action in a complaint; and though certain defenses by way of counterclaim are pleaded in the answer in a very informal and inartificial manner, still, if the facts showing that they constitute valid claims against the plaintiff are sufficiently stated, the counterclaim will be upheld, if good in substance.¹³⁸ The defendant must allege sufficient facts to show that he is entitled to a counterclaim, and to show the origin and character of his demand;¹³⁹ and the facts showing how the claim arose out of the transaction set out in the plaintiff's complaint must be stated in the answer.¹⁴⁰

It is not sufficient to allege facts merely setting forth a defense to the plaintiff's action; the defendant must allege facts showing a liability on the part of the plaintiff and disclosing a right of action in the defendant against the plaintiff.¹⁴¹ And where the right is wholly statutory, facts must be alleged to bring the defendant's claim within the statute.¹⁴² "The criterion for determining whether the defense set up can be maintained as a counterclaim is whether the answer sets up a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if it does, then such cause of action is a counterclaim; and it must disclose such a state of facts as would entitle the defendant to his action if he were plaintiff in the prosecution of his suit; it should contain the substance of a complaint, and, like it, contain a plain and concise statement of the facts constituting a cause of action."¹⁴³

¹³⁷ *Roldan v. Power*, 14 Misc. 480, 35 N. Y. Supp. 697.

¹³⁸ *Wallace v. Bear River Water etc. Co.*, 18 Cal. 461.

¹³⁹ *Braithwaite v. Akin*, 3 N. Dak. 365, 56 N. W. 133; *Decorah First Nat. Bank v. Laughlin*, 4 N. Dak. 391, 61 N. W. 473.

¹⁴⁰ *Brown v. Buckingham*, 11 Abb. Pr. 387.

¹⁴¹ *Quinn v. Smith*, 49 Cal. 163; *Babcock v. Maxwell*, 21 Mont. 507, 54 Pac. 943; *Wehn v. Fall*, 55 Neb. 547, 70 Am. St. Rep. 397, 76 N. W. 13.

¹⁴² *Haupt v. Ames*, 26 App. Div. 550, 50 N. Y. Supp. 495; *Clark v. Sullivan*, 2 N. Dak. 103, 49 N. W. 416, 13 L. R. A. 233; *Burge v. Gandy*, 41 Neb. 149, 59 N. W. 359.

¹⁴³ *Garrett v. Love*, 89 N. C. 205.

§ 642. **Designation of pleading.**—As a general rule, a counterclaim must be designated as such, and contain a prayer for affirmative relief, in order to be effective.¹⁴⁴ The reason for this rule under the New York statute has been well stated by Van Wyck, J., in *Wood v. Gordon*:¹⁴⁵ It seems safe to say that a rule has been established which requires that when the new matter set forth in an answer approaches too closely the line—by no means distinctly visible at all times—called the ‘boundary line’ between new matter constituting an affirmative defense and new matter setting forth a counterclaim, the pleader must label his plea if he desires or expects a reply without an order from the court; and so too it is held that the defendant’s prayer for affirmative, equitable relief, will not alone be sufficiently explicit to force a reply as a counterclaim, but that he must characterize his plea as a counterclaim before he can successfully complain of the plaintiff’s failure to demur or reply. This rule, which is enforced against the defendant to prevent his technical effort for judgment without trial, will be turned to his aid when he is met at trial by the plaintiff’s objection to his giving proofs of his allegations in order to secure his affirmative, equitable relief; for he will then be allowed to make such proof and obtain such relief, notwithstanding he has not labeled his plea as a counterclaim.” It has also been held that the defendant is bound by the designation he gives his answer, and he cannot treat as a defense what he has denominated a counterclaim, or *vice versa*.¹⁴⁶ And where, as is the rule in California,¹⁴⁷ the statement of any new matter in the answer in avoidance, or constituting a defense or counterclaim, is deemed controverted by the opposite party, the defendant cannot, after omitting to designate his pleading, insist that it was a cross-complaint, so as to entitle him to a judgment on the pleadings, when, in fact, it was a counterclaim.¹⁴⁸

§ 643. **Answer or demurrer.**—The statement of any new matter in the answer in avoidance, or constituting a defense or

¹⁴⁴ *Carpenter v. Hewel*, 67 Cal. 589, 8 Pac. 314; *Brannan v. Paty*, 58 Cal. 330; *Babcock v. Maxwell*, 21 Mont. 515, 54 Pac. 943; *Equitable Life Assur. Soc. v. Cuyler*, 75 N. Y. 511; *Rood v. Taft*, 94 Wis. 380, 69 N. W. 183; *Stowell v. Eldred*, 39 Wis. 614.

¹⁴⁵ 13 N. Y. Supp. 595.

¹⁴⁶ *Equitable Life Assur. Soc. v. Cuyler*, 75 N. Y. 511; *Wright v. Delafield*, 25 N. Y. 266; *Resch v. Senn*, 31 Wis. 138.

¹⁴⁷ Cal. Code Civ. Proc., § 462.

¹⁴⁸ *Cohn v. Kelly*, 132 Cal. 468, 64 Pac. 709.

counterclaim, must on the trial be deemed controverted by the opposite party.¹⁴⁹ A counterclaim, however, is always subject to demurrer or answer.¹⁵⁰ Thus a demurrer will lie where it appears on the face of the counterclaim that it does not state facts proper to be alleged as counterclaim,¹⁵¹ or that the court has not jurisdiction,¹⁵² or (in Washington) that there is another action pending between the same parties for the same cause;¹⁵³ and if the objection that there is another action pending does not appear on the face of the counterclaim, the objection may be taken by answer.¹⁵⁴ In California, where a counterclaim based upon a money demand is barred by the statute of limitations, the plaintiff is deemed to have pleaded the statute.¹⁵⁵

The plaintiff in his reply to the counterclaim may set up new matter not inconsistent with his complaint, constituting a defense to the counterclaim.¹⁵⁶

FORMS OF COUNTERCLAIMS.

§ 644. Counterclaim against carrier for negligence.

Form No. 197.

The defendant, further answering and by way of counterclaim herein, alleges: that the transportation of the goods mentioned in the complaint was conducted so badly and negligently, and with so little care, that by the mere carelessness, negligence, and improper conduct of the said plaintiff and his servants in that behalf, a part of the said goods, of the value of at least . . . dollars, were wholly lost to the defendant; and a part thereof, of the value of . . . dollars, were damaged in the sum of . . . dollars; which said loss and damages, amounting to the sum of . . . dollars, the defendant claims the right to counterclaim and

¹⁴⁹ Cal. Code Civ. Proc., § 462.

¹⁵⁰ *Brugman v. Burr*, 30 Neb. 406, 46 N. W. 644; *Leyser v. Rindskopf*, 3 N. Mex. 233, 5 Pac. 540; *First Nat. Bank v. Laughlin*, 4 N. Dak. 391, 61 Pac. 473; *Sears v. Martin*, 22 Or. 311, 29 Pac. 890; *Wait v. Wheeler* etc. *Mfg. Co.* 23 Or. 297, 31 Pac. 661; *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476.

¹⁵¹ *First Nat. Bank v. Laughlin*, 4 N. Dak. 391, 61 Pac. 473; *Phillips*

v. Port Townsend Lodge, 8 Wash. 529, 36 Pac. 476.

¹⁵² *Cragin v. Lovell*, 88 N. Y. 258.

¹⁵³ *Caine v. Seattle* etc. *R. R. Co.*, 12 Wash. 596, 41 Pac. 904.

¹⁵⁴ *Id.*

¹⁵⁵ *Curtiss v. Sprague*, 49 Cal. 301.

¹⁵⁶ *Babeock v. Maxwell*, 21 Mont. 507, 54 Pac. 943; *Van Biber v. Fields*, 25 Or. 527, 36 Pac. 526; *Glecker v. Slavens*, 5 S. Dak. 364, 59 N. W. 323.

set-off against the plaintiff's demand to the extent thereof; and the defendant demands judgment against said plaintiff for the said sum of . . . dollars, or so much thereof as he may be entitled to over and above the plaintiff's claim.

§ 645. Defenses and counterclaims, pleaded together.

Form No. 198.

[TITLE.]

The defendant [naming him, if he is one of several, answering separately], by M. N., his attorney, answering the complaint herein:

- I. For a first defense thereto, alleges, etc.
- II. For a second defense, said defendant alleges, etc.
- III. For a counterclaim thereto, said defendant alleges [here set forth cause of action, as in a complaint].
- IV. For a second counterclaim thereto, said defendant alleges, etc.

Wherefore, etc. [Demand for judgment as in complaint.]

§ 646. Plaintiff's reply.

Form No. 199.

The plaintiff, replying to the defendant's answer [or, to the first defense stated in the defendant's answer] herein,

- I. Denies [specify new matter in answer which is denied].
- II. Alleges that [set forth new matter in avoidance, as in an answer].

As to the [first] counterclaim in said answer contained, the plaintiff, for a first defense,—

- I. Denies each and every allegation thereof [or, plead specific denial of particular facts].
- II. For a second defense to said counterclaim, alleges that [here state new facts, as in an answer].

§ 647. Counterclaim by way of set-off against plaintiff's factor.

Form No. 200.

[TITLE.]

I. The defendant, for a counterclaim herein, alleges that the goods mentioned in the complaint were, with the privity of the plaintiff, sold and delivered to the said defendant by one M., in his own name, as the sole owner, and as and for his own goods.

II. That said M., was in fact the agent and factor of the plaintiff in respect to said goods.

III. That the plaintiff did not appear, and was not known by the defendant at or before the time of said sale and delivery to be the owner of the goods, or in any way interested therein.

IV. That the defendant bought and accepted the goods of and from M., as the true and sole owner and seller; and that credit for the said goods was given to the defendant by the said M., and not by the said plaintiff.

V. That the said M., before and at the time of the sale and delivery of the said goods, was, and still is, indebted to the defendant for the following cause: [Here state the cause of action relied on as a set-off], out of which said sum of money, so due to the defendant, he hereby offers to set off to the plaintiff so much as will be sufficient to satisfy the plaintiff's damages, if any, in respect to the alleged matters complained of [or, if the cause of action in the complaint is admitted, say: sufficient to satisfy the sum so due to the plaintiff].

[Demand for judgment.]

§ 648. Another action pending.

Form No. 201.

[TITLE.]

That at the commencement of this action there was, and now is, another action pending in the . . . court, in and for the county of . . . , in this state, between the same parties as in this action, in which the plaintiff in this action, being the defendant, has set up the same cause of action, alleged in the complaint as a counterclaim, against this defendant, who is the plaintiff in the said action.

§ 649. Counterclaim for breach of warranty.

Form No. 202.

[TITLE.]

I. The defendant, for a counterclaim herein, alleges that the said note was not, before it became due, transferred and delivered to the plaintiff for value.

II. That the said note was made and delivered by the defendant to one M. N., who was at that time an agent or servant of

the plaintiff, and acting as such on behalf of the plaintiff in that transaction, in exchange for a quantity of cigars; which was sold by sample to the defendant at that time by said M. N., as such agent.

III. That when said cigars were delivered to this defendant, they did not correspond with the samples, and were not worth more than . . . dollars.

IV. That as soon as the defendant learned of the character of said cigars, he offered to said M. N., as such agent, to return them, which he is still ready and willing to do.

Wherefore, the defendant demands judgment for his damages herein, to-wit, the sum of . . . dollars, and that the same be deducted from the amount of the said note.

§ 650. Equitable counterclaim for specific performance.

Form No. 203.

[TITLE.]

I. The defendant denies that the plaintiff at the time of the commencement of this action was the owner or entitled to the possession of the premises described in the complaint.

II. That on the . . . day of . . . , 19.., the plaintiff was the owner of said premises, and now has the legal title thereto; but on that day the plaintiff, by a contract in writing, of which a copy is annexed as a part of this answer, marked exhibit A, sold, and agreed to convey, the same to the defendant on the terms therein specified, and put the defendant in possession thereof as purchaser.

III. That the defendant duly performed all the conditions thereof on his part, and on the . . . day of . . . , 19 . . , tendered to the plaintiff the sum of . . . dollars, being the full sum then due the plaintiff upon said contract, with interest, but plaintiff then refused to receive the same.

IV. That defendant has ever since remained, and still is, ready and willing to pay plaintiff said sum, but the plaintiff has at all times refused to receive the same; and this defendant now brings the said sum of. . . dollars into this court to be paid to the said plaintiff, if he will receive the same.

Wherefore, etc. [Demand for judgment as in action for specific performance.]

§ 651. Counterclaim for breach of warranty.

Form No. 204.

[TITLE.]

The defendant, for a counterclaim herein, alleges that at the time of the sale of the said goods in the complaint mentioned, the said plaintiff represented and warranted that [here state the warranty claimed, and allege breach and damage, following substantially the forms given in chapter CXVIII of this work, with such changes as may be necessary, and close with demand for judgment].

§ 652. Payment in part, and deficiency in the goods exceeding the balance, with counterclaim for excess.

Form No. 205.

[TITLE.]

I. For a counterclaim, the defendant alleges that the plaintiffs have brought this action, as defendant is informed and believes, to recover a balance claimed to be due for mirrors and other articles furnished to, and for work and labor done for, this defendant by the plaintiffs, on various days between the . . . day of . . . , 19 . . . , and the . . . day of . . . , 19 . . . ; that the total amount of the account of said mirrors and other articles, and said work and labor, as made out and presented by the plaintiffs, was the sum of . . . dollars.

II. That the defendant paid to the plaintiffs from time to time various sums of money on account of said mirrors and other articles, and work and labor, amounting in all to the sum of . . . dollars, and redelivered to plaintiffs certain articles, to-wit, [describe the articles], of the value of . . . dollars.

III. That it was agreed between this defendant and the plaintiffs that all mirrors furnished to the defendant should be perfect and true mirrors, and in every way satisfactory to the defendant; and that if any of them upon trial should prove to be untrue or imperfect, the same should be taken back by the plaintiffs, and others substituted in their stead.

IV. That among the articles furnished by the plaintiffs to this defendant under said agreement, and included in said account, was one pier-glass, three mantel mirrors, and four gilt cornices, which were charged in gross in said account at the price of . . . dollars. That the said three mantel mirrors above men-

tioned ~~proved~~, upon examination and trial, to be untrue and imperfect; that they were entirely unsatisfactory to this defendant; that he promptly notified the plaintiffs of the deficient and unsatisfactory quality and character of said mirrors, and requested them to take them away and replace them with true and perfect mirrors, but they have never complied with the request of this defendant in this regard; that the defendant has at all times been, and still is, ready to redeliver said mirrors to said plaintiffs; that the same, if true, perfect, and satisfactory, would have been worth about the sum of . . . dollars, at the price that such mirrors were to have been furnished, under the agreement between the plaintiffs and this defendant; but that they were worth at least . . . dollars less, on account of their deficient character. And the defendant claims that the deficiency in value of said mirrors, to-wit, the sum of . . . dollars, should be deducted from said account.

Wherefore, the defendant demands that the said sum of . . . dollars be allowed and adjudged as due this defendant upon this counterclaim, and that he have judgment against the plaintiffs for the excess thereof over and above the plaintiffs' claim herein, and that he recover his costs of this action.

§ 653. Statement admitting counterclaim.

Form No. 206.

[TITLE.]

The plaintiff in this action hereby admits the counterclaim in the defendant's answer, and consents that the same, amounting to [here state amount, with interest, if any], be deducted from the amount demanded in the complaint.

[DATE.]

G. H., Plaintiff's Attorney.

CHAPTER XXVI.

CROSS-COMPLAINT.

§ 654. **Nature and object of cross-complaint.**—As we have already pointed out, in discussing the distinction between counterclaim and cross-complaint, the latter is substantially the same as the cross-bill in equity. It is a pleading by the defendant to an action which contains a statement of facts sufficient to constitute a cause of action against another party with reference to the transaction upon which the original action is founded, or affecting property to which the original action relates.¹ The provisions of the codes in those states where the cross-complaint is expressly provided for are similar to the provision in the California code. Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint.² In Oregon, the cross-bill has been practically abolished, the code³ providing, that in an action at law, where the defendant is entitled to relief arising out of facts requiring the interposition of a court of equity and material for his defense, he may, upon filing his answer therein, also as plaintiff file a complaint in equity in the nature of a cross-bill, which shall stay the proceedings at law, and the case shall thereafter continue as a case in equity, in which said proceedings may be perpetually enjoined by final decree, or allowed to proceed in accordance with such final decree. Under the Kansas statutes,⁴ affirmative relief may be had against the plaintiff, or against a co-defendant. Although there is no express statutory provision authorizing such pleadings to be designated cross-bills, yet they may be, and usually are, so designated.⁵ If defendant alleges facts

¹ Estee's Pl. & Pr., § 3370; Snow v. Holmes, 71 Cal. 142, 11 Pac. 856; Coulthurst v. Coulthurst, 58 Cal. 239; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456.

² Cal. Code Civ. Proc. § 442; Idaho Rev. Codes, § 4188; Bacon v.

Rice, 14 Idaho, 107, 93 Pac. 511; Utah Rev. Stats., § 3238; Iowa (Miller's) Code, § 663; Ark. Rev. Stats., § 5712; Wyo. Rev. Stats., § 2446.

³ Bellinger & Cotton's Code, § 391.

⁴ Kan. Rev. Stats., §§ 4177, 4187.

⁵ Markson v. Kothman, 29 Kan.

upon which affirmative relief may be based, and such relief is prayed, it will be treated as a cross-petition.⁶ It would be equally proper, however, to describe such pleadings as a counterclaim.⁷

In all jurisdictions where relief by way of cross-complaint is authorized by statute, that relief must affect, or be affected by, the subject-matter of the action, or relate to or depend upon the contract or transaction in suit. In this respect the provision for cross-complaint is similar to one of the code provisions authorizing counterclaims, being broader, however, than the latter, in that it authorizes a cross-complaint against any party. It is to be noted also that the relief sought must, as in the case of this class of counterclaims, be affirmative relief.

§ 655. Against whom relief may be sought.—So far as affirmative relief is sought by a defendant against a plaintiff, there is no more reason why the pleading should be denominated a cross-complaint than a counterclaim; but although the statutes of the several states may vary in their provisions as to the parties against whom a cross-complaint may be set up, they all provide that relief may thus be had against a co-defendant.⁸

Statements have been rather loosely made in cases to the effect that the parties named in the cross-complaint must be parties to the original action, and that the complaint itself must contain all the facts necessary to constitute a cause of action in favor of the defendant and against the plaintiff in the original complaint.⁹ But it may be laid down as a general rule that relief will be granted against a new party on a cross-complaint, provided he is a necessary party, although the statute is silent upon this point.¹⁰ While new parties may be brought in upon cross-complaint, however, their presence must be necessary to the full de-

719; *Lyman v. Stanton*, 40 Kan. 727, 20 Pac. 510.

⁶ *Brown v. Massey*, 19 Okla. 482, 92 Pac. 246.

⁷ *Venable v. Dutch*, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260; *Lyman v. Stanton*, 40 Kan. 727, 20 Pac. 510.

⁸ *Lewis v. Fox*, 122 Cal. 244, 54 Pac. 823; *MacKenzie v. Hodgkin*, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209; *Porter v. Grady*, 21 Colo. 74, 39 Pac. 1091; *Hill v. Frink*, 11 Wash. 562, 40 Pac. 128.

⁹ *Estee's Pl. & Pr.*, § 3370; *Coulthurst v. Coulthurst*, 58 Cal. 239; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456.

¹⁰ *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; *Eureka v. Gates*, 120 Cal. 54, 52 Pac. 125; *MacKenzie v. Hodgkin*, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209; *Stockton Sav. Soc. v. Harrold*, 127 Cal. 612, 60 Pac. 165; *First Nat. Bank v. Bews*, 3 Idaho, 486, 31 Pac. 816; *Chalmers v. Trent*, 11 Utah, 88, 39 Pac. 488.

termination of the rights of the parties then before the court touching the property in litigation between them; and new parties cannot be thus brought in where the property involved is not the same, and the plaintiff is not interested in or affected by the questions or property to which the cross-complaint relates.¹¹ But the mere fact that the cause of action of the defendant includes additional property, as well as that with which the plaintiff is concerned, is immaterial.¹² In Colorado, the equity rule permitting a cross-bill for affirmative relief against new parties obtains.¹³

Some of the states provide for cross-complaints against plaintiffs in cases where counterclaims would seem to be a sufficient remedy;¹⁴ and in other states, although there are no provisions relating to cross-complaints, a cross-complaint asking affirmative relief against the plaintiff is permissible.¹⁵

Under the California code,¹⁶ permitting intervention, and authorizing the defendant to file a cross-complaint,¹⁷ the plaintiff may file such a cross-complaint, since the section permitting intervention treats the intervention as a complaint to which either party may answer or demur, as if it were an original complaint; so far as the intervention is concerned, the plaintiff then becomes a defendant for the purpose of filing a cross-complaint.¹⁸

§ 656. Necessity for relation to original complaint.—As has already been noted, equity practice required that the matters set up by cross-bill relate to or be connected with the matters set up in the original bill, and the codes, and cases construing them, have adopted this rule as to cross-complaints.¹⁹ If the cause

¹¹ *Lewis v. Fox*, 122 Cal. 244, 54 Pac. 823; *Goodell v. Verdugo etc. Co.*, 138 Cal. 317, 71 Pac. 354; *Alpers v. Bliss*, 145 Cal. 585, 79 Pac. 171.

¹² *Stockton Sav. Soc. v. Harrold*, 127 Cal. 612, 60 Pac. 165.

¹³ *Allen v. Tritch*, 5 Colo. 222; *Marriott v. Clise*, 12 Colo. 561, 21 Pac. 909.

¹⁴ *Snow v. Holmes*, 71 Cal. 142, 11 Pac. 856; *Waugenheim v. Graham*, 39 Cal. 169; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369; *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Willman v. Friedman*, 4

Idaho 209, 95 Am. St. Rep. 59, 4 *Idaho*, 299, 38 Pac. 937; *Bullion etc. Mining Co. v. Eureka Hill Mining Co.*, 5 Utah, 3, 11 Pac. 515.

¹⁵ *Gassert v. Black*, 11 Mont. 185, 27 Pac. 791; *Waite v. Wingate*, 4 Wash. 324, 30 Pac. 81.

¹⁶ Cal. Code Civ. Proc., § 387.

¹⁷ Cal. Code Civ. Proc., § 442.

¹⁸ *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

¹⁹ *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. 753; *Snow v. Holmes*, 71 Cal. 142, 11 Pac. 856; *Odell v. Wilson*, 63 Cal. 159; *Clark v. Taylor*, 91 Cal. 552, 27 Pac. 860; *Willman v. Fried-*

of action set forth in a cross-complaint is entirely foreign to matters alleged in the original complaint, it is properly dismissed;²⁰ although it would seem that the plaintiff would waive the objection by filing an answer to the cross-complaint.²¹

The mere relation of the matters alleged in the cross-complaint to the original complaint is not the only test, however, and although the pleading be designated a cross-complaint, and affirmative relief is asked, it will be regarded as an answer, if the matters set up are merely defensive;²² the mere fact that the pleading contains a prayer for affirmative relief cannot make that a cross-complaint which is only proper as a defense.²³

In discussing the question whether tort could properly be the subject of a counterclaim, we noted in a previous section²⁴ several cases which apparently proceeded upon the theory that contrary causes of action for tort could not arise out of the same transaction. It was held in a California case that a cross-complaint is not allowable in actions for tort.²⁵

Another result of the connection between the cross-complaint and the original complaint is that it falls with the original where the court has no jurisdiction of the action.²⁶ It may be, however, that where the complaint does not contain jurisdictional allegations, the filing of a cross-bill will supply the defect.²⁷ The omission of a material fact in a complaint is cured by its averment in a cross-complaint and the admission of such averment

man, 4 Idaho, 299, 38 Pac. 937; Hill v. Frink, 11 Wash. 562, 40 Pac. 128; Haslam v. Haslam, 19 Utah, 1, 56 Pac. 243; Center Creek Water etc. Co. v. Lindsay, 21 Utah, 192, 60 Pac. 559.

²⁰ *Sterne v. Vincennes First Nat. Bank*, 79 Ind. 560.

²¹ *Boland v. Ross*, 120 Mo. 208, 25 S. W. 524; *Fitzgerald v. Cross*, 30 Ohio St. 444.

²² *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Chalmers v. Trent*, 11 Utah, 88, 39 Pac. 491.

²³ *Doyle v. Franklin*, 40 Cal. 110; *Brannan v. Paty*, 58 Cal. 330; *Carpenter v. Hewel*, 67 Cal. 590, 8 Pac. 314; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747.

²⁴ Ante, § 635.

²⁵ *Heilbron v. Kings River etc. Co.*, 76 Cal. 15, 17 Pac. 933. But in *Van*

Bibber v. Hilton, 84 Cal. 539, 24 Pac. 308, 598, the supreme court, commenting on this holding, says: "The expression so used in the case cited is in conflict with the express provisions of section 442 of the Code of Civil Procedure, if construed as meaning that in no case of an action for tort a cross-complaint would be proper or affirmative relief be granted. There are many cases of that kind where a cross-complaint might be proper. The expression so used in *Heilbron v. Canal Co.* stands alone, and is not supported by any of the other cases cited, and, our attention now being called to it, it is overruled."

²⁶ *Southern Pacific R. R. Co. v. Pixley*, 103 Cal. 118, 37 Pac. 194.

²⁷ *Goodrum v. Ayers*, 56 Ark. 93, 19 S. W. 97.

in an answer to the cross-complaint;²⁸ and this is true, although a demurrer based on the omission has been erroneously overruled.²⁹

§ 657. **Dismissal of complaint.**—The right of a defendant to a hearing on his cross-complaint cannot be defeated by a dismissal of the complaint; the cross-complaint still stands as though it were an original complaint,³⁰ and this is true, even though the plaintiff be nonsuited on motion of the defendant.³¹ Thus a dismissal of a suit to foreclose a mortgage does not carry with it a cross-complaint setting up possession and title in the plaintiff, and praying to have the title quieted.³² Where, however, a cross-complaint has been stricken from an answer, leaving only matters of defense, the plaintiff may dismiss it any time before trial;³³ and if the plaintiff has filed his dismissal before service of summons and appearance of the defendant, and has served and filed a notice of a motion to strike out an answer thereafter filed, and for the entry of a judgment of dismissal *nunc pro tunc*, he cannot be deprived of his right to the judgment of dismissal by the filing of a cross-complaint by the defendant before the hearing of the motion.³⁴

§ 658. **Allegations.**—What has been said with reference to the necessity for allegations in a counterclaim applies with equal force to a cross-complaint; the pleading must state facts sufficient to constitute a cause of action against the party complained of, and it cannot be aided by averments in any of the other pleadings.³⁵ It must be so framed as to state clearly and concisely the facts constituting the cause of action, in order that the relief prayed for, if granted, may be decreed in accordance therewith.

²⁸ Cohen v. Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711.

²⁹ Id. That defects in complaint are cured by averments of answer, see Daggett v. Gray, 110 Cal. 172, 42 Pac. 568; Vance v. Anderson, 113 Cal. 536, 45 Pac. 816.

³⁰ Thompson v. Spraid, 66 Cal. 350, 5 Pac. 506; Mott v. Mott, 82 Cal. 413, 22 Pac. 1140; Hinkel v. Donohue, 90 Cal. 389, 27 Pac. 381.

³¹ Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Maffett v. Thompson, 32 Or. 551, 52 Pac. 565, 53 Pac. 854.

³² Watts v. Sweeney, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680.

³³ Thompson v. Spraid, 66 Cal. 350, 5 Pac. 506.

³⁴ Hinkel v. Donohue, 90 Cal. 389, 27 Pac. 381.

³⁵ Coulthurst v. Coulthurst, 58 Cal. 239; Harrison v. McCormick, 69 Cal. 618, 11 Pac. 456; Stratton v. California Land etc. Co., 86 Cal. 353, 24 Pac. 1065; Winter v. McMillan, 87 Cal. 263, 22 Am. St. Rep. 243, 25 Pac. 407; Marriott v. Clise, 12 Colo. 561, 21 Pac. 909; Sheffelin v. Weathered, 19 Or. 172, 23 Pac. 898.

It is bad practice to attempt in a single pleading to allege matter in bar of an action and at the same time to set up a cause of action in favor of the defendant. If the defendant has any cause of cross-complaint, he should plead it as such; for if it constitutes a cross-complaint, and is pleaded as such, it requires an answer from the plaintiff, and, as in the case of an original complaint, the rule that a pleading must be strictly construed as against the pleader applies.³⁶

The causes of cross-complaint should be separately stated, in order to avoid confusion;³⁷ and where a pleading does not show what portions of it are intended as a legal defense to a complaint and what portions are intended as a cross-complaint, it will be held bad on demurrer for ambiguity.³⁸

Unlike a counterclaim, new matter set up in a cross-complaint requires an answer,³⁹ and the better practice therefore is to designate a cross-complaint as such. If, however, an answer states the facts necessary to constitute a cause of action for a cross-complaint, it is immaterial whether the defendant designates it an answer or a cross-complaint. It is the fact set up in the pleading which makes it the one or the other, and its character will be determined by the court.⁴⁰ If a pleading denominated a cross-complaint, and introduced as "a further and separate answer and cross-complaint," does not in fact constitute a cross-complaint, it will not entitle the defendant to a judgment on the pleadings for failure of the plaintiff to answer.⁴¹ So, also, where the answer sets up a set-off and counterclaim, and prays for a judgment against the plaintiff for the amount alleged to be due, it is not a cross-complaint, and therefore is not required to be answered by the plaintiff.⁴² And where a paper is filed in an action by the plaintiff, and styled an "answer to the defendant's cross-complaint," it will not be considered as a pleading where no cross-complaint has in fact been filed.⁴³ As a corollary of the

³⁶ *Shain v. Belvin*, 79 Cal. 264, 21 Pac. 747.

³⁷ *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. 308, 598.

³⁸ *O'Connor v. Frasher*, 53 Cal. 435.

³⁹ Cal. Code Civ. Proc., § 462.

⁴⁰ *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Gregory v. Bovier*, 77 Cal. 121, 19 Pac. 232.

⁴¹ *Goldman v. Bashore*, 80 Cal. 146,

22 Pac. 82; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210.

⁴² *Herold v. Smith*, 34 Cal. 122; *Jones v. Jones*, 38 Cal. 584.

⁴³ *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, 13 Pac. 863; *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764; *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637.

above rule, it follows that the defendant cannot, after omitting to designate his pleading, insist that it was a cross-complaint so as to entitle him to a judgment on the pleadings, when in fact it was a counterclaim.⁴⁴

§ 659. **Filing and service.**—Most of the codes contain a provision similar to that in California, to the effect that the defendant may file a counterclaim at the same time and in addition to his answer, or subsequently, by permission of the court.⁴⁵ Thus the cross-complaint is not necessarily a part of the answer, although it may be. The court may, in its discretion, permit a cross-complaint to be filed after the submission of the case, and for the purpose of making it conform to the proofs.⁴⁶

The cross-complaint must be served upon the parties affected thereby.⁴⁷ The only mode of serving defendants to the cross-complaint, who are co-defendants served with the original summons, and of whom the court has acquired jurisdiction, is to serve the cross-complaint upon them in the manner required by law, although no summons is necessary.⁴⁸ But where the plaintiff is the defendant in the cross-complaint, and all the matters of substance pleaded in the cross-complaint were pleaded in the answer served upon the plaintiff, and where it appears that the plaintiff has no beneficial interest in the cause of action, and that any proceeds recovered would belong to his assignors, who defended the cross-complaint, the omission to serve the plaintiff therewith is a harmless irregularity, not prejudicing any of his rights.⁴⁹

⁴⁴ *Cohen v. Kelly*, 132 Cal. 468, 64 Pac. 709.

⁴⁵ Cal. Code Civ. Proc., § 442.

⁴⁶ *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Carter v. Lothian*, 133 Cal. 452, 65 Pac. 962.

⁴⁷ Cal. Code Civ. Proc., § 442; *Idaho Rev. Codes*, § 4198; *Utah Comp. Laws*, § 3231; *White v. Pat-*

ton, 87 Cal. 151, 25 Pac. 270; *Willman v. Friedman*, 4 Idaho, 209, 95 Am. St. Rep. 59, 4 Idaho 299, 38 Pac. 937; *Chalmers v. Trent*, 11 Utah, 88, 39 Pac. 488.

⁴⁸ *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975.

⁴⁹ *McKenzie v. Hodgkin*, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209.

FORMS OF CROSS-COMPLAINT.

§ 660. By defendant, outline form.

Form No. 207.

[TITLE OF ACTION AS ORIGINALLY COMMENCED.]

The defendant, C. D., answering the complaint herein, and by way of cross-complaint against the plaintiff and the defendants [name those who will be affected by the relief sought], and also N. O. and O. P., who this defendant prays may be brought into this action and made parties thereto, alleges:

[Here plead as in an answer to the original complaint, and then set forth the new cause of action substantially as in a complaint.]

[Conclude with a prayer for affirmative relief.]

[VERIFICATION.]

G. H., Defendant's Attorney.

§ 661. Cross-complaint for divorce for plaintiff's adultery.

Form No. 208.

For a cross-complaint, the defendant alleges [proceedings as in forms given in chapter CII].

Wherefore, the defendant demands judgment, etc. [as in said forms.]

§ 662. Order bringing in new parties on filing of cross-complaint.

Form No. 209.

[TITLE.]

The defendant, C. D., having filed a cross-complaint in this action, praying affirmative relief in relation to and affecting the subject-matter of this action, and it appearing from the same that N. O. and O. P. are necessary parties to a complete determination of the controversy involved in said cross-complaint,—

On motion of G. H., attorney for said defendant,—

It is ordered, that said N. O. and O. P. be brought in as parties defendant in this action, and that the proceedings be amended to include them as defendants; that a copy of said cross-complaint and of this order be served upon each of them and upon each of the co-defendants of said C. D. within ten days from this date, and that they have twenty days after such service, exclusive of the day thereof, in which to answer said cross-complaint.

[Add such further conditions as the case requires.]

Done this . . . day of . . . , 19..

J. K., Circuit Judge.

CHAPTER XXVII.

SEVERAL DEFENSES.

§ 663. **Demurrer and answer.**—The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein, and answer the residue, or may demur and answer at the same time.¹ This, however, does not justify the mixing of law and fact in the same answer.² But he cannot demur to part of an entire cause of action and answer the residue; nor can he, in New York, demur and answer at the same time to the same cause of action.³ The same rule applies in Oklahoma.⁴ This is similar to the rule in chancery.⁵ A demurrer to a part of a bill, followed by an answer as to the rest, is not deemed overruled or withdrawn.⁶ An answer pleading separately two defenses, one specifically denying the allegations of the complaint, and one setting up affirmative matter, is not subject to a general demurrer.⁷

§ 664. **Objections, how taken.**—Defects which appear on the face of the complaint must be objected to by demurrer, or they are waived, and cannot be objected to by answer; so with a defect of parties.⁸ And the same cause of action cannot be demurred to and answered at the same time,⁹ as the answer over-

¹ Cal. Code Civ. Proc., § 431; *People v. McClellan*, 31 Cal. 101; Alaska Codes, pt. 4, ch. 7, § 58; Ariz. Rev. Codes, § 4175; Mont. Rev. Codes, § 6535; Nev. Comp. Laws, § 3135; N. Mex. Comp. Laws, § 2685; subd. 35; Or. B. & C. Codes, § 68; Utah Rev. Stats., § 2962; Wash. Bal. Codes, §§ 2907, 2911; Wyo. Rev. Stats., § 3535.

² *Brooks v. Douglass*, 32 Cal. 208.

³ *Ingraham v. Baldwin*, 12 Barb. 10; *Struver v. Ocean Ins. Co.*, 16 How. Pr. 422; *Munn v. Barnum*, 12 How. Pr. 563, 1 Abb. Pr. 281.

⁴ *Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170.

⁵ *Clark v. Phelps*, 6 Johns. Ch. 214;

Bruen v. Bruen, 4 Edw. 640; *Souzer v. De Meyer*, 2 Paige, 574; *Jarvis v. Palmer*, 11 Paige, 650; *Spofford v. Manning*, 6 Paige, 383.

⁶ *Pierpont v. Fowle*, 2 Woodb. & M. 23, Fed. Cas. No. 11152. When the objection must be taken by demurrer, when by answer, see *Brainard v. Jones*, 11 How. Pr. 569.

⁷ *Snipsie v. Smith*, 7 Cal. App. 150, 93 Pac. 1035; Cal. Code Civ. Proc., § 441.

⁸ *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551.

⁹ *Slocum v. Wheeler*, 4 How. Pr. 373; *Spellman v. Weider*, 5 How. Pr. 5; *Munn v. Barnum*, 1 Abb. Pr. 281.

rules the demurrer.¹⁰ But in California he may both answer and demur at the same time to each several cause of action.¹¹ Nor will the court allow a party to withdraw his answer and demur.¹² But the defendant may demur to one count and answer to the other.¹³ An objection to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action, can be taken at any time.¹⁴ It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defense—he may demur, answer, and plead to different parts of the bill; so that if a bill for discovery and relief contain proper matter for the one and not for the other, the defendant should answer the proper, and demur to the improper, matter; and if he demur to the whole, the demurrer will be overruled.¹⁵

§ 665. **What answer waives.**—An answer and demurrer may be interposed at the same time. But filing an answer is a waiver of the demurrer previously interposed;¹⁶ and of irregularities previously set up in demurrer.¹⁷ It is also a waiver of alleged error as to change of parties by substituting one defendant for another without notice.¹⁸ An answer cannot properly set up an objection which appears upon the face of the complaint where a demurrer upon that ground had been overruled.¹⁹ But objections which are subjects of demurrer, but do not appear upon the face of the complaint, may be taken by answer.²⁰ An equitable defense to an action at law for money had and received must be pleaded.²¹ A defendant waives his objection to any ruling of the court with reference to the form of the pleading by answering and going to trial.²² Answer after a demurrer overruled is a

¹⁰ *Jarves v. Palmer*, 11 Paige, 650; *Spofford v. Manning*, 6 Paige, 383; *Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170.

¹¹ *People v. McClellan*, 31 Cal. 101; Code Civ. Proc., § 431.

¹² *Finch v. Pindon*, 19 Abb. Pr. 96.

¹³ *Ingraham v. Baldwin*, 12 Barb. 9.

¹⁴ Cal. Code Civ. Proc., § 434.

¹⁵ *Higinbotham v. Burnet*, 5 Johns. Ch. 186; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; *Livingston v. Story*, 9 Pet. 632, 9 L. Ed. 255.

¹⁶ *De Boom v. Priestly*, 1 Cal. 206;

Pierce v. Minturn, 1 Cal. 470; *Brooks v. Minturn*, 1 Cal. 481; *Bibend v. Kreutz*, 20 Cal. 109; *Hodgson v. Marine Ins. Co.*, 1 Cranch C. C. 569, Fed. Cas. No. 6566; *Irwin v. Henderson*, 2 Cranch C. C. 167, Fed. Cas. No. 7084.

¹⁷ *Bell v. Railroad Co.*, 4 Wall. 598, 18 L. Ed. 338.

¹⁸ *Smith v. Curtis*, 7 Cal. 584.

¹⁹ *Tennant v. Pfister*, 45 Cal. 272.

²⁰ Cal. Code Civ. Proc., § 433.

²¹ *Marks v. Sayward*, 50 Cal. 58.

²² *Anderson v. North Pacific Lumber Co.*, 21 Or. 281, 28 Pac. 5.

waiver of the demurrer,²³ unless the complaint should be so defective as not to support the judgment.²⁴ If several grounds of demurrer are alleged, the first being that the complaint does not state facts sufficient to constitute a cause of action, and the demurrer is overruled, after which the defendant answers, he thereby waives all objection to the complaint except the first.²⁵ Application for leave to plead over is addressed to the discretion of the court below.²⁶ And unless this discretion is manifestly abused, the appellate court will not interfere.²⁷

§ 666. **Cross-complaint and counterclaim.**—A cross-complaint bears a close resemblance to a counterclaim. The distinction is subtle, but none the less definite. The cross-complaint brings in more comprehensive matter than a counterclaim, and includes any just cause of action as a set-off to the plea of plaintiff. When the answer contains a cross-complaint, a reply is necessary, in default of which all matters alleged in the cross-complaint will be taken as confessed. Such replication is not necessary to a counterclaim.²⁸ A counterclaim, while it may exist in favor of defendant and against plaintiff, may in other respects go further than a cross-complaint, and, if the cause of action arose on contract, may set forth any other cause of action arising on contracts as a counterclaim.²⁹ A cross-complaint must in itself state all the requisite facts to entitle the defendant to affirmative relief, and defects in it cannot be cured by averments of any of the other pleadings in the action.³⁰ The same requisites are essential in a counterclaim.³¹

§ 667. **In an action for conversion.**—An answer that defendant claimed the property as assignee for the creditors of the owner, that plaintiff never made any demand on defendant, but stood by, with knowledge of his claim, and allowed and induced

²³ *Madden v. Occidental S. S. Co.*, 86 Cal. 445, 25 Pac. 5; *Barth v. Deuel*, 11 Colo. 494, 19 Pac. 471; *Young v. Martin*, 3 Utah, 484, 24 Pac. 909; *Lonkey v. Wells*, 16 Nev. 271.

²⁴ *Garver v. Lynde*, 7 Mont. 108, 14 Pac. 697. See *Goschwander v. Cort*, 19 Or. 513, 26 Pac. 621.

²⁵ *Thalheimer v. Crow*, 13 Colo. 397, 22 Pac. 779.

²⁶ *Powell v. Dayton R. R. Co.*, 14 Or. 22, 12 Pac. 83.

²⁷ *Corson v. Neatheny*, 9 Colo. 212, 11 Pac. 82.

²⁸ *Herold v. Smith*, 34 Cal. 122.

²⁹ *Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434.

³⁰ *Kreichbaum v. Melton*, 49 Cal. 50.

³¹ *Quinn v. Smith*, 49 Cal. 163; *Coulthurst v. Coulthurst*, 58 Cal. 239; *Collins v. Bartlett*, 44 Cal. 371.

defendant to sell the property, does not state a counterclaim.³² If the counterclaim must be existing at the time of the commencement of the action, it is not enough to allege that at that time plaintiff was indebted in a certain sum on a contract, as the liability may not have matured at that time.³³

Defendant's answer and counterclaim may be in conflict, and if defendant secures judgment for specific performance on his counterclaim, it matters not that his answer had alleged that all plaintiff's rights had been forfeited before.³⁴ The counterclaim should contain the substantial requirements of a complaint, and it is not well pleaded where joined with the other parts of the defense.³⁵

§ 668. Commencement and conclusion.—It is proper that each defense should indicate distinctly, by fit and appropriate words, where it commences and where it concludes.³⁶ An objection to an answer on the ground that separate defenses are not separately stated cannot be taken by demurrer. The defect can only be reached by a motion to strike out, or by some other appropriate proceeding.³⁷ But no formal commencement or conclusion is prescribed.³⁸ The title of a cause is not a part of a plea.³⁹

§ 669. Each defense must be complete.—One defense cannot refer to another in the same answer for support.⁴⁰ But it was held in *Rice v. O'Connor*, (10 Abb. Pr. 362) that several defenses in one statement is not bad on demurrer. Upon a demurrer to a distinct defense, stated separately in an answer, no resort can be had to other portions of the answer to sustain such defense; for each defense must be complete in itself.⁴¹ In a complaint containing more than

³² Babcock v. Maxwell, 29 Mont. 31, 74 Pac. 64.

³³ Provident Mut. Building etc. Assoc. v. Davis, 143 Cal. 253, 76 Pac. 1034; Cal. Code Civ. Proc., § 438.

³⁴ Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123.

³⁵ LeClare v. Thibault, 41 Or. 601, 69 Pac. 552.

³⁶ Lippencott v. Goodwin, 8 How. Pr. 242; Benedict v. Seymour, 6 How. Pr. 298.

³⁷ Hagely v. Hagely, 68 Cal. 348, 9 Pac. 305.

³⁸ Bridge v. Payson, 5 Sandf. 210.

³⁹ Bank of Columbia v. Ott, 2 Cranch C. C. 529, Fed. Cas. No. 878.

⁴⁰ Xenia Branch Bank v. Lee, 2 Bosw. 694, 7 Abb. Pr. 372; Spencer v. Babcock, 22 Barb. 326, Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801.

⁴¹ Siter v. Jewett, 33 Cal. 92; Xenia Branch Bank v. Lee, 7 Abb. Pr. 372; Loosey v. Orser, 4 Bosw. 391; Jackson v. Van Slyke, 44 Barb. 116, note.

one count, the introductory matter, such as partnership capacity of the parties, need not be repeated, but may be incorporated in subsequent counts by paragraphs, by reference thereto.⁴² One separate defense, if defective in any material averment, cannot be aided by the averments of another separate defense.⁴³ An answer cannot be aided by extrinsic facts.⁴⁴ When the complaint contains more than one cause of action, the answer should indicate to which cause of action each defense is interposed.⁴⁵ If the substance of the defense clearly shows to which cause of action it is addressed, it is sufficient on demurrer.⁴⁶ If one of several pleas of a defendant going to the whole cause of action is sustained, it bars recovery by the plaintiff, notwithstanding some other issues may be found in favor of the plaintiff.⁴⁷

§ 670. Joint answer.—A joint answer to a bill in chancery, if sworn to by all the parties, is sufficient; a joint and several form is not indispensable.⁴⁸ Where a joint answer of several defendants denies an allegation in the complaint which the plaintiff must prove to establish his cause of action against some of the defendants, but which he need not prove to entitle him to recover against the others, the answer raises material issue for the defendants as to whom the plaintiff must prove such allegation.⁴⁹ Where a plea states that the defendants come and defend, etc., it will be construed that all defendants are joined.⁵⁰

§ 671. Must be consistent.—Several defenses may be set up in an answer,⁵¹ but generally, if they are contradictory, it is bad.⁵² A sworn answer must be consistent, and not deny in one sentence

⁴² *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201; *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485, 68 Pac. 871.

⁴³ *Catlin v. Pedrick*, 17 Wis. 88.

⁴⁴ *Beers v. Dalles City*, 16 Or. 334. As to reference to separate defense in answer, see *Yost v. Commercial Bank of Santa Ana*, 94 Cal. 494, 29 Pac. 858.

⁴⁵ *Kneedler v. Sternbergh*, 10 How. Pr. 67.

⁴⁶ *Willis v. Taggard*, 6 How. Pr. 435.

⁴⁷ *Curtis v. Jones*, 1 How. App. Cas. 137. What judgment should be rendered when one of two pleas is

found for the plaintiff, and the other for the defendant. See *Dorsey v. Chenault*, 2 Cranch C. C., 316, Fed. Cas. No. 4013; *Kerr v. Force*, 3 Cranch C. C. 8, Fed. Cas. No. 7730.

⁴⁸ *Davis v. Davidson*, 4 McLean, 136, Fed. Cas. No. 3631.

⁴⁹ *Bank of Cooperstown v. Corlies*, 1 Abb. Pr. (N. S.) 412. Denial of joint liability and admission of individual liability. See *Gruhn v. Stanley*, 92 Cal. 86, 28 Pac. 56.

⁵⁰ *Kerr v. Swallow*, 33 Ill. 379.

⁵¹ Cal. Code Civ. Proc., § 441.

⁵² *Bell v. Brown*, 22 Cal. 671; *Hopper v. Hopper*, 11 Paige, 46.

what it admits in another sentence.⁵³ Several defenses, inconsistent with each other, may, under proper circumstances, be set up in a verified answer.⁵⁴ But where an answer is susceptible of being construed to contain either of two defenses, one of payment and the other of counterclaim, it should be construed as setting up only the defense of payment, and requiring no reply.⁵⁵ The inconsistent defenses which are allowed to be pleaded in a verified answer are not such as require in their statement a direct contradiction of any fact elsewhere directly averred. They are those in which the inconsistency arises rather by implication of law, being in the nature of pleas of confession and avoidance, as contradistinguished from denials where the party impliedly or hypothetically admits, for the purpose of that particular defense, a fact which he, notwithstanding, insists does not in truth exist.⁵⁶ If no objection be taken to an answer, by a motion to strike out or by demurrer, which sets up inconsistent defenses, defendant may, on the trial, rely on any one of such defenses.⁵⁷ If a defendant in his answer admits a material allegation of the complaint, he cannot afterwards contest it.⁵⁸

§ 672. **Inconsistent defenses.**—Separate defenses to a cause of action are not inconsistent when they all, taken together, may be true; but when the truth of some of them cannot be maintained without falsifying others, they are inconsistent,⁵⁹ and defendant is entitled to present and rely upon any of such defenses upon the trial, subject to proper instructions as to their effect in each case;⁶⁰ and it is error for the court to

⁵³ *Kuhland v. Sedgwick*, 17 Cal. 123; *Hensley v. Tartar*, 14 Cal. 508; *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177; *Robinson v. Stewart*, 10 N. Y. 189; *Storer v. Coe*, 2 Bosw. 662; *Manice v. New York Dry Dock Co.*, 3 Edw. Ch. 143; *Willet v. Metropolitan Ins. Co.*, 2 Bosw. 678.

⁵⁴ *Bell v. Brown*, 22 Cal. 671. See *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613. But compare *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177.

⁵⁵ *Burke v. Thorne*, 44 Barb. 363. As to inconsistencies in the answer, see *Hollenbeck v. Clow*, 9 How. Pr. 289; *Lansing v. Parker*, 9 How. Pr.

288; *Stiles v. Comstock*, 9 How. Pr. 48.

⁵⁶ *Bell v. Brown*, 22 Cal. 671.

⁵⁷ *Klink v. Cohen*, 13 Cal. 623; *Uridias v. Morrell*, 25 Cal. 35.

⁵⁸ *Howard v. Throckmorton*, 48 Cal. 482. See, also, *Spanagel v. Reay*, 47 Cal. 608.

⁵⁹ *McDonald v. American Mort. Co.*, 17 Or. 626, 21 Pac. 883; *Snodgrass v. Andross*, 19 Or. 236, 23 Pac. 969; *Randall v. Simmons*, 40 Or. 554, 67 Pac. 513; *Herbert Craft Co. v. Bryan* (Cal. 1902), 68 Pac. 1020; *Murphy v. Russell*, 8 Idaho, 133, 67 Pac. 421.

⁶⁰ *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871.

compel defendant to elect one of the defenses upon which alone to make a stand.⁶¹ General denial, and that the alleged cause of action is barred by the statute of limitations, are not legally inconsistent with each other.⁶² So, in an action upon a lease, a defense that the defendant was merely a tenant from month to month is not inconsistent with a defense that by reason of acts and omissions of the plaintiff, amounting to an eviction, the defendants were compelled to remove from the premises.⁶³ Inconsistent pleas are admissible in an answer under Wyoming practice.⁶⁴ The pleas of *non est factum* and *non assumpsit* are not so inconsistent as to make them inadmissible.⁶⁵ An objection that an answer contains inconsistent defenses cannot be taken by demurrer. The remedy is by motion to strike out, or to require the party pleading to elect between them.⁶⁶ Where a defendant denies the execution or delivery of a note, and in a separate defense alleges that the same note was made with a fraudulent intent, the execution of the note is admitted, since the two statements are utterly inconsistent.⁶⁷

§ 673. **Prayer in answer.**—In an action to recover personal property, or to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff.⁶⁸ A formal prayer is not necessary in an answer, when no counterclaim is set up.⁶⁹

§ 674. **Separate answer.**—In actions against several defendants, each may answer separately.⁷⁰ But dilatory defenses must

⁶¹ Horton v. Driskell, 13 Wyo. 66, 77 Pac. 354; Fleishman v. Meyer, 46 Or. 267, 80 Pac. 209.

⁶² Lawrence v. Peek, 3 S. Dak. 645, 54 N. W. 808. See McCormick v. Kaye, 41 Mo. App. 263; Barnes v. Scott, 29 Fla. 285, 11 South. 48.

⁶³ Kline v. Hanke, 14 Mont. 361, 36 Pac. 454.

⁶⁴ Lake Shore etc. R. R. Co. v. Warren, 3 Wyo. 134, 6 Pac. 724. So in South Dakota: Stebbins v. Lardner, 2 S. Dak. 127, 48 N. W. 847. See, also, Billings v. Drew, 52 Cal. 565; Bruce v. Burr, 67 N. Y. 240; Pavey v. Pavey, 30 Ohio St. 600; Clarke v. Lyon Co., 7 Nev. 75; State v. Rogers, 79 Mo. 283; Hall v. Clement, 41 N. H. 166.

Contra, Seattle Nat. Bank v. Carter, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177.

⁶⁵ Staab v. Jaramillo, 3 N. Mex. 33, 1 Pac. 170.

⁶⁶ Caldwell v. Ruddy, 2 Idaho, 5, 1 Pac. 339. Compare Lynch v. Richter, 10 Wash. 486, 39 Pac. 125. See, as to inconsistent defenses, Olympia v. Stevens, 15 Wash. 601, 47 Pac. 11; Pugh v. Oregon Imp. Co., 14 Wash. 331, 44 Pac. 547, 689; Corbitt v. Harrington, 14 Wash. 197, 44 Pac. 132.

⁶⁷ Maxwell v. Bolles, 28 Or. 1, 41 Pac. 661.

⁶⁸ Gould v. Scannell, 13 Cal. 430.

⁶⁹ Bendit v. Annesley, 42 Barb. 192

⁷⁰ 2 Saund. Pl. & Ev. 18, 19.

be common to all.⁷¹ Against several executors, those served first, or who appear first, may answer for the estate.⁷²

§ 675. Several defenses.—The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished.⁷³ Separate allegations of matters in avoidance are admissible in connection with the general denial.⁷⁴ Several demands against the plaintiff which are available to the defendant as a set-off may be pleaded in one defense, each being separately described.⁷⁵ It would seem to be otherwise of counterclaims.

FORMS, SEVERAL DEFENSES.

§ 676. Demurrer and answer.

Form No. 210.

[TITLE.]

The defendant demurs [or the defendants, naming them, if only a part of them join, demur] to the first [or other] cause of action stated in the complaint, on the following grounds:

I. [State the grounds.]

II. And for answer to the plaintiff's complaint, the defendant denies, admits, and alleges, as follows:

That, etc.

§ 677. Several defenses and a counterclaim.

Form No. 211.

[TITLE.]

The defendant answers to the complaint:

First. To the first cause of action:

I. That he denies each and every allegation in the first paragraph thereof.

⁷¹ Hurley v. Second Bldg. Assoc., 15 Abb. Pr. 206, note.

⁷² Salters v. Pruyn, 15 Abb. Pr. 224.

⁷³ Cal. Code Civ. Proc., § 441; N. Y. Code, 1877, § 507; Bennett v. Le Roy, 14 How. Pr. 178, 5 Abb. Pr. 55, 6 Duer, 683; Gardner v. McWilliams, 42 Or. 14, 69 Pac. 915.

⁷⁴ Kellogg v. Baker, 15 Abb. Pr.

286; McDonald v. American Mort. Co., 17 Or. 626, 21 Pac. 883; Snodgrass v. Andross, 19 Or. 236, 23 Pac. 969; Veasey v. Humphreys, 27 Or. 515, 41 Pac. 8. See Pavey v. Pavey, 30 Ohio St. 600; Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328.

⁷⁵ Ranney v. Smith, 6 How. Pr. 420; Norris Safe & Lock Co. v. Clark, 28 Wash. 268, 68 Pac. 718, 70 Pac. 129.

II. That as to the second paragraph thereof he has no knowledge, information, or belief, sufficient to enable him to answer the same or any allegation thereof, and he, therefore, denies each and every allegation therein contained.

Second. To the second cause of action he answers:

That the note mentioned therein is not his note.

Third. To the third cause of action he answers, and avers:

1. For a first defense:

I. That it was a part of the agreement referred to in the complaint that the plaintiff should not sell goods for any other person than the defendant.

II. That the plaintiff during the period of his service mentioned in the complaint, sold sundry goods for one B. S., and for other persons whose names are unknown to the defendant, without the defendant's consent.

2. For a second defense:

That he has fully paid the plaintiff for his services.

Fourth. For a counterclaim:

I. That between the . . . day of . . . , 19 . . . , and the . . . day of . . . , 19 . . . , the plaintiff received from D. A. . . . dollars for the use of defendant.

II. That he has not paid the same.

Wherefore the defendant demands judgment for . . . dollars, with interest from the . . . day of . . . , 19 . . .

§ 678. Several defenses—Another form.

Form No. 212.

[TITLE.]

The defendant [or defendants severally, each for himself] answers to the complaint:

First. For a first defense:

I. As to the first cause of action set forth in the complaint, that no allegation thereof is true.

II. That on, etc. [set out defense].

Second. For a defense to the second cause of action set forth in the complaint, the defendant alleges [set forth defense].

Third. For a third defense:

And by way of counterclaim [or set-off or cross-complaint] to the [first] cause of action set forth in the complaint, the defendant alleges [set forth a cause of action against the plaintiff].

CHAPTER XXVIII.

DEFENSES—AFFIDAVIT OF MERITS OR OF DEFENSE.

§ 679. **Defined.**—An affidavit of merits or defense represents that, on the substantial facts of the case, justice is with the affiant.¹ When a defendant makes such an affidavit, he swears that he has a genuine and *bona fide* defense, not a defense which will be successful at all events, but a defense to the merits, which he ought to be allowed to present,² the merits meaning the legal rights of the parties as distinguished from questions of practice and discretion.³

An affidavit of merits is not in any sense a pleading, but it is often so inseparably connected with the pleadings of the defendant that a trial on the merits cannot be had without it. Hence its principal features are deserving of some consideration at this point.

The chief use of the affidavit of merits or defense is in connection with proceedings to secure relief from judgments taken by default.⁴ Such an affidavit is necessary also in order to support a motion for a change of venue.⁵ An affidavit of merits is almost universally required in order to vacate a judgment taken by default.⁶

As a general rule, a general affidavit of merits is usually held to be sufficient;⁷ but, for the purpose of opening a default, it has been held that a verified answer will not take the place of an affidavit of merits.⁸ In a recent California case, however,⁹ it was held that a verified answer served with the notice of motion, and containing specific denials of the material allegations of the complaint, and also affirmative matter, which, if true, was a com-

¹ Anderson's Law Dict.; Bouvier's Law Dict.

² McDonald v. Olwell, 17 Ill. 376.

³ St. John v. West, 4 How. Pr. 329.

⁴ Cal. Code Civ. Proc., §§ 473, 859.

⁵ Cal. Code Civ. Proc., § 396.

⁶ Bailey v. Taaffe, 29 Cal. 424; Francis v. Cox, 33 Cal. 323; Nevada Bank v. Dresback, 63 Cal. 324; Tuttle v. Scott, 119 Cal. 588, 51 Pac. 849; Martin v. Skehan, 2 Colo. 614; Colorado Springs Co. v. Hewitt, 3 Colo. 375; Leahy v. Dunlap, 6 Colo. 552; McPherson v. Kingsbaker, 22 Kan. 646; Lamb v. Gaston etc. Min. Co., 1

Mont. 64; Donnelly v. Clark, 6 Mont. 135, 9 Pac. 887; State v. Consolidated Virginia etc. Min. Co., 13 Nev. 194; Ewing v. Jennings, 15 Nev. 379; Mitchell v. Campbell, 14 Or. 454, 13 Pac. 190.

⁷ Francis v. Cox, 33 Cal. 323; Howe v. Coldren, 4 Nev. 171; State v. Consolidated Virginia etc. Min. Co., 13 Nev. 194.

⁸ Parrott v. Den, 34 Cal. 79; Martin v. Skehan, 2 Colo. 614; Gauthier v. Rusicka, 3 N. Dak. 3, 53 N. W. 80.

⁹ Merchant's Ad. Sign Co. v. Los Angeles Bill Posting Co., 128 Cal. 619, 61 Pac. 277.

plete defense to the action, was held to be of itself a sufficient affidavit of merits.

Under the Colorado statute¹⁰ providing that no defendant shall be permitted to deny the execution of an instrument sued on, unless he verify his plea by affidavit, the defendant cannot substitute an affidavit of merits for such verified plea.¹¹

An affidavit of merits made by the defendant's attorney, setting forth that he is personally familiar with the facts; that he knows of his own knowledge of facts which constitute a full, meritorious, and legal defense; and that defendant has a complete defense, is sufficient, and no objection can be taken thereto merely because it was made by counsel.¹² In such case, however, the affidavit should show a sufficient reason why it is not made by the party himself.¹³ Where the affidavit is made by counsel, it is only necessary that it show that he is familiar with the facts in the case.¹⁴ Where two defendants file a joint answer to a complaint, with which plaintiff has filed an affidavit stating the nature of the demand and the amount due, an affidavit of merits accompanying the answer, sworn to by one of them, is sufficient.

An affidavit which declares "that the defendant has fully and fairly stated the case to his counsel, and that he has a good and substantial defense on the merits to the whole of the plaintiff's demand, as he is advised by his counsel, and verily believes to be true," is sufficient.¹⁵ The affiant should aver that he has fully and fairly stated "the case," not "his case," to his attorney.¹⁶ But there is no essential difference between an affidavit of merits which states that the defendant "has fully and fairly stated the case in this action" and one which states that he "has fully and fairly stated the facts of the said case."¹⁷ And an affidavit of merits, otherwise good, is not defective because of failure to allege that the affiant believed the advice of his counsel; nor is it insufficient because of the omission of the names of the defendants from the title of the action, where the notice of motion states that

¹⁰ Rev. Stats., p. 506, § 14.

¹¹ *City of Central v. Wilcoxon*, 3 Colo. 566.

¹² *Will v. Lytle Creek Water Co.*, 100 Cal. 344, 34 Pac. 830; *Jean v. Hennessy*, 74 Iowa, 348, 7 Am. St. Rep. 486, 37 N. W. 771.

¹³ *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882.

¹⁴ *Howe v. Coldren*, 4 Nev. 171; *Horton v. New Pass Gold Min. Co.*, 21 Nev. 184, 27 Pac. 376.

¹⁵ *Watkins v. Degener*, 63 Cal. 500; *Buell v. Dodge*, 63 Cal. 553; *Rowland v. Coyne*, 55 Cal. 1.

¹⁶ *People v. Larue*, 66 Cal. 235, 5 Pac. 157.

¹⁷ *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. 987.

it will be made "upon the affidavit and demand of defendant, and upon said notice and all the papers and pleadings on file in said action," and both the notice and demand were duly entitled, and the affidavit was filed with the notice.¹⁸ But an affidavit merely averring that the affiant had fully and fairly stated to the attorney all of the facts constituting his defense, instead of the facts of the case, is insufficient.¹⁹ In cases of motions for change of venue, it is a common and convenient practice to combine the affidavit of merits with the affidavit of the ground on which the motion is made, where the latter does not appear upon the face of the complaint, and is to be established by affidavit. It has been held that where it appears from the affidavit of merits that the defendant is entitled to file an answer which will raise issues for trial which he desires to have tried in the proper county, the affidavit is sufficient.²⁰

A motion to set aside a default in an action for the price of goods, supported by an affidavit, in which the defendant says that he expects to prove that he has paid for the goods, but fails to state that he has in fact paid for them, must be disregarded.²¹ And an affidavit of merits stating facts on information and belief alone is insufficient, as being hearsay.²² A statement in the affidavit that the defendant has a good defense "to the plaintiff's declaration filed in this suit" is insufficient.²³ And an affidavit which states merely that the defendant believes he has a good defense to a part of the amount of damages claimed in the action on the merits is defective.²⁴ The affidavit must state that the defendant has a good and substantial defense.²⁵ A verified complaint alleging the participation of another defendant with the defendant owners in the operation of a machine, when a fire was caused thereby, cannot be varied by an affidavit for the defendants denying that fact.²⁶

§ 680. **Time to answer.**—The time within which the defendant must answer is regulated by the codes, and differs in the several

¹⁸ *Watt v. Bradley*, 95 Cal. 415, 30 Pac. 557.

¹⁹ *Nickerson v. California Raisin Co.*, 61 Cal. 268; *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226.

²⁰ *State v. Superior Court*, 9 Wash. 668, 38 Pac. 206.

²¹ *Hale v. Bender*, 13 Neb. 66, 12 N. W. 920.

²² *Jenkins v. Gamewell Fire Alarm Tel. Co. (Cal.)*, 31 Pac. 570.

²³ *Howe v. Hasbrouck*, 1 How. Pr. 68.

²⁴ *McDonnell v. Murphy*, 20 Ill. 346.

²⁵ *Bank of Utica v. Root*, 4 Hill, 535.

²⁶ *Quint v. Dimond*, 135 Cal. 572, 67 Pac. 1034.

states.²⁷ The codes generally, however, provide that the time to answer may be enlarged or extended in the discretion of the court or judge.²⁸ In New York, the defendant must answer within the statutory time, or such further time as he may obtain by order.²⁹ In California, an answer filed without leave of court, after the time for answering has expired, but before default has been entered, is at most an irregularity. The court, in its discretion, may strike it out or retain it, or permit another to be filed, but the plaintiff cannot as of right have such answer stricken out. For these purposes the defendant is not in default until his default has been actually entered.³⁰ The only purpose of a default is to limit the time during which the defendant may file his answer, and that time never extends beyond a trial and judgment.³¹ If the defendant demurs only, and the demurrer is overruled, the court may allow him to answer, imposing terms in its discretion.³² If the demurrer is deemed frivolous, terms will be imposed before an answer is allowed. Such a rule is required to prevent the demurrer from becoming a means of delay only; and if the court does not fix the time within which an answer in such case may be filed, the defendant should answer within the same time as in the case of service of a copy of the original complaint.³³ When a demurrer is interposed and overruled, the question of time to answer and terms are chiefly regulated by the rules and discretion of the court in which the action is pending.³⁴

When the defendant is allowed time to answer until the plaintiff elects on which count of his complaint he will go to trial, the plaintiff should serve a copy of the complaint with the notice of his election.³⁵ And if an answer has been already filed, it may be allowed by order of the court to stand as an answer to such amended complaint, and it shall be treated as if filed when the order is made.³⁶ So, if the defendant should fail to answer in the time specified in the summons, it is not an unsound exercise of discretion to refuse him leave to file an answer which does not

²⁷ Cal. Code Civ. Proc., § 407; N. Y. Code Civ. Proc., § 448.

²⁸ Cal. Code Civ. Proc., § 473; Or. B. & C. Codes, § 103.

²⁹ N. Y. Code Civ. Proc., §§ 520, 781, 782.

³⁰ Cal. Code Civ. Proc., § 473; Bowers v. Dickerson, 18 Cal. 421; Acock v. Halsey, 90 Cal. 220, 27 Pac. 193.

³¹ Drake v. Duvenick, 45 Cal. 463. P. P. F. Vol. I—27

³² Cal. Code Civ. Proc., § 472. See, also, Maumus v. Hamblon, 38 Cal. 539.

³³ People v. Rains, 23 Cal. 128.

³⁴ Cal. Code Civ. Proc., §§ 472, 473, 1054; Thornton v. Borland, 12 Cal. 438; Smith v. Yreka etc. Co., 14 Cal. 202; Lord v. Hopkins, 30 Cal. 78.

³⁵ Willson v. Cleaveland, 30 Cal. 192.

³⁶ Mulford v. Estudillo, 32 Cal. 131.

show a meritorious defense.³⁷ Where an action was brought against a partnership, and one member of the firm, although not served with process, entered into a stipulation which was filed in the case, giving him time to plead and file motion for a change of venue, and to dismiss the complaint without any limitation on his appearance, an order made two years later, giving the defendants forty-eight hours to file an answer, was held not to be unreasonable merely because the partner was not in the state, since he had entered a general appearance and, from the number of motions filed by him, was evidently sufficiently familiar with the case to enable him to answer.³⁸

A stipulation extending the time within which to answer to and including a specific day, which falls on Sunday, entitles the defendant to answer it any time during the succeeding Monday.³⁹ The fact that an answer is not filed until after the expiration of the time for answering does not render the filing a nullity; and where the answer seeks affirmative relief, a judgment of dismissal of the action by the plaintiff is void.⁴⁰ In Oregon, where an answer is not filed within the time limited, the proper practice is to apply to the trial court for a default or judgment for want of an answer.⁴¹ The Washington statute⁴² fixes the time for answer in response to a summons at twenty days in all cases.⁴³

An order of court extending the time of the moving party to plead only one day after the decision of the motion made more than five months after the service of summons on him, was held to be an attempt to extend the time to plead beyond thirty days without the consent of the plaintiff, and was void, as being beyond the jurisdiction of the court, and could not preclude the entry of the default of the defendant pending the time named in such void order.⁴⁴

The courts will take judicial notice of the territorial extent of the local divisions of the country into states, counties, cities, etc., for the purpose of fixing the time within which an answer must be filed.⁴⁵

³⁷ Thornton v. Borland, 12 Cal. 439; Hallowell v. Page, 24 Mo. 590.

³⁸ Adamson v. Bergen, 15 Colo. App. 396, 62 Pac. 629.

³⁹ Blackwood v. Cutting Packing Co., 71 Cal. 461, 12 Pac. 493.

⁴⁰ Acock v. Halsey, 90 Cal. 215, 27 Pac. 193. See, also, Truett v. Onderdonk, 120 Cal. 586, 53 Pac. 26.

⁴¹ Gaines v. Cyrus, 23 Or. 403, 31 Pac. 833.

⁴² Laws 1893, p. 407.

⁴³ McMaster v. Advance Thresher Co., 10 Wash. 147, 38 Pac. 760.

⁴⁴ Kennedy v. Mulligan, 136 Cal. 556, 69 Pac. 291.

⁴⁵ People v. Smith, 1 Cal. 9.

CHAPTER XXIX.

INTERVENTION, INTERPLEADER, ETC.

§ 681. **Intervention.**—A plea in intervention should contain all the necessary allegations within itself; and the intervener should not be allowed to refer to and make a part of his pleading portions of the original complaint.¹ At any time before trial, any person who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both, may intervene in an action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint.² The right to intervene under this section is not limited to any particular kind or class of actions, but is general.³ And the fact that the intervener might protect his interest in some other way is immaterial.⁴ The right is purely statutory, and the statute prescribes the mode of exercising it.⁵ The right to intervene may be exercised at any time before trial of the action,⁶ but an intervention cannot be allowed after final judgment.⁷ Good practice requires the petition to be filed before the trial is entered upon.⁸ But the petition is in time, although not filed

¹ Blackwell v. Latch, 13 Okla. 169, 73 Pac. 933.

² Cal. Code Civ. Proc., § 387; Alaska Codes, pt. 4, ch. 3, § 41; Ariz. Civ. Code, pars. 1278, 1279; Colo. (Mills' Ann. Code) § 22; Idaho Rev. Codes, §§ 4111-4115; Mont. Rev. Codes, §§ 6496-6500; Nev. Comp. Laws, § 3694; N. Dak. Code Civ. Proc., § 5239; Or. B. & C. Codes, §§ 41, 42; S. Dak. Code Civ. Proc., § 96; Utah Rev. Stats., § 2925; Wash. Bal. Codes, §§ 4846, 4847.

³ Robinson v. Crescent City Transp. Co., 93 Cal. 316, 28 Pac. 950.

⁴ Coffey v. Greenfield, 55 Cal. 382.

⁵ Chase v. Evoy, 58 Cal. 348, 355.

⁶ Coburn v. Smart, 53 Cal. 742.

⁷ Owens v. Colgan, 97 Cal. 454, 32 Pac. 519; Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767; Leonis v. Biscailuz, 101 Cal. 330, 35 Pac. 875.

⁸ Rockwell v. Coffey, 20 Colo. 397, 38 Pac. 376.

until after a motion in the principal action for a default against the defendant.⁹ The order allowing an intervention may be made *ex parte*.¹⁰

§ 682. **Petition.**—Whatever its form, it seems that under the statute the plea of an intervener is now called a complaint. It cannot be filed without leave of the court, and prudence would suggest that it should appear that leave was obtained. If the petition is insufficient as to facts, the objection can be taken at any time.¹¹ One intervening in opposition to the application of a receiver in an action to make a certain expenditure, does not become a party to the action, or to any proceeding collateral thereto, other than that in which he intervenes.¹² The purpose of a petition in intervention is to show that the intervener has such interest as to entitle him to so intervene, and the question of whether a new issue of fact is presented is not a test whether an issue different from that between the original parties is raised.¹³

§ 683. **Appeal.**—The right of an intervener to take an appeal is immediate upon the sustaining of an objection, by demurrer, to his right to intervene.¹⁴ If pleadings in intervention are filed in the court below without objection, and the parties go to trial without objecting, they cannot afterwards on appeal raise the objection that it was irregular and erroneous to permit an intervention.¹⁵

§ 684. **Assignees.**—An assignee *pendente lite* of part of the subject-matter of the controversy may be brought in.¹⁶ An assignee in bankruptcy or insolvency, but only on his own application,¹⁷ and an assignee applying to be made defendant in an action for conversion of property, must show some right thereto.¹⁸ An

⁹ Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25. As to who may intervene, see Martin v. McCarthy, 3 Colo. App. 37, 32 Pac. 551; Morey v. Lett, 18 Colo. 128.

¹⁰ Spanagel v. Reay, 47 Cal. 608; Kimball v. Richardson-Kimball Co., 111 Cal. 396, 43 Pac. 1111.

¹¹ Harlan v. Eureka M. Co., 10 Nev. 92.

¹² Elliott v. Superior Court, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109.

¹³ Cache etc. Ditch Co. v. Hawley, 43 Colo. 32, 95 Pac. 317.

¹⁴ Stich v. Dickinson, Goldner Intervener, 38 Cal. 608. See Henry v. Travelers' Ins. Co., 16 Colo. 179, 26 Pac. 318.

¹⁵ McKenty v. Gladwin, 10 Cal. 227; Smith v. Penny, 44 Cal. 161.

¹⁶ McGown v. Leavenworth, 2 E. D. Smith, 24.

¹⁷ Cleveland v. Boerum, 3 Abb. Pr. 294.

¹⁸ Gunther v. Greenfield, 8 Abb. Pr. (N. S.) 191.

assignee for the benefit of creditors, in the absence of peculiar facts, has no such interest in the "matter in litigation" as entitles him to intervene to defend a purely personal action against his assignor.¹⁹ If the owner of a claim assigns it absolutely, retaining, however, an interest in it, he may intervene to protect his interest in an action brought by the assignee to collect the same, and if he does not intervene, he is bound by the judgment.²⁰ Where parties succeed to the interest of the defendant in the premises, after the commencement of the action, and before answer filed, they may be allowed to defend.²¹

§ 685. **Attachment suits.**—In an attachment suit, judgment creditors of defendant may intervene to set aside the attachment, because void as to them.²² In an action to recover money on which an attachment has been issued and levied upon property of the defendant, a subsequent attaching creditor may intervene at any time before the entry of judgment, for the purpose of contesting the validity of the first attachment. And the allegations in the pleading, on the part of the intervener, traversing the complaint, have the same effect as denials in the answer, and require affirmative proof by the plaintiff of his cause of action, in default of which the intervener will have judgment in his favor.²³ Subsequent attaching creditors may intervene in a suit of the prior attaching creditor and the common debtor, when they allege that there is nothing due to said first creditor, and that the object is to hinder, delay, and defraud other creditors.²⁴ The interveners become defendants, and as they allege that the plaintiff is not entitled to recover, it amounts to a denial of the facts set forth in the complaint, and consequently the *onus probandi* is on the plaintiff; and if he fails to prove his case, even though the real defendants have made default, judgment will be given in favor of the interveners against him, and in his favor against the real defendants.²⁵ Where a subsequent attaching creditor has his attachment levied on the property previously levied on by a prior

¹⁹ McClurg v. State Bindery Co., 3 S. Dak. 362, 44 Am. St. Rep. 799, 53 N. W. 428. See Meyer v. Black, 4 N. Mex. 190, 16 Pac. 620.

²⁰ Gradwohl v. Harris, 29 Cal. 150.

²¹ McFadden v. Wallace, 38 Cal. 51.

²² Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184. See, also, Kimball v. Richardson-Kimball Co., 111 Cal.

386, 43 Pac. 1111. Hawes v. Clement, 64 Wis. 152, 25 N. W. 21; Tim v. Smith, 93 N. Y. 87; Goodbar v. City Nat. Bank, 78 Tex. 461, 14 S. W. 851.

²³ Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157.

²⁴ Id.

²⁵ Id.

attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims.²⁶

§ 686. **Dismissal.**—Where plaintiffs brought suit to foreclose a lien, and other parties intervened as lien claimants, and after an appearance by the defendants plaintiff filed a dismissal of the suit, it was held that the dismissal could not affect the rights of the interveners, and they had a right to an adjudication as between themselves and the defendants.²⁷ Nonsuit of plaintiff is not a dismissal as to an intervener whose intervention defendant has answered. A motion to dismiss an intervention should point out the precise ground on which it is made.²⁸

§ 687. **Ejectment.**—In ejectment, a person who is in no way connected with the right of possession asserted by the plaintiff or the defendant, but, on the contrary, alleges title in himself paramount to both, cannot intervene.²⁹ If, however, plaintiff and the intervener agree upon the facts, and stipulate that the claim of the intervener shall be determined upon the legal effect of the stipulated facts, plaintiff cannot afterwards object that the case is not a proper one for intervention.³⁰

§ 688. **Foreclosure.**—A simple contract creditor of a common debtor cannot intervene in a foreclosure suit. But judgment creditors, being, as such, subsequent incumbrancers, may intervene; and a court may order them to be made parties, probably by an amendment of the complaint as the better course, or on petition of intervention.³¹ In a suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the interveners cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to

²⁶ *Coghill v. Marks*, 29 Cal. 673.
But see *Dixey v. Pollock*, 8 Cal. 570.

²⁷ *Elliott v. Ivers*, 6 Nev. 287.

²⁸ *Poehlmann v. Kennedy*, 48 Cal. 201.

²⁹ *Porter v. Garrissino*, 51 Cal. 559.
See *Rosecrans v. Ellsworth*, 52 Cal.

509. As to intervention by landlord in ejectment against tenant in possession, see *Reay v. Butler*, 69 Cal. 572, 11 Pac. 463.

³⁰ *Donner v. Palmer*, 51 Cal. 629.

³¹ *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569.

their prejudice.³² In an action to foreclose a mortgage upon property claimed as a homestead, the wife should be allowed to intervene.³³

§ 689. Interest of parties.—The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. It must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.³⁴ To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.³⁵ In an action by the holder of a chattel mortgage against the mortgagor for the possession of the mortgaged property, a mere judgment creditor, without lien by levy of execution or attachment, is not entitled to intervene for the purpose of showing the mortgage paid or fraudulent.³⁶ Intervention proceedings are to be liberally construed, with the view to assist parties in obtaining justice. And in determining whether a party is entitled to intervene, the averments of the petition, so far as they are well pleaded and not denied, are to be taken as true.³⁷ So it is within the discretion of the trial court to allow an intervener to amend his complaint at the trial to conform to the proofs, and it is not error to allow such amendment.³⁸

§ 690. Mechanic's lien.—In a suit to enforce a mechanic's lien on a ditch, a mortgagee of the ditch subsequent to the lien has no

³² *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569. Compare *Henry v. Traveler's Ins. Co.*, 16 Colo. 179, 26 Pac. 318.

³³ *Sargent v. Wilson*, 5 Cal. 504; *Marks v. Marsh*, 9 Cal. 96; *Moss v. Warner*, 10 Cal. 296; *Mabury v. Ruiz*, 58 Cal. 11.

³⁴ *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Harlan v. Eureka M. Co.*, 10 Nev. 92; *Henry v. Traveler's Ins. Co.*, 16 Colo. 179, 26 Pac. 318. See *Wood v. Denver City Water Works Co.*, 20 Colo. 253, 266,

46 Am. St. Rep. 288, 38 Pac. 239.

³⁵ *Horn v. Volcano Water Co.*, 13 Cal. 70, 73 Am. Dec. 569, cited in *Stich v. Dickinson*, 38 Cal. 608; *Brooks v. Hager*, 5 Cal. 281; *Yetzer v. Young*, 3 S. Dak. 263, 52 N. W. 1054.

³⁶ *Id.* See *Bennett v. Whitcomb*, 25 Minn. 148.

³⁷ *Henry v. Traveler's Ins. Co.*, 16 Colo. 179, 26 Pac. 318.

³⁸ *Ward v. Waterman*, 85 Cal. 491, 24 Pac. 930. See *Majors v. Taussig*, 20 Colo. 44, 36 Pac. 816.

absolute right of intervention. And when the suit had been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused.³⁹ The filing of an intervention in an action to foreclose a mechanic's lien within the prescribed statutory time, and becoming parties to the suit during the existence of the lien, is the same as commencing an original action.⁴⁰

§ 691. Nonsuit.—Where the intervener claims an interest adverse to both plaintiff and defendant, and plaintiff answers the intervention raising material issues, his right to be heard thereon is not affected by nonsuit granted on motion of defendant. The action is still pending as to such issues, and should be tried, not dismissed.⁴¹

§ 692. Ordering in necessary parties.—When a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in, and to that end may order amended and supplemental pleadings or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.⁴² The court may, on its own motion, order in necessary parties;⁴³ but will not, on motion of defendant and against the will of plaintiff, bring in other parties unless their presence is necessary.⁴⁴ If a court on the trial makes an order that certain persons be permitted to appear and answer, on the erroneous supposition that they are necessary parties, such persons are not interveners, and do not become parties to the action.⁴⁵ And if the plaintiff chooses to waive any relief which would render the presence of other parties necessary, and take judgment for that only to which he is entitled as against defendants already in court, and as to which a complete

³⁹ *Hocker v. Kelley*, 14 Cal. 164.

⁴⁰ *Mars v. McKay*, 14 Cal. 127.

⁴¹ *Poehlmann v. Kennedy*, 48 Cal. 201.

⁴² Cal. Code Civ. Proc., § 389. See, also, N. Y. Code Civ. Proc., § 452, and Or. B. & C. Codes, §§ 40, 41; 1 Van Santv. Eq. Pr. 121.

⁴³ *Settembre v. Putnam*, 30 Cal. 490. See, also, *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423.

⁴⁴ *Sawyer v. Chambers*, 11 Abb. Pr. 110.

⁴⁵ *Chase v. Evoy*, 53 Cal. 348, 355.

determination can be had, the court may award the latter relief without the addition of other parties.⁴⁶ The phrase "when a complete determination," etc., means that there are persons not parties whose rights must be ascertained and settled before the rights of the parties to the suit can be determined.⁴⁷ As a court of equity will not permit litigation by piecemeal, and as the whole subject-matter and all the parties should be before it, to determine once and forever their respective claims, the court will order them to be brought in.⁴⁸ And it is the imperative duty of the court in such case to order the parties in,⁴⁹ although such parties be non-residents.⁵⁰ But a motion made by the plaintiffs, after the dismissal of their complaint, to amend by making an indispensable party a party defendant, is properly denied, where no reason is shown why he was not originally joined.⁵¹ Permitting an additional party to be joined after suit has commenced is not reversible error, where the defendants objecting do not show that they were prejudiced, and the plaintiff makes no objection.⁵²

§ 693. **Specific performance.**—In an action against several for a specific performance of their joint contract to purchase real estate of the plaintiff, and secure a part of the price by their bond and mortgage, the court will not proceed unless all parties are in.⁵³

§ 694. **Sureties.**—Sureties may be let in to defend upon proper application, in the place of their principal.⁵⁴ But if a party who has given a bond of indemnity to a sheriff takes charge of the defense in an action against the sheriff and defends it by his own attorney, though done in the sheriff's name, the judgment against the sheriff is conclusive against the party giving the bond; as he might have intervened and defended as party to the record, had he so chosen, as he did as a party in interest.⁵⁵ The sureties of a defendant in an action of replevin, upon an undertaking given

⁴⁶ *Settembre v. Putnam*, 30 Cal. 490.

⁴⁷ *McMahon v. Allen*, 12 How. Pr. 39.

⁴⁸ *Wilson v. Lassen*, 5 Cal. 114; *Ord v. McKee*, 5 Cal. 515; *Shaver v. Brainard*, 29 Barb. 25.

⁴⁹ *Tonnelle v. Hall*, 3 Abb. Pr. 205; *Davis v. Mayor of New York*, 2 Duer, 663. But see 14 N. Y. 506, 67 Am. Dec. 186.

⁵⁰ *Sturtevant v. Brewer*, 17 How. Pr. 571, 9 Abb. Pr. 414.

⁵¹ *Peck v. Peck*, 33 Colo. 421, 80 Pac. 1063.

⁵² *Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045.

⁵³ *Powell v. Finch*, 5 Duer, 666.

⁵⁴ *Jewett v. Crane*, 13 Abb. Pr. 97, 35 Barb. 208.

⁵⁵ *Dutil v. Pacheco*, 21 Cal. 441, 82 Am. Dec. 749.

to effect a return of the property in controversy to the defendant pending the action, have an interest in the action which entitles them to intervene if the defendant is insolvent and the action is not being defended in good faith.⁵⁶

§ 695. **Tax.**—A. & Co. having on general deposit with B. & Co. seventy-five thousand dollars, a tax for county purposes was levied thereon, and payment demanded of both A. & Co. and B. & Co.; it was held that the county might intervene in an action concerning the money to recover said tax.⁵⁷

§ 696. **Who may intervene.**—Where one tenant in common sues to recover possession of the premises, and the damages sustained by the ouster, his cotenants cannot intervene.⁵⁸ Persons who ought to have been joined as parties, but who were not, may apply to come in, and, if there are no laches on their part, may apply to come in at any time before final judgment.⁵⁹ A judgment creditor of a deceased person is not entitled to be made a party to a suit in partition between his heirs and those entitled to his real property.⁶⁰ Where a man brought suit to annul a second marriage on the ground that he had a former wife living, and obtained a decree for want of an answer, and then married a third wife, and subsequently the second wife opened the judgment against her marriage on the ground of fraud, and then the third wife was allowed to intervene, and she put in an answer alleging the invalidity of both former marriages and the validity of her own, it was held that both such former marriages could not be adjudged void without an amendment to the complaint.⁶¹

§ 697. **Intervention—Miscellaneous cases—Pleading.**—The denial of a petition to intervene in an action to establish a trust in certain real estate in favor of the plaintiff, by one claiming the legal title to and possession of a certain portion of the premises involved, is not erroneous, where it does not appear that the rights or remedies of the intervener could be affected by a judgment between the parties to the suit.⁶² In an action of accounting

⁵⁶ Coburn v. Smart, 53 Cal. 742.

⁵⁷ Yuba County v. Adams, 7 Cal. 37.

⁵⁸ Donner v. Palmer, Bradley Intervener, Cal. Sup. Ct., October term 1867 (not reported).

⁵⁹ Hubbard v. Eames, 22 Barb. 597.

⁶⁰ Waring v. Waring, 3 Abb. Pr. 246.

⁶¹ Anonymous, 15 Abb. Pr. (N. S.) 171.

⁶² Curtis v. Lathrop, 12 Colo. 169, 20 Pac. 250. Compare Coffey v.

between partners, firm creditors may join in an intervention for the purpose of sharing in a fund in the hands of one of the partners, resulting from a fraudulent sale by him of the firm property.⁶³ So a mortgagee of personal property who is entitled by the terms of his mortgage to immediate possession may intervene in an action by a third person against the mortgagor to recover the specific property, and his right to intervene is not affected by the plaintiff taking possession of the property at the commencement of the action on giving a bond as the statute provides.⁶⁴ In an action for damages for trespass alleged to have been committed by the defendant in entering upon the plaintiff's land, and constructing and using a roadway across the same, one claiming a grant of a right of way over the land from the plaintiff, and who shows himself to be the real party in interest, and the one by whose order and in whose employment the acts complained of were done, has the right to intervene.⁶⁵ In an action by one of two water companies claiming the exclusive privilege of supplying water to a certain town and its inhabitants, a temporary injunction was granted restraining the other company from supplying the water; and it was held that certain residents of the town, under the facts and circumstances set forth in their petition, were entitled to intervene and become parties for the purpose of contesting the exclusive privilege asserted by the plaintiff company.⁶⁶ Where the whole complaint in intervention is not set out in the record, it will be presumed upon appeal that a demurrer thereto was properly overruled.⁶⁷ All the averments of an answer to a complaint in intervention must be considered as denied by the intervenor.⁶⁸

§ 698. **Interpleader.**—A defendant against whom an action is pending upon a contract, or for specific personal property, may at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract or for the same property, upon notice to such person and the adverse party, apply to the

Greenfield, 55 Cal. 382, Ward v. Watterman, 85 Cal. 488, 24 Pac. 930.

⁶³ Grossini v. Perazzo, 66 Cal. 545, 6 Pac. 450.

⁶⁴ Martin v. Thompson, 63 Cal. 3.

⁶⁵ Robinson v. Crescent City etc. Co., 93 Cal. 316, 28 Pac. 950.

⁶⁶ Wood v. Denver City Water Works Co., 20 Colo. 253, 46 Am. St. Rep. 288, 38 Pac. 239.

⁶⁷ Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111.

⁶⁸ Pearson v. Creed, 78 Cal. 144, 20 Pac. 302.

court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order.⁶⁹ The granting of the order is within the discretion of the court.⁷⁰ But it should not be granted where the action is for the price of goods sold, on the ground that a third person claimed to be the owner of the goods,⁷¹ even though such third person claimed that the goods had been procured from him by fraud.⁷² But where defendant alleged that he had been sued by a third person, claiming that the plaintiff sold the goods as his agent, whereas the plaintiff claimed that he sold them in his own right, it was held a proper case to order that defendant be discharged on paying the money into court, and that such third person be substituted as defendant.⁷³ An interpleader will be sustained whenever it is necessary for the protection of a person, from whom several others claim legally or equitably the same thing, debt, or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. He must occupy the place of a mere stakeholder.⁷⁴ It seems that the material allegations in a complaint in an action of interpleader are that two or more persons have preferred a claim against the plaintiff; that they claim the same thing; that the plaintiff has no beneficial interest in the thing claimed; and that he cannot determine without hazard to himself to which of the defendants the thing belongs.⁷⁵

Under the Washington statutes,⁷⁶ providing that any person having in his possession any property claimed by more than one person may commence an action against all or any of such persons to have their rights determined, it is not necessary for the plaintiff to show that he has been sued, or is threatened by suit, by any

⁶⁹ Cal. Code Civ. Proc., § 386, N. Y. Code Civ. Proc., § 820.

⁷⁰ Barry v. Mutual Life Ins. Co. of N. Y., 53 N. Y. 536.

⁷¹ Sherman v. Partridge, 4 Duer, 646.

⁷² Trigg v. Hitz, 17 Abb. Pr. 436.

⁷³ Johnston v. Lewis, 4 Abb. Pr. (N. S.) 150.

⁷⁴ Pfister v. Wade, 56 Cal. 43; Pope v. Ames, 20 Or. 199, 25 Pac. 393; De Zouche v. Garrison, 140 Pa.

St. 430, 21 Atl. 450; Clark v. Mosher, 107 N. Y. 118, 1 Am. St. Rep. 798, 14 N. E. 96; Baltimore etc. R. R. Co. v. Arthur, 90 N. Y. 234.

⁷⁵ Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991. See Dorn v. Fox, 61 N. Y. 268; Stone v. Reed, 152 Mass. 179, 25 N. E. 49; North Pacific Lumber Co. v. Lang, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799.

⁷⁶ Ballinger's Codes, §§ 4843-4845.

one or more of such parties.⁷⁷ These statutes are merely supplemental to the laws of procedure in courts of record.⁷⁸

Where a tenant finds that there are claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into court to abide the ultimate decision of the case.⁷⁹ In an action to determine the title or right of possession to real property which at the time of the commencement of the action is in the possession of a tenant, the landlord may be joined as a party defendant.⁸⁰ A tenant against whom conflicting claims for rent are made may file a bill of interpleader against the several claimants to determine their respective rights to the rent, and in such action the court may determine the rights of the claimants as between themselves.⁸¹

FORMS OF INTERVENTION AND INTERPLEADER.

§ 699. Commencement of complaint by intervener.

Form No. 213.

[TITLE.]

Now comes R. S., and by leave of the court first had and obtained, files this as his complaint in intervention in the above-entitled cause, and as the grounds of his intervention alleges [state facts showing the right to intervene, and set forth cause of action or defense as in ordinary complaint or answer].

[DEMAND FOR RELIEF.]

[VERIFICATION.]

§ 700. Order allowing intervention.

Form No. 214.

The foregoing complaint in intervention having been this day presented to me in open court, and leave asked to file the same by E. F., attorney for R. S., the intervener named therein, it appearing that good cause exists therefor, it is ordered that leave be and is hereby granted to file the same, and that said R. S. be permitted to intervene in said cause.

[DATE.]

[SIGNATURE OF JUDGE.]

⁷⁷ Daulton v. Stuart, 30 Wash. 562, 70 Pac. 1096.

⁷⁸ Seattle v. Turner, 29 Wash. 515, 69 Pac. 1083.

⁷⁹ McDevitt v. Sullivan, 8 Cal. 592; McCoy v. Bateman, 8 Nev. 126.

⁸⁰ Cal. Code Civ. Proc., § 379.

⁸¹ Schluter v. Harvey, 65 Cal. 153, 3 Pac. 659. See Ketcham v. Brazil Block Coal Co., 88 Ind. 515.

§ 701. Order to bring in necessary parties, without motion.

Form No. 215.

[TITLE.]

I. This cause coming on to be tried, and it appearing to the court that S. T. is a necessary party to a complete determination of the controversy:

II. It is ordered that the summons and complaint in this action be amended by the addition of S. T. as a defendant therein; that the plaintiff cause the said S. T. to be duly served with a copy of the said summons and complaint, further amended as he may be advised, within . . . days from the date of this order; that the said S. T. have . . . days to answer the complaint, after such service; and that the trial of this cause be postponed until the expiration of said . . . days allowed the said S. T. to answer as aforesaid.

§ 702. Affidavit in action to recover money.

Form No. 216.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above-entitled action.

II. That the said action has been commenced and is now pending in this court, against the above-named defendant, on a contract; and that the said defendant has not yet answered therein, and his time to do so does not expire until the . . . day of . . . , 19.. , next.

III. That said action is brought to recover the sum of . . . dollars, deposited with said defendant on or about the . . . day of . . . , 19 . . . , by one A. B.; and that the plaintiff claims to be entitled to said moneys so deposited, under an assignment thereof to him by the said A. B.

IV. That on the . . . day of . . . , 19 . . . , one M. N. gave to said defendant notice that the said moneys had been assigned to him by A. B., and demanded of said defendant that he pay the said deposit to him; which demand was made without any collusion with the defendant. And this deponent further says that he is not acquainted with the respective merits of said claims, and does not know to which of said parties he can safely pay said money; but hereby offers to pay the same into court, upon being

discharged from liability to either of them, in order that said several claimants may interplead, and settle their claims between themselves.

[JURAT.]

[SIGNATURE.]

§ 703. Affidavit where action is brought to recover specific personal property.

Form No. 217.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above-entitled action.

II. That the complaint therein was served on him on the . . . day of . . . , 19 . . . , at . . . , and no answer has yet been filed.

III. That the property which is claimed by the plaintiff herein was delivered to this deponent for storage by one O. P., of . . . , subject to his order.

IV. That the same property is claimed by one Q. R., of . . . , under a written order of the said O. P., dated on the . . . day of . . . , 19 . . . , and directing its delivery to him as the alleged purchaser thereof; while the plaintiff herein claims under a general assignment of all the property of the said O. P. to him, executed by the said O. P. on the same day.

V. That the defendant is ignorant of the rights of the respective claimants, and is not acting in collusion with either of them.

VI. That the defendant is ready and willing to deliver the said property to such person as the court may direct, upon being discharged from liability to either of the said claimants.

[JURAT.]

[SIGNATURE.]

§ 704. Notice of motion to allow party to interplead.

Form No. 218.

[TITLE.]

Take notice that on the affidavit herewith served, and on the complaint herein, the defendant will move the court, at the court-room thereof, at . . . on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, to substitute M. N., of . . . , in his place, as defendant herein, and to discharge this defendant from liability to either the plaintiff or the said M. N., concerning [designate the contract],

mentioned in the complaint, upon this defendant's paying into court the sum of . . . dollars, the amount claimed in the summons herein [or if the action is for specific property, say, concerning the property mentioned in the complaint, upon said defendant's transferring the same to such person as the court may direct]; or for such other relief as may be just.

[DATE.]

[SIGNATURE.]

§ 705. Order of interpleader.

Form No. 219.

[TITLE.]

On reading and filing the affidavit of C. D., and upon proof of due service of notice of this motion, and on motion of G. H., for C. D., and after hearing E. F. in opposition:

It is ordered that on payment by the defendant to the clerk of the county of . . . of the amount claimed in the summons herein, principal and interest, within five days from the date of this order, Q. R. be substituted as defendant in this action in place of C. D., the defendant above named, and that said C. D. thereupon be discharged from liability to either the plaintiff above named or said Q. R. And it is further ordered that if the said Q. R. does not appear and defend this action within . . . days after service upon him of a copy of this order, together with a copy of the summons and complaint herein, the plaintiff may apply for an order that the money so deposited be paid over to him.

[DATE.]

§ 706. Petition by landlord to be made defendant in action of ejectment.

Form No. 220.

[TITLE.]

The petition of M. N. respectfully shows to this court:

I. That an action is now pending in this court by A. B., plaintiff, against C. D., defendant, for the recovery of the possession of certain real property, situated in the county of . . . , and more particularly described in the complaint in said action; which action your petitioner is informed and believes is at issue and upon the calendar of this court, awaiting trial.

II. That said C. D. occupies said premises as tenant of your petitioner, and not otherwise. That your petitioner claims in good faith to be the owner in fee simple of said premises [here briefly indicate title].

Wherefore your petitioner prays that he may be made a party defendant in said action, and may be allowed to defend the same, and that he may have such other relief as may be just.

[DATE.]

[SIGNATURE.]

[VERIFICATION.]

§ 707. Notice of motion to make party defendant.

Form No. 221.

[TITLE.]

[ADDRESS.]

Please take notice that on the annexed petition, and on the papers on file in this action, the undersigned will move the court, at the courtroom thereof, at . . . , on the . . . day of . . . , 19.., at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, for an order directing M. N., the petitioner above named, to be made a party defendant in the action now pending in this court between A. B., plaintiff, and C. D., defendant, and for such other relief as may be just.

[DATE.]

[SIGNATURE.]

§ 708. Order making third person a party defendant.

Form No. 222.

[TITLE.]

On reading and filing the petition [or affidavit] of S. T., dated the . . . day of . . . , 19 . . . , and proof of due service of notice of this motion, and on motion of E. F. for said S. T., and after hearing G. H. in opposition.

It is ordered that S. T. be made a party defendant in said action, and that the summons and complaint be amended accordingly; and that S. T. cause notice of appearance for himself herein to be given to plaintiff's attorney within . . . days from the entry of this order, and a copy of the complaint as amended served upon his attorney, and that the cause thereupon proceed as if said S. T. had been originally a party defendant therein.

§ 709. Petition for intervention by third person whose property is attached.

Form No. 223.

[TITLE OF ORIGINAL ACTION.]

The petition of L. M. respectfully shows that on the . . . day of . . . , 19 . . . , the above-entitled action was commenced and a writ of attachment issued therein, by virtue of which the sheriff of . . . county seized and attached the following described property as the property of the defendant [insert description of property]; that in truth and in fact the said property so attached was and is not the property of the defendant, nor has he any interest therein, but was and is the property of this petitioner, and the same is unlawfully held by the said sheriff upon the said writ of attachment.

Wherefore, your petitioner prays that the alleged lien upon the said property under the said writ of attachment be removed and discharged, and for such further or other relief as shall seem just.

L. M., Petitioner.

§ 710. Petition for intervention in replevin.

Form No. 224.

[TITLE.]

To the . . . court of the county of . . .

The petition of L. M. respectfully shows to the court:

[Here state facts showing nature of the action, and its present condition, as well as the facts showing the interest or ownership of the petitioner, as would be done in a complaint.]

Wherefore, your petitioner asks leave to intervene in this action as against both plaintiff and defendant therein [or, as the case may be], and he demands judgment against both plaintiff and defendant [or, as the case may be], for the property described in this petition of intervention and in the petition of the plaintiff in said action [or, for the possession of the same, as the case may be], or for the value thereof, if the same cannot be found, and for his damages and costs.

O. P., Attorney for Intervener.

§ 711. Petition by owner of chattels to intervene in replevin.

Form No. 225.

[TITLE.]

To the . . . court of . . . county.

The petition of L. M. respectfully represents:

I. That the above-entitled action is now pending in this court for the recovery of the possession of certain personal property, to-wit, [description of property]; which action has not, as deponent is informed and believes, proceeded to judgment.

II. That the defendant received the said [property] from this deponent for storage, and this deponent is the sole owner thereof.

III. That the claim of the plaintiff in this action is made adversely to deponent's title, and deponent desires to litigate the question directly with him.

Wherefore, your petitioner prays that he be allowed to come in as a party defendant to defend this action; and that all proceedings be stayed in said action [on the part of either party] until a hearing can be had upon this petition.

L. M., Petitioner.

§ 712. Order to show cause why petition for intervention should not be granted.

Form No. 226.

[TITLE.]

On reading and filing the petition of L. M., of . . . , praying to be let in as a party defendant in this action.

It is ordered that the plaintiff [and defendant] herein show cause, on the . . . day of . . . , 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, why the prayer of said petitioner should not be granted.

Further ordered that until the determination of this motion all proceedings herein on the part of the plaintiff [and defendant] be stayed.

And let copies of this order and said petition be served on the attorneys for the plaintiff and defendant, respectively, at least . . . days before the hearing of such motion.

[DATE.]

. . . Judge.

§ 713. Petition of intervening creditor to set aside prior attachment.

Form No. 227.

[TITLE OF ORIGINAL ACTION.]

The petition of E. F. respectfully shows that on the . . . day of . . . , 19 . . . , the above-entitled action was commenced and a writ of attachment issued therein; that by virtue of such writ the sheriff of . . . county thereafter seized upon and attached certain property of the defendant described as follows: [insert description of property attached]; that thereafter, and on the . . . day of . . . , 19 . . . , your petitioner, who is a creditor of the said defendant, commenced an action against the said defendant in said court, and duly sued out a writ of attachment in his said action, whereby the said sheriff duly attached the property of the said defendant hereinbefore described, subject, however, to the prior attachment in favor of the plaintiff in this action.

Petitioner further states that on the . . . day of . . . , 19 . . . , judgment was duly rendered in the aforesaid action brought by your petitioner against said defendant for the sum of . . . dollars, damages and costs, and that thereafter, on the . . . day of . . . , 19 . . . , an execution was duly issued out of said court upon said last-named judgment and delivered to the said sheriff, by virtue of which he levied upon the same property above described.

Your petitioner further alleges that, as he is informed and verily believes, the writ of attachment issued in the action first above set forth, and all proceedings thereon, are illegal and void, and that the said levy of the said sheriff thereunder constitutes no lien upon the said property and against the lien of your petitioner, for the reason that [here set forth the defect or illegality relied upon, by showing that the first attachment is void].

[Or, if the first attachment is attacked on the ground of fraud:] Your petitioner further alleges that the said first writ of attachment is illegal, fraudulent, and void, and constitutes no lien upon the said property as against the lien of your petitioner, for the reason that [here state the facts showing that the claim is collusive or fraudulent].

Wherefore, your petitioner prays that the said first-named writ of attachment be set aside and vacated, and that petitioner's lien upon the property above described be declared and estab-

lished, and that the said property and its proceeds be applied to the satisfaction of his said judgment, and for such other relief as to the court may seem just.

. . . , Petitioner.

§ 714. Order of hearing on said petition.

Form No. 228.

[TITLE OF ORIGINAL ACTION.]

Upon reading and filing the petition of E. F., praying that [here state prayer of the petition]; on motion of G. H., Esq., attorney for said petitioner:

It is ordered that the said petition be heard before this court at . . . , the . . . day of . . . , 19.., at . . . o'clock . . . M. on that day, or as soon thereafter as counsel can be heard, and that said plaintiff A. B. and the said sheriff of . . . county [if other parties are adversely interested name them] show cause at the said time and place why the said petition should not be granted, and that a copy of this order and the said petition be served on each of the said parties at least . . . days before the time of said hearing, and until the further order of this court that all proceedings upon the said writ of attachment be stayed.

Dated, . . . , 19 . .

. . . , Judge.

§ 715. Order vacating attachment.

Form No. 229.

[TITLE OF ORIGINAL ACTION.]

The petition of E. F. in the above-entitled matter having come on to be heard, upon reading the same and the affidavit of L. M. in support thereof, and the affidavit of O. P. in opposition thereto, and upon the record and proceedings in said action, and after hearing counsel in support of and in opposition to said motion, and being fully advised in the premises,—

It appearing that the writ of attachment heretofore issued in this action was and is insufficient and defective for the following reasons [here state the facts showing the writ to be insufficient or void],—

On motion of G. H., attorney for the petitioner,—

It is ordered that the prayer of said petition be and it is hereby granted, and that the said writ of attachment and the levy made by virtue thereof be and the same are hereby set aside and vacated, and that the said sheriff of . . . county apply the property so

attached [or, the proceeds of the sale of said property so attached] to the satisfaction of the judgment of the petitioner in the action brought by said petitioner against said defendant C. D., in which judgment was rendered in favor of said petitioner upon the . . . day of . . . , 19 . . . , after deducting the legal costs, fees, and charges of said sheriff as allowed by law.

Dated . . . , 19 . . .

. . . , Judge.

§ 716. Order awarding issues on said petition.

Form No. 230.

[TITLE OF ORIGINAL ACTION.]

The petition of E. F. in the above-entitled matter having come on to be heard, upon reading the same and the affidavit of L. M. in support thereof, and the affidavit of O. P. in opposition thereto, and upon the record and proceedings in said action, and after hearing counsel in support of and in opposition to said motion, and being fully advised in the premises;

It appearing that certain issues have arisen by the allegations of said petition proper for trial by a jury, upon motion of G. H., attorney for the said petitioner;

It is ordered that the said petitioner be made a party defendant herein for the purpose of seeking the relief prayed for by said petition, and that the following issues arising between the said petitioner and the said plaintiff [and name any other adverse party] be and are hereby awarded:

1st. [Here state issues to be tried, as, for instance:] Was this action and the writ of attachment therein fraudulent and void as against the petitioner as a creditor of said defendant?

2d. [Briefly state any other issues to be tried.]

It is further ordered that the said issues be set for trial by jury on the . . . day of . . . , 19 . . .

Dated . . . , 19 . . .

. . . , Judge of said Court.

§ 717. Garnishee's answer by way of interpleader.

Form No. 231.

[CAPTION.]

[VENUE.]

E. F., being duly sworn, says that he was served with a garnishee summons in the above-entitled action on the . . . day of . . . , 19 . . . , and that he was then, and is now, in no manner and

upon no account whatever indebted or under liability to the defendant C. D., and that he had then, and now has, in his possession and under his control no real estate and no personal property, effects, or credits of any description whatever belonging to said defendant or in which he has any interest, except it be as hereinafter alleged, and that he is in no manner liable as garnishee in this action, unless it be upon the facts and circumstances hereinafter stated, upon which he respectfully submits the question to the court, to-wit:

The affiant admits that he is indebted in the sum of . . . dollars upon [here state the nature of the indebtedness], and the defendant makes claim that the said sum is due to him from the affiant, and that one [name the claimant], who resides at [give residence], also makes claim that the said sum is due from this affiant unto him.

Affiant further states that he has in his possession and under his control the following described personal property: [insert description]; and that the defendant, C. D., and one [name claimant], who resides at [give residence], each makes claim to said property.

That the affiant is not in collusion with either, and is unable to determine which of said claimants is entitled to said property, and makes this affidavit as an answer to said garnishment, and also for the purpose of a motion that said [name claimant] be interpleaded as a defendant in this garnishee action, and that affiant may pay said sum and deliver said property into court, and have a receipt therefor, and be thereby discharged from all liability to any of the parties for the same.

[JURAT.]

E. F.

§ 718. To obtain interpleader in equity.

Form No. 232.

[TITLE.]

I. That before the making of the claim hereinafter mentioned one M. N. deposited with the plaintiff [describe the property] for [safe-keeping].

II. That the defendant W. X. claims the same [under an alleged assignment thereof to him from the said M. N.].

III. That the defendant Y. Z. also claims the same [under an order of the said M. N., transferring the same to him].

IV. That the plaintiff is ignorant of the respective rights of the defendants.

V. That he has no claim upon the said property, and is ready and willing to deliver it to such persons as the court shall direct.

VI. That this action is not brought by collusion with either of the defendants.

Wherefore, the plaintiff demands judgment: 1. That the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto; 2. That they be required to interplead together concerning their claims to the said property; 3. [That some person be authorized to receive the said property pending such litigation]; 4. That upon delivering the same to such [person], the plaintiff be discharged from all liability to either of the defendants in relation thereto; and 5. That the plaintiff's costs be paid out of the same.

§ 719. Affidavit by defendant for interpleader of third person in action of replevin.

Form No. 233.

[TITLE.]

[VENUE.]

C. D., being duly sworn, says:

I. That he is the defendant in the above-entitled action.

II. That the same is brought to recover from the defendant the following described personal property, to-wit, [describe same].

III. That the summons and the complaint herein were served on the . . . day of . . . , 19.. , and the time for answering has not yet expired, and the defendant has not yet answered the same.

IV. That one [name claimant], who is not a party to this action, makes a demand against the defendant for the whole of the same property, the possession of which this action is brought to recover.

V. That the said demand is made without collusion with the defendant, and [here allege any facts as to possession, showing that the defendants are not liable for any damages for detention, or otherwise, according to facts of case].

VI. That the defendant does not know the rights of the respective claimants, nor to whom said property should be delivered.

Defendant therefore prays the court to substitute said [claimant] as defendant herein, and to discharge this defendant from

all liability to either party so claiming, upon his delivering the said property, or its value, to such persons as the court may order, which he hereby offers to do.

[JURAT.]

C. D.

§ 720. The same, where the third party claims a part only of the property.

Form No. 234.

[TITLE.]

[VENUE.]

C. D., being duly sworn, says:

I. That he is the defendant in the above-entitled action.

II. That the same is brought to recover from the defendant the following-described personal property, to-wit, [describe same].

III. That the complaint herein was served on the . . . day of . . . , 19 . . . , and the time for answering has not yet expired, and the defendant has not yet answered the same.

IV. That a part of said property, to-wit, [here describe the part], is claimed by one [name claimant], who has notified the defendant that he owns and is entitled to the possession of such part, and demands the same of this defendant [as will more fully appear by the written notice and demand of which a true copy is hereto annexed].

V. That the defendant is ignorant of the rights and merits of the respective claims of said plaintiff and said [claimant], and that a complete determination of the questions in controversy cannot be had without the presence of said [claimant] as a party to this action, [and that, as to the property so claimed by said claimant, this defendant makes no claim].

VI. That all said property has been taken from the possession of this defendant by the sheriff of . . . county, upon the requisition of the plaintiff in this action.

Wherefore, etc.

[JURAT.]

C. D.

§ 721. Order of interpleader.

Form No. 235.

[TITLE.]

This action having regularly come on for trial on the . . . day of . . . , 19 . . . , before the court, E. F. appearing for the plaintiff, and G. H. for the defendant, and it appearing to the court

that L. M. and N. O. are necessary parties defendant in this action, without whose presence therein a complete determination of the controversy cannot be had; and that they have such an interest in the subject-matter of the controversy that the court should require them to be made parties for their due protection:

Ordered, that on payment by the defendant to the clerk of this court of the amount claimed in the summons herein, principal and interest, less ten dollars costs of this motion, within five days from the entry of this order, O. P. be substituted as defendant in this action, in place of Y. Z., the defendant above named, and that said Y. Z. thereupon be discharged from liability to either the plaintiff above named or said O. P.

And further ordered, that the said O. P. have leave to appear and defend this action within twenty days after service upon him of a copy of this order, together with a copy of the complaint herein, and that in case he fail so to do the plaintiff may apply to the court for judgment as by default, and for such other relief as he may be entitled to.

[Dated . . . , 19..]

J. K., Judge.

§ 722. Delivery of specific property, and appointing receiver therefor.

Form No. 236.

[TITLE.]

[Commencement and recitals as in last preceding form.]

Ordered: 1. That the defendant deliver the property mentioned in the complaint herein to R. S., Esq., of . . . , who is hereby appointed receiver thereof.

2. That O. P., of . . . , be substituted as defendant in this action, in place of the above-named Y. Z., who shall, upon delivery of the said property to the said receiver, be discharged from all liability therefor, either to the plaintiff or to the said O. P.

3. That the said receiver hold the said property subject to the further direction of this court. [If any special authority is needed, as for collection of incomes, or the sale of the property, insert it here.]

4. That within . . . days after entry [or, notice] of this order, the plaintiff serve a summons and a copy of his complaint, amended as he may see fit, [with a copy of this order,] upon the said O. P., and that the said O. P. answer such complaint within . . . days thereafter.

5. That if the plaintiff neglect to serve his summons and complaint and this order as herein directed, the defendant, Y. Z., may apply to the court for an order dismissing the action, and that the said property be delivered by the receiver unto said defendant; and further ordered that if defendant neglect to answer such complaint as herein required, if served as herein directed, the plaintiff may apply, on notice, for an order that said property be delivered by the receiver to the plaintiff.

6. That . . . dollars costs be allowed to the said Y. Z., to be deducted by him out of the fund [or, to be paid by the plaintiff, and allowed to him in case of his final recovery of judgment].

Dated . . . , 19..

By the Court:

J. K., Judge.

CHAPTER XXX.

REPLICATION.

§ 723. **In general.**—Under the California Code of Civil Procedure, no reply to new matter in the answer, or to a counterclaim, is required; but such matter must, on the trial, be deemed controverted by the opposite party.¹ But in New York, Ohio, Wisconsin, Colorado, Washington, and other states, new matter, pleaded either as a defense or as a counterclaim, requires a reply. Such is certainly the more rational mode of pleading. In view of the practice in those states where a replication is required or permitted, we have set forth in this work certain forms therefor. The answer to a cross-complaint does not differ from an answer to an original complaint, either in form or substance, and the pleader is referred to that portion of the work treating of answers in general. A paper filed in an action by the plaintiff, and styled an “answer to the defendant’s cross-complaint,” will not be considered as a pleading when no cross-complaint is filed.²

§ 724. **Necessity for replication.**—An answer in an action on a note denying that there was any consideration, but alleging that it was given as security only, and denying that there was anything due thereon, is no more than a denial of the facts pleaded in the complaint, and so requires no reply.³ So, also, as to an answer to a complaint for the recovery of real property, where the answer alleged that the only title the plaintiff had resulted from a void tax-deed.⁴

§ 725. **Chancery practice.**—In general, if the complainant in a bill in chancery does not file a general replication to the answer of the defendants, the answer is to be taken as true, and no evidence can be given by the complainant to contradict it.⁵ After a

¹ Cal. Code Civ. Proc., § 462; Ariz. Rev. Stats., 1901, par. 1357; In re Garcelon, 104 Cal. 581, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595; Grangers’ Assoc. v. Clark, 84 Cal. 201, 23 Pac. 1081.

² Carroll v. Girard Fire Ins. Co., 72

Cal. 297, 13 Pac. 863. See Warner v. Darrow, 91 Cal. 309, 27 Pac. 737.

³ Adams v. Casey, 39 Wash. 37, 80 Pac. 853.

⁴ Cuenin v. Halbouer, 32 Colo. 51, 74 Pac. 885.

⁵ Gallagher v. Roberts, 1 Wash. C.

cause is set for hearing, on bill and answer, and reference to the auditor directed, the plaintiff is allowed to file a general replication.⁶ A replication to a plea in chancery is an admission of its sufficiency as a defense.⁷

§ 726. **Conclusion.**—A replication containing new matter should conclude with a verification, and not to the country.⁸ But if it states no new matter, it may conclude to the country.⁹ A replication at once denying the particular fact intended to be put in issue, and concluding to the country, without any preamble, and without a formal traverse, frequently occurs in practice; and on account of conciseness should, when practicable, be adopted.¹⁰ If the plea answers the matter which is the gist of the action, it is sufficient.¹¹ In an action of debt against devisees, a replication of assets by descent may conclude with a verification.¹²

§ 727. **Counterclaim of defendant.**—A counterclaim is in the nature of a complaint in a cross-action. If it is a demand for damages for converting property, it is not necessary for the plaintiff to put in a reply denying the amount of value, or the allegation of damage. These must be proved on an assessment, although the plaintiff puts in no reply.¹³ And defendant is entitled to only nominal damages, unless he proves substantial damage.¹⁴ A reply merely denying that the defendant is entitled to any sum admits the facts set up, as in counterclaim.¹⁵ The plaintiff's complaint contained eight counts in the common form; the defendant's answer denied generally all the allegations of the complaint, and set up a counterclaim; the plaintiff's reply contained, among other things, a counterclaim to the defendant's counterclaim, and the defendants moved to strike out this portion of the reply; it was held that defendants had mistaken their

C. 320, Fed. Cas. No. 5194; *Peirce v. West*, Pet. C. C. 351, Fed. Cas. No. 10909.

⁶ *Peirce v. West*, Pet. C. C. 351, Fed. Cas. No. 10909.

⁷ *Hughes v. Blake*, 6 Wheat. 453, 5 L. Ed. 303, affirming 1 Mason, 515, Fed. Cas. No. 6845.

⁸ *Hallett v. Slidell*, 11 Johns. 56; *Hanna v. Rust*, 21 Wend. 149.

⁹ *Bindon v. Robinson*, 1 Johns. 516; *Patcher v. Sprague*, 2 Johns. 462

¹⁰ 1 Chit. Pl. 592, 2 T. R. 442.

¹¹ *Andrus v. Waring*, 20 Johns. 153. See, also, *Snyder v. Croy*, 2 Johns. 428.

¹² *Labagh v. Cantine*, 13 Johns. 272.

¹³ *Connoss v. Meir*, 2 E. D. Smith, 314.

¹⁴ *McKensie v. Farrell*, 4 Bosw. 192; *Merritt v. Millard*, 5 Bosw. 645.

¹⁵ *McKensie v. Farrell*, 4 Bosw. 192.

remedy; they should have demurred. Whether such reply is good, *quære*.¹⁶

§ 728. **Form.**—A replication which is merely a denial is not special.¹⁷ Where the defendant pleads a record of the same court, the replication of *nul tiel record* concludes with a verification, and a day is given to the parties to have judgment; if the plea be of a record of another court, the replication may either conclude by giving the defendant a day to bring in the record, or with an averment, and prayer of debt and damages; in which latter case there must be a rejoinder reasserting the existence of the record.¹⁸

§ 729. **When not permitted.**—A reply cannot be permitted where no counterclaim is interposed by the answer. New matter which does not constitute a counterclaim is to be deemed controverted.¹⁹ The pleading of defendant as to a party made defendant, on the defendant's motion, is, as to plaintiff, an answer in defense, and regarded as denied, without a reply from plaintiff.²⁰ Under the statute of California, the affirmative allegations of the answer stand controverted by the plaintiff; the burden being on the defendant to prove their truth, rendering a reply unnecessary.²¹ And a counterclaim, or matter in avoidance, set up in an answer, need not be denied by plaintiff to put defendant upon his proof.²² In Pennsylvania, where the replication puts in issue the averments of the answer, it throws upon the defendants the burden of sustaining them.²³

§ 730. **Sufficient reply.**—If an answer alleges mere matters of evidence, a replication traversing the ultimate and issuable fact which the answer was intended to aver is sufficient.²⁴ Defendant may have judgment on the pleadings, if his answer sets up a good defense in new matter and the plaintiff's reply is not verified when it should be.²⁵ And where a statute requires

¹⁶ *Stewart v. Travis*, 10 How. Pr. 148.

¹⁷ *Manhattan Co. v. Miller*, 2 Caine, 60; *Boucher v. Powers*, 29 Mont. 342, 74 Pac. 942.

¹⁸ *Bobyshall v. Oppenheimer*, 4 Wash. C. C. 388, Fed. Cas. No. 1591.

¹⁹ *Devlin v. Bevins*, 22 How. Pr. 290. See *Bissell v. Pearse*, 21 How. Pr. 130.

²⁰ *Copper Belle Min. Co. v. Costello* (Ariz.), 95 Pac. 803.

²¹ *Bryan v. Maume*, 28 Cal. 238; *Grangers' Assoc. v. Clark*, 84 Cal. 201, 23 Pac. 1081.

²² *Herold v. Smith*, 34 Cal. 122.

²³ *Naglee's Estate*, 52 Pa. St. 154.

²⁴ *Moore v. Murdock*, 26 Cal. 514.

²⁵ *Hill Brick & Tile Co. v. Gibson*, 43 Colo. 104, 95 Pac. 293.

a replication to all new matter alleged in the answer, the plaintiff may have judgment without a replication, if the new matter states no defense.²⁶

§ 731. **Departure from complaint.**—A replication must not depart from the cause of action stated in the complaint; if it does so, the plaintiff cannot recover upon it.²⁷

§ 732. **Practice in California.**—In California, there is no such practice as pleading a counterclaim to a counterclaim. But the plaintiff may have the benefit of a counterclaim to defendant's counterclaim without pleading it, as he has no opportunity of doing so.²⁸ In Indiana, if the defendant pleads a counterclaim in his answer, the plaintiff may reply a counterclaim to it.²⁹ The replication may introduce new matter to explain and fortify the complaint without a departure.³⁰ It has been held, in the United States circuit court, that the practice now is, where the plaintiff finds it necessary, from the answer, to prove new matter, to amend the bill. Nevertheless, if a special replication containing the essential qualities of a general replication is filed, denying all the material parts of the answer, and also charging new matter, it will be considered as surplusage at the hearing.³¹ A departure in pleading is not allowed in equity. If the answer requires a new case to be made, it cannot be done in the replication, but must be by an amendment to the bill.³²

§ 733. **To plea of bankruptcy.**—A replication setting forth, in the words of the act, all the grounds on which a discharge would be void by the act is bad; it must specify the particular fraud relied on.³³

§ 734. **To plea in bar.**—Though in England a court of law protects the title of an equitable owner of a chose in action, sued

²⁶ Babcock v. Maxwell, 29 Mont. 31, 74 Pac. 64.

²⁷ Messenger v. Woge, 20 Colo. App. 275, 78 Pac. 314; Baldridge v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. 477; Flannery v. Campbell, 30 Mont. 172, 75 Pac. 1109; Zorn v. Livesley, 44 Or. 501, 75 Pac. 1057; Gill v. Basell, 38 Wash. 212, 80 Pac. 437.

²⁸ Hart v. Cooper, 47 Cal. 78. Whether a plaintiff may interpose in

his reply a counterclaim to the counterclaim of the defendant, compare Miller v. Losee, 9 How. Pr. 356; Stewart v. Travis, 10 How. Pr. 148.

²⁹ House v. McKinney, 54 Ind. 240.

³⁰ Hallett v. Slidell, 11 Johns. 56.

³¹ Duponti v. Mussy, 4 Wash. C. C. 123, Fed. Cas. No. 4185.

³² Vattier v. Hinde, 7 Pet. 252, 8 L. Ed. 675.

³³ Service v. Heermance, 2 Johns. 96.

on in the name of the legal owner, by refusing to receive a plea which is in fraud of his rights, yet they will not allow these rights to be shown by way of replication to what is a good plea in bar of the action of the plaintiff, nor admit them to be relied on at the trial. The law of the United States courts is otherwise; and the proper practice is to reply to the equitable title and give notice thereof to the defendant, and thus show the asserted bar to be in fraud of his rights; and when thus shown, the bar is adjudged insufficient.³⁴

§ 735. To plea in avoidance.—No replication is needed to a plea in avoidance, all such facts being deemed denied, and the plaintiff may prove facts not pleaded in avoidance of the plea of defendant.³⁵

§ 736. To plea of former recovery.—Plaintiff replied *pro-testando* that in a former action two trespasses had been joined in the same count, and the court, on notice, compelled him to elect for which he would proceed, and that he should not go for both; and the jury found damages accordingly. It was held that the former recovery was no bar, but the replication was bad, as being argumentative, instead of traversing and denying the former recovery.³⁶ A replication to a plea of a former recovery that the evidence was wholly insufficient to establish the claim, or that no evidence was offered or received by the court, will not avoid the bar.³⁷

§ 737. To plea of fraud.—In an action on a note the plea was that the note was given by the defendant to the plaintiff in payment for land which the defendant had been induced to buy of him by his false and fraudulent representations that he was the owner of it; it was held that fraud was the material allegation, and a replication denying the fraudulent representation was a perfect answer.³⁸ But an averment in reply, that plaintiff cannot obtain sufficient information upon which to base a belief, is in fact an admission, since he is presumed to know

³⁴ *L'Invincible*, 1 Wheat. 238, 4 L. Ed. 80; *Corser v. Craig*, 1 Wash. C. C. 424, Fed. Cas. No. 3255; *Briggs v. Dorr*, 19 Johns. 95; *Warren v. Emerson*, 1 Curt. C. C. 239, Fed. Cas. No. 17195.

³⁵ *Plyer v. Pacific Portland Cement Co.*, 152 Cal., 125, 92 Pac. 56.

³⁶ *Snyder v. Croy*, 2 Johns. 227.

³⁷ *Ramsey v. Herndon*, 1 McLean, 450, Fed. Cas. No. 11546.

³⁸ *Bradner v. Demick*, 20 Johns. 404.

what he said and did.³⁹ If the maker of a note pleads a set-off, and that the paper was fraudulently transferred to the plaintiff to prevent the set-off, a replication merely alleging legal title admits the fraudulent transfer and the set-off.⁴⁰

§ 738. To plea of judgment.—If a defendant pleads judgment and no assets *ultra*, replication thereto may either be *nul tiel record*, or assets *ultra*, or *per fraudem*, or other matters of fact; and such replications are probably triable by jury.⁴¹ Where a judgment is pleaded in bar of an action, a reply setting forth facts showing that the judgment was fraudulently obtained is a sufficient replication to the plea, under Colorado practice.⁴² If the plea avers that the promise sued on was a promise to pay the debt of another,—to-wit, B.,—a replication that the promise was not a promise to pay the debt of said B. is good.⁴³

§ 739. To plea of justification.—A replication neither answering nor aiding the matter of a special plea of justification is bad.⁴⁴ In trespass, where the defendant pleads in justification a simple reference to a statute, the plaintiff must reply *de injuria propria*.⁴⁵ The general replication *de injuria sua propria absque tali causa* is bad when the defendant insists on a right, and is good only when he insists on matters of excuse.⁴⁶ In a plea justifying an arrest under process, an allegation of its loss, by way of an excuse for not producing it, does not turn the justification into matter of excuse;⁴⁷ and a replication may protest the warrant, and conclude *de injuria*, etc.⁴⁸ The general replication *de injuria* to a plea of *millitur manus imposuit* puts in issue every material allegation, including the reasonableness of the force, and the plaintiff may recover, if an excess of force is shown.⁴⁹

§ 740. To plea of payment.—When the answer in a suit on a bill of exchange sets up payment, part in money and the residue

³⁹ Mastin v. Bartholomew, 41 Colo. 328, 92 Pac. 682.

⁴⁰ Savage v. Davis, 7 Wend. 223.

⁴¹ Teasdale v. Brantons, 2 Hayw. (N. C.) 377, Fed. Cas. No. 13813.

⁴² Hallack v. Loft, 19 Colo. 74, 34 Pac. 568.

⁴³ Hotchkiss v. Ladd, 36 Vt. 593, 86 Am. Dec. 679.

⁴⁴ Foshay v. Riche, 2 Hill, 247.

⁴⁵ Comly v. Lockwood, 15 Johns. 188.

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⁴⁶ Cooper v. Monke, Will. 54; Jones v. Kitchin, 1 Bos. & P. 76; Lytle v. Lee, 5 Johns. 112; Plumb v. M'Crea, 12 Johns. 491; Allen v. Crofoot, 7 Cow. 46; Griswold v. Sedgwick, 1 Wend. 126; Tubbs v. Caswell, 8 Wend. 129.

⁴⁷ Coburn v. Hopkins, 4 Wend. 577.

⁴⁸ Stickle v. Richmond, 1 Hill, 77.

⁴⁹ Bennett v. Appleton, 25 Wend. 371.

in bills of exchange, which, it is averred, were received by the plaintiff in payment, a replication which simply avers the non-payment of the bills and the insolvency of the drawers and drawees at their maturity, tenders an immaterial issue, and the finding should be for the defendant, upon the pleading.⁵⁰ Reply is unnecessary to an answer pleading merely payment.⁵¹ In an action for wages, where the answer sets up a settlement and discharge as a defense, no reply is necessary.⁵² In Oregon, a plea of payment in an answer is new matter, which, not being denied by the reply, stands admitted.⁵³ An answer for a defense, for the demand sued for, averred that the defendant had paid certain sums to plaintiff, and concluded with a notice that defendant would insist on the sums so paid as a counterclaim, and a demand for judgment; it was held that this did not set up a counterclaim, but the facts pleaded amounted to the defense of payment only, and therefore no reply was necessary.⁵⁴

§ 741. **To plea of performance.**—A replication to a plea of general performance, in an action on a bond, should assign a special breach. An omission to do so must be taken advantage of by demurrer, and is cured by verdict.⁵⁵

§ 742. **To a plea of privilege by an attorney,** it is a good replication that for a year he had ceased to practice.⁵⁶

§ 743. **To a plea of usury.**—The plaintiff may reply that it was not corruptly agreed, in manner and form, etc., without a traverse, and with a conclusion to the country.⁵⁷

§ 744. **Facts must be alleged.**—Where the statute of limitations is pleaded at law or in equity, and the plaintiff desires to bring himself within its savings, he must, in his replication, or by an amendment to his bill, set forth the facts specially.⁵⁸ To an answer setting up the six years' statute of limitations, a reply,

⁵⁰ *Frisbee v. Lindley*, 23 Ind. 511

⁵¹ *Bracket v. Wilkinson*, 13 How Pr. 102.

⁵² *Maricle v. Brooks*, 5 N. Y. Supp 210, 51 Hun, 638.

⁵³ *Benicia Agric. Works v. Creighton*, 21 Or. 495, 28 Pac. 775, 30 Pac. 676.

⁵⁴ *Burke v. Thorn*, 44 Barb. 363.

⁵⁵ *Minor v. Mechanics' Bank of*

Alexandria, 1 Pet. 46-70, 7 L. Ed. 47.

⁵⁶ *Brooks v. Patterson*, Cole. & C. Cas. 133.

⁵⁷ *Buynham v. Matthews*, 2 Stra. 871; *Waterman v. Haskin*, 7 Johns. 283.

⁵⁸ *Miller v. McIntyre*, 6 Pet. 61, 8 L. Ed. 320; affirming 1 McLean, 85, Fed. Cas. No. 9582; *Piatt v. Vattier*, 9 Pet. 405, 9 L. Ed. 173; *Taylor v.*

in general terms, that the defendant has made payments on the claim within six years, is sufficient without pleading the particulars.⁵⁹ Under California practice, when a defendant pleads the statute of limitations, matters upon which the plaintiff relies to relieve him from the bar of the statute are deemed to have been pleaded in reply to the answer.⁶⁰

§ 745. Facts must be traversed.—In the correct order of pleading, it is necessary that the facts of the plea should be traversed by the replication, unless matters in avoidance be set up. It is not sufficient that the facts alleged in the replication are inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea.⁶¹

§ 746. Fraud as a reply.—Fraud is a sufficient answer to the plea of the statute of limitations; and if the defendant fraudulently seized the notes, he is not only estopped from setting up the statute, but it would begin to run only from the discovery of the fraud.⁶²

§ 747. Insufficient reply.—A replication to a plea of the statute of limitations that the plaintiff lives in another state, there being no such exception in the statute, is bad.⁶³ To a plea of the statute of limitations, it is not a good replication that a suit for the same demand was commenced in a court in another state, and discontinued within six years.⁶⁴ When the plea avers that the causes of action mentioned in the declaration did not, nor did either of them, accrue within six years, a replication which alleges that said causes of action, or some of them, did accrue within six years, is bad for uncertainty.⁶⁵ A replication of a new promise by the executor, to his plea of the statute of limitations, to a count on the promise of the testator, is bad for departure.⁶⁶ In general, a replication must not depart

Benham, 5 How. 233, 12 L. Ed. 130;
Marsteller v. McClean, 7 Cranch, 156,
3 L. Ed. 300.

⁵⁹ Board etc. v. Cole, 8 Ind. App.
485, 36 N. E. 47.

⁶⁰ Fox v. Tay, 89 Cal. 339, 23 Am.
St. Rep. 474, 24 Pac. 855, 26 Pac. 897.

⁶¹ United States v. Buford, 3 Pet.
12, 7 L. Ed. 585; Jones v. Hays, 4
McLean, 521, Fed. Cas. No. 7467.

⁶² Bricker v. Lightner's Ex., 40 Pa.
St. 199.

⁶³ Jones v. Hays, 4 McLean, 521,
Fed. Cas. No. 7467.

⁶⁴ Delaplaine v. Crowninshield, 3
Masen, 329, Fed. Cas. No. 3756.

⁶⁵ Hotchkiss v. Ladd, 36 Vt. 593,
86 Am. Dec. 679.

⁶⁶ Benjamin v. De Groot, 1 Denio,
151.

from any material allegation in the complaint; yet, where there is an evasive plea, the plaintiff may avoid the effect of it by restating his cause of action with more particularity and certainty, so as to meet and thwart the particular defense set up.⁶⁷ A reply can serve the plaintiff no purpose, except to controvert or avoid new matters set up in the answer.⁶⁸ He cannot set up one cause of action in his complaint, and, after answer made, abandon that and make an entirely new cause of action on a reply.⁶⁹ Nor can a claim for relief, as set forth in the complaint, be in any manner enlarged in reply to the defendant's answer.⁷⁰ As to new matter contained in the answer, the replication should follow the requisites of an answer, whether the denial should be general or specific,⁷¹ and should be verified under the same circumstances.⁷² In an action for work and labor done, in which a counterclaim for different items is set up, a reply alleging that the amounts of the items are less than that set forth in the counterclaim, and have been fully paid, without asking any affirmative relief, is not inconsistent with the complaint.⁷³

§ 748. Promissory note.—Where, in an action on a promissory note, brought under the New York code of 1848, the defendant pleaded the statute of limitations, and the plaintiff replied, merely denying the plea, it was held that evidence of a new promise was admissible under the reply.⁷⁴ Where, in an action by an executor upon notes due to his testator by the defendant, who, it was alleged, had fraudulently seized them after the death of the testator, the defendant pleaded the statute of limitations, after the commencement of the trial, and it was evident that the fraudulent seizure was the plaintiff's answer to the plea, it was held that the want of a formal replication was not cause for reversing the judgment.⁷⁵

§ 749. Reply—When unnecessary.—If the answer is wholly lacking in substance as to the essentials which constitute a good

⁶⁷ 1 Chit. Pl. 603; *Troup v. Smith*, 20 Johns 33.

⁶⁸ *Lillienthal v. Hotelling Co.*, 15 Or. 371, 15 Pac. 630.

⁶⁹ *Osten v. Winehill*, 10 Wash. 333, 38 Pac. 1123; *Clark v. Sherman*, 5 Wash. 681, 32 Pac. 771.

⁷⁰ *Bell v. Waudby*, 4 Wash. 743, 31 Pac. 18.

⁷¹ *Hammer v. Edwards*, 3 Mont. 187.

⁷² *Hill Brick etc. Co. v. Gibson*, 43 Colo. 104, 95 Pac. 293.

⁷³ *Van Bibber v. Fields*, 25 Or. 527, 36 Pac. 526.

⁷⁴ *Esselstyn v. Weeks*, 2 Abb. Pr. 272.

⁷⁵ *Bricker v. Lightner's Executor*, 40 Pa. St. 199.

answer, no reply is necessary.⁷⁶ Whatever facts are alleged in the answer that might have been proved under a specific denial of the allegations of the complaint should be regarded as specific denial only, and require no replication.⁷⁷ But whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some fact not inconsistent with such allegations, constituting a defense or counterclaim, and which could not have been proved under a specific denial, are new matter, and require a replication.⁷⁸

If there is no replication, all affirmative material allegations of the answer will be presumed to be admitted.⁷⁹ But affirmative allegations in answer in quiet-title suit do not call for a reply;⁸⁰ likewise an allegation that the debt sued on is not yet due.⁸¹ But legal conclusions need not be denied;⁸² nor is a party required to reply to evidence set out in an answer.⁸³ Under the New York Code of Civil Procedure (§ 516), it is in the discretion of the court to require the plaintiff to reply to new matter set up in answer by way of avoidance.⁸⁴ A replication is not necessary to an answer which puts in issue the ownership of the note sued upon, and contains new matter which is not defensive.⁸⁵ And the plaintiff need not reply to an affirmative defense until his demurrer to a special defense has been determined.⁸⁶ Defendant by going to trial on the issues raised by his answer waives the necessity for a reply, if one was otherwise required.⁸⁷

§ 750. Reply—Sufficiency of.—In an equity case, the insufficiency of a reply is immaterial, when the defendants wholly fail

⁷⁶ *Weber v. Rothschild*, 15 Or. 385, 3 Am. St. Rep. 162, 15 Pac. 650.

⁷⁷ *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409.

⁷⁸ *Id.*; *Davis v. Clark*, 2 Mont. 310.

⁷⁹ *McMillan v. Carter*, 6 Mont. 215, 9 Pac. 906; *Larsen v. Oregon etc. Nav. Co.*, 19 Or. 240, 23 Pac. 974.

⁸⁰ *Dueber v. Wolfe*, 47 Wash. 634, 92 Pac. 455.

⁸¹ *Schechter v. White*, 41 Colo. 219, 92 Pac. 700.

⁸² *McMillan v. Carter*, 6 Mont. 215, 9 Pac. 906; *Larsen v. Oregon etc. Nav. Co.*, 19 Or. 240, 23 Pac. 974; *Denver, etc. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714.

⁸³ *Steinway v. Steinway*, 22 N. Y.

Supp. 945, 68 Hun, 430, 29 Abb. N. C. 457.

⁸⁴ *Cauchois v. Proctor*, 29 N. Y. Supp. 770, 79 Hun, 388. See, also, as to reply under New York practice, *Wood v. Gordon*, 13 N. Y. Supp. 595; *Springer v. Bien*, 16 Daly, 275; *Van Doren v. Jelliffe*, 20 N. Y. Supp. 636.

⁸⁵ *Woolman v. Capital Nat. Bank*, 2 Colo. App. 454, 31 Pac. 235.

⁸⁶ *Ewing v. Van Wagenen*, 6 Wash. 39, 32 Pac. 1009. Waiver of reply to new matter in counterclaim. See *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511, 54 N. W. 404, 21 L. R. A. 328.

⁸⁷ *Schechter v. White*, 41 Colo. 219, 92 Pac. 700.

to substantiate the allegations of their answer.⁸⁸ Where a plea of another action pending has been interposed, a reply that subsequent to the filing of the plea the suit whose pendency was alleged had been dismissed is good against demurrer.⁸⁹ A reply which merely denies knowledge or information sufficient to form a belief as to whether the facts are correctly stated in the answer does not deny the material allegations as required by section 516 of the New York Code of Civil Procedure.⁹⁰

§ 751. Reply—Time of filing of.—The ruling of the trial court permitting the plaintiff to file a reply on the same day that the defendant moves for judgment on the pleadings, because of failure to reply, will not be disturbed when there is no showing of abuse of discretion.⁹¹

§ 752. Rejoinder—Its office.—A rejoinder must answer the replication, and tender an issue on a single point. If it is double, it is demurrable.⁹² A rejoinder is bad which avers several distinct answers to the replication, or puts matter of law in issue to the jury.⁹³ A rejoinder must maintain the plea, and cannot set forth matter of variance with it.⁹⁴ After pleading that the plaintiff was not damnified, the defendant cannot rejoin confessing and avoiding the action,⁹⁵ by setting up a personal discharge. So one defendant, having joined with the others in a plea in bar, cannot afterwards interpose a rejoinder going to his personal discharge.⁹⁶

§ 753. Breach of agreement.—A replication in an action of covenant on an agreement to build was held bad for traversing immaterial time and place, and introducing averments of performance before made in the declaration.⁹⁷ To a declaration for a breach of agreement to bid at auction up to a certain limit, the defendant pleaded that the property was sold for

⁸⁸ *Hill v. Young*, 7 Wash. 33, 34 Pac. 144.

⁸⁹ *Boyle v. Great Northern Ry. Co.*, 13 Wash. 383, 43 Pac. 344.

⁹⁰ *Steinway v. Steinway*, 26 N. Y. Supp. 657, 74 Hun, 423.

⁹¹ *Stinson v. Sachs*, 8 Wash. 391, 36 Pac. 287.

⁹² *United States v. Cumpton*, 3 McLean, 163, Fed. Cas. No. 14902. See

McGowan v. Caldwell, 1 Cranch C. C. 481, Fed. Cas. No. 8806.

⁹³ *McCue v. Corporation of Washington*, 3 Cranch C. C. 639, Fed. Cas. No. 8735.

⁹⁴ *Barlow v. Todd*, 3 Johns. 367; *Allen v. Watson*, 16 Johns. 205.

⁹⁵ *Munro v. Alaire*, 2 Caines, 320.

⁹⁶ *Andrus v. Waring*, 20 Johns. 153.

⁹⁷ *Rogers v. Burk*, 10 Johns. 400.

more. It was held that a reply of fraud in the defendant in allowing the property to be sold for the greater amount was no departure.⁹⁸

§ 754. Conversion.—A declaration alleged that the defendants wrongfully took certain goods. The replication averred that the taking was by a sheriff, at the instance and by the direction of the defendants. It was held that there was no departure.⁹⁹

§ 755. Demurrer to reply.—The reply of the plaintiff stated that he was himself the receiver mentioned in the answer, and that he was the holder and owner of the note, as such receiver, and that he sought to recover upon it in that capacity, and not individually. The defendant demurred to the reply, assigning several grounds, the substance of which was that the reply was a departure from the complaint. It was held that the demurrer was well taken. The reply was a total departure from the complaint. The right to recover individually and the right to recover as receiver are entirely distinct rights, and depend upon entirely different facts. The plaintiff, on receiving the answer, should have amended his complaint, or, if it was not amendable, he should have discontinued.¹⁰⁰ A reply which does not respond to the entire pleading or part thereof to which it is directed is bad on demurrer for want of sufficient facts.¹⁰¹ But a bad reply is sufficient for a bad answer on demurrer, and a demurrer to such reply ought to be carried back and sustained to such answer.¹⁰²

§ 756. Departure.—A departure is matter of substance, and bad on general demurrer.¹⁰³ A rejoinder of infancy was held a departure from a plea of an insolvent discharge.¹⁰⁴ After a plea of no award, a rejoinder confessing and avoiding the award is a departure.¹⁰⁵ A rejoinder impeaching the award as incomplete is a departure.¹⁰⁶ But a rejoinder that the defendant, prior to the making of the award, had, by writing under his hand and

⁹⁸ Bame v. Drew, 4 Denio, 287.

⁹⁹ Richardson v. Hall, 21 Md. 399.

¹⁰⁰ White v. Miles, 11 How. Pr. 36.

¹⁰¹ Poudre v. Tate, 76 Ind. 1. See Bottles v. Miller, 112 Ind. 584, 41 N. E. 728; Silvers v. Canary, 109 Ind. 267, 9 N. E. 904.

¹⁰² Landon v. White, 101 Ind. 249; State v. Edwards, 114 Ind. 581, 16 N.

E. 627; Western Union Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224.

¹⁰³ Sterns v. Patterson, 14 Johns. 132.

¹⁰⁴ Roberts v. Kelly, 2 Hall, 307 (333).

¹⁰⁵ Munro v. Alaire, 2 Caines, 320.

¹⁰⁶ Barlow v. Todd, 3 Johns. 367.

seal, revoked the submission, is good. A void award is no award.¹⁰⁷ A rejoinder affirming the defense of the plea by denying the substance of the replication, without reaffirming an immaterial averment of value in the plea, is not a departure.¹⁰⁸

§ 757. **Duplicity.**—A replication which alleges two distinct and independent facts, either of which is a complete answer to the plea, is double, and is bad on special demurrer.¹⁰⁹

§ 758. **Goods sold.**—To a complaint charging acceptance of goods purchased to have been procured by the fraudulent representations of the seller, without examination by the buyer, the defendant answered, denying the fraud, and alleging that the buyer had examined the goods and had full knowledge of their quality. The reply admitted an examination of the goods by the plaintiff, and a knowledge of certain facts indicating the defects complained of, but averred that he relied on defendant's representations, and that the defendant had subsequently promised to pay the damages claimed. It was held that the reply was a departure, and that objection could be taken to it by demurrer.¹¹⁰

§ 759. **Insurance policy.**—To a declaration on a policy of insurance, averring a total physical loss, a replication of survey and condemnation after arrival at the port of destination is a departure.¹¹¹

§ 760. **Obstructing highway.**—An indictment for obstructing a highway alleged in the first count the obstruction of a road "leading from S.'s gate to B.'s house," and in the second count the obstruction of a road leading "from S.'s gate towards the turnpike." A replication averring that the road ran "from S.'s gate to the turnpike" was held a departure, as the former averred the existence of a public road, while the latter did not.¹¹²

§ 761. **Withdrawal and substitution of plea.**—Where a plaintiff replies to a plea, and his replication, being demurred to, is held

¹⁰⁷ *Blacksell v. Tomkins*, 11 East, 187; *Allen v. Watson*, 16 Johns. 205.

¹⁰⁸ *Burr v. Baldwin*, 2 Wend. 580.

¹⁰⁹ *Burnham v. Webster, Davies*, 236, Fed. Cas. No. 2178. See *Craig*

v. Brown, Pet. C. C. 443, Fed. Cas. No. 3329.

¹¹⁰ *McAroy v. Wright*, 25 Ind. 22.

¹¹¹ *Griswold v. National Ins. Co.*, 3 Cow. 96.

¹¹² *State v. Price*, 21 Md. 449.

to be insufficient, and he withdraws that replication and substitutes a new one,—the substituted one being complete in itself, not referring to or making part of the one which preceded,—he waives the right to question in the supreme court the decision of the court below on the sufficiency of what he had first replied. The same is true when he abandons a second replication, and with leave of the court files a third and last one.¹¹³

FORMS IN REPLICATION.

§ 762. Demurrer to answer.

Form No. 237.

[TITLE.]

The plaintiff demurs to the answer of the defendant [or the first or other defense or counterclaim contained in the answer of the defendant], for insufficiency, in not stating facts sufficient to constitute a defense [or counterclaim, or state other statutory ground].

§ 763. Reply to counterclaim.

Form No. 238.

[TITLE.]

The plaintiff replies to the counterclaim contained in the answer of the defendant [or the first or other counterclaim contained in the answer of the defendant].

I. That, etc. [denying as in an answer].

764. General denial of new matter.

Form No. 239.

[TITLE.]

The plaintiff replies to the answer of the defendant:

I. That he denies each and every allegation contained in the [second] defense.

II. [Or, as to the (second) defense, by way of counterclaim set forth in the answer, he denies each and every allegation therein.]

¹¹³ Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604.

§ 765. Special denial.

Form No. 240.

[TITLE.]

The plaintiff replies to the answer of the defendant:

That he denies [here insert the particular allegation denied].

§ 766. Reply interposing both denial and new matter.

Form No. 241.

[TITLE.]

The plaintiff replies to the answer of the defendant herein:

First. For a first reply to the [first] counterclaim:

He denies each and every allegation of the answer respecting the same.

Second. For a second reply to said counterclaim he alleges:

That at the time alleged in the complaint as the time of making the supposed note therein mentioned, this plaintiff was under the age of twenty-one years, to-wit, of the age of . . . years.

§ 767. Reply of statute of limitations.

Form No. 242.

[TITLE.]

The plaintiff replies to the answer herein:

That the said cause of action alleged for a counterclaim [or demand alleged as a set-off] in said answer did not accrue at any time within . . . years next before the commencement of this action.

§ 768. Demurrer to reply.

Form No. 243.

[TITLE.]

The defendant demurs to the plaintiff's reply [or first or other reply], for insufficiency, in not stating facts sufficient to constitute a reply.

§ 769. Notice of motion for judgment for defendant on failure to reply to counterclaim.

Form No. 244.

Take notice, that the defendant will apply to this court, at . . . , in the city of . . . , on the . . . day of . . . , 19.. , at . . .

o'clock in the . . . noon, of said day, or as soon thereafter as counsel may be heard, for an order that, for want of a reply or demurrer on the part of the plaintiff to defendant's counterclaim, the said defendant have judgment against the plaintiff for . . . dollars [or, pursuant to the prayer of the answer of said defendant], with costs of the action and of this motion, and for such other relief as may seem just.

[DATE.]

J. K., Defendant's Attorney.

To . . . , plaintiff and . . . , his attorney.

§ 770. Order for judgment for want of reply.

Form No. 245.

[TITLE.]

The defendant's answer herein, setting up a counterclaim, having been duly served on the plaintiff more than twenty days since, and no reply or demurrer having been interposed by the plaintiff:

Ordered, that judgment be entered herein in favor of the above-named defendant against the above-named plaintiff for the sum of . . . dollars [or state other relief sought], besides the costs and disbursements of this action, together with ten dollars costs of this motion.

[Or, in case reference or assessment of damages by a jury is necessary:] Ordered, that the defendant have judgment against the plaintiff for the damages sustained on account of the cause of action set forth in the counterclaim, with costs, [in replevin, add] and that he recover the possession of the personal property described in the complaint, or the value thereof, in case a delivery cannot be had.

And further ordered, that it be referred to R. F., Esq., of . . . , to take proof of the demand alleged in the counterclaim [or, specify the particular inquiry to be made], and to examine the defendant or his agent on oath respecting any payments that have been made to the defendant, or his agent for his use, and to report to the court with all convenient speed.

[Or, Ordered that the damages sustained by the defendant by reason of the matters alleged in the counterclaim be assessed by a jury under the direction of the court.]

Dated . . . , 19..

O. P., Judge.

§ 771. Judgment thereon.

Form No. 246.

[TITLE.]

The defendant in this action, having duly served his answer on the . . . day of . . . last, setting up a counterclaim to the plaintiff's cause of action, and the plaintiff having failed to reply or demur thereto; now, on motion of M. N., for defendant:

It is adjudged, that said defendant recover of the said plaintiff the sum of . . . dollars, together with his costs and disbursements, herein taxed at . . . dollars, amounting in all to the sum of . . . dollars.

§ 772. Order compelling reply.

Form No. 247.

[TITLE OF CAUSE.]

On reading and filing the pleadings herein, and notice of this motion, [and proof of due service], and on motion of G. H., for the defendant, after hearing E. F., [or, no one appearing] in opposition:

Ordered, that the plaintiff reply to the new matter by way of avoidance, contained in the answer herein, within twenty days from service of a copy of this order.

CHAPTER XXXI.

SUPPLEMENTAL PLEADINGS.

§ 773. **In general.**—Either plaintiff or defendant may be allowed, on motion, to file a supplemental complaint or answer, alleging facts material to the case which have arisen after the former complaint or answer was filed.¹ While a new cause of action may not be alleged in a supplemental complaint, different or additional relief which is consistent with the original cause of action stated may be asked for therein.² The New York code permits also a statement of facts in a supplemental pleading, of which the party was ignorant at the time the original pleading was made. However, facts which existed at the commencement of the action, but which were then unknown to the pleader, but afterward came to his knowledge, were always proper to be alleged in an amended pleading. This section includes among the matters which may be alleged in a supplemental pleading the judgment or decree of a competent court rendered after the commencement of the action, determining the matters in controversy, or a part thereof.³ Such matters could doubtless be pleaded under the comprehensive language of the California code.

Though the right to file a supplemental pleading rests in the discretion of the court,⁴ and an order granting or refusing leave to file is not appealable, yet it is an "intermediate order," which may be reviewed on appeal, by California practice.⁵ At common law the right of the defendant to avail himself of matters of defense, arising after the commencement of the suit, was as ample, perhaps, as under the code. But the plaintiff had no corresponding right. In courts of equity, however, the plaintiff could avail himself of matters arising after the filing of the bill, by a supplemental bill;⁶ at law, matters of defense arising after the commencement of the suit, but before plea or continuance was pleaded, not in bar of the suit generally, but to the further

¹ Cal. Code Civ. Proc., § 464.

² *Melvin v. E. B. & A. L. Stone*

Co., 7 Cal. App. 324, 94 Pac. 389.

³ *Medbury v. Swan*, 46 N. Y. 200.

⁴ *McDaniels v. Gowey*, 30 Wash. 412, 71 Pac. 12.

⁵ Code Civ. Proc., § 956.

⁶ Story's Eq. Pl., ch. 8.

maintenance of the suit. Whether the former answer is wholly superseded by a supplemental one must depend on its form and the circumstances of the case, as inconsistent defenses may be pleaded under the codes.

Circumstances occurring subsequently to filing an answer, materially affecting the rights of the respective parties, to the advantage of the defendant, should be embodied in a supplemental answer, to authorize evidence of them without plaintiff's consent.⁷ Such facts cannot be incorporated with the original complaint by an amendment without presenting averments inconsistent with the date of the commencement of the action; as when a female marries, and her husband must be joined with her, an averment of the marriage should be made by supplemental pleading, and not by amendment of the original.⁸

Neither a purchaser at sheriff's sale, as such, nor a redeptioner, either before or after redemption, nor an assignee of the sheriff's certificate of sale, upon his own *ex parte* motion, made in his own name, is entitled to have the judgment upon which the execution or order of sale issued vacated, and himself substituted as plaintiff, in order that he may file a supplemental complaint to bring in other parties.⁹

A complaint and supplemental complaint incorporated in one document, styled "Amended and supplemental complaint," the supplemental complaint being distinguished only by being contained in separately but consecutively numbered paragraphs, are to be considered as separate pleadings.¹⁰

§ 774. When allowed.—If defendant has answered generally to a matter of which he has no particular knowledge, he may be allowed to file a supplemental answer on the same subject after he has acquired particular information concerning it, and to introduce into such answer new matter which has come to his knowledge since filing the original answer, on furnishing the opposite party with the names of the witnesses by whom he expects to prove it.¹¹ Leave will not be given to set up by supplemental answer matter not constituting a defense.¹² And the answer proposed must be true, and must contain a good

⁷ Van Maren v. Johnson, 15 Cal. 308; Moss v. Shear, 30 Cal. 472.

⁸ Van Maren v. Johnson, 15 Cal. 311.

⁹ Abadie v. Lobero, 36 Cal. 390.

¹⁰ California Farm etc. Co. v. Schi-

appa-Pietra, 151 Cal. 732, 91 Pac. 593.

¹¹ Caster v. Wood, 1 Baldw. 289, Fed. Cas. No. 2505.

¹² Betz v. Betz, 19 Abb. Pr. 90.

defense, or leave will be refused, and its truth may be inquired into on motion.¹³ Permission should be obtained on motion, on affidavit and notice, before trial.¹⁴ Where new facts amount to entire satisfaction, it is the duty of the court to allow the motion without reference to the question of laches.¹⁵ Where a contract sued on provides for payments in installments, a supplemental pleading may be filed to cover those installments accruing after suit filed.¹⁶ A mere defect in statement of a defense set up in a supplemental answer is not sufficient reason for refusing to permit it to be filed.¹⁷

§ 775. After reversal.—The higher court, upon a reversal and further proceedings being awarded, may allow a supplemental answer to bring before the court the facts which were proper to be known before instructions were given to a master as to the mode of settling the accounts, and no objection can be taken to such allowance upon a subsequent appeal.¹⁸

§ 776. Discharge of debt.—Evidence of the discharge of the debt sued on by transactions subsequent to the filing of an answer is admissible only under the plea of payment *puis darrein* continuance.¹⁹ A settlement between the parties may be brought before the court by supplemental answer.²⁰

§ 777. Foreclosure.—A supplemental answer to a bill of foreclosure should embrace new matter discovered subsequent to the filing of the original answer. But this is a matter of discretion with the court, who will not enforce the rule so as to work injustice.²¹

§ 778. Judgment.—If judgment is rendered in another action after answer is made, the proper course to make evidence of such judgment admissible is to obtain leave to serve and file a supplemental answer.²²

¹³ Morel v. Garely, 16 Abb. Pr. 269.

¹⁴ Garner v. Hannah, 6 Duer, 262.

¹⁵ Drought v. Curtiss, 8 How. Pr. 56.

¹⁶ Hodges v. Price, 38 Wash. 1, 80 Pac. 202; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209.

¹⁷ Burnett v. Ewing, 39 Wash. 45, 80 Pac. 855.

¹⁸ Williams v. Gibbes, 20 How. 535, 15 L. Ed. 1013.

¹⁹ Jessup v. King, 4 Cal. 331.

²⁰ McRea v. Warehime, 49 Wash. 194, 94 Pac. 924.

²¹ Suydam v. Truesdale, 6 McLean, 459, Fed. Cas. No. 13656.

²² Drought v. Curtiss, 8 How. Pr. 56.

§ 779. **Parties changed.**—If, owing to matters which have occurred pending the action, there is a misjoinder of parties plaintiff, objection thereto must be taken by a supplemental answer, or it is waived.²³ Demurrer is not the proper practice to eliminate parties on account of matters occurring subsequently.²⁴

§ 780. **Title acquired.**—If in an action to recover possession of real estate defendant acquires title to the premises pending the litigation, it must be pleaded by supplemental answer, in order to make evidence thereof admissible.²⁵

§ 781. **Title lost.**—In an action for ejectment, the defendant cannot show that plaintiff has parted with right to possession by conveying title to another, unless such fact is set up in the original or a supplemental answer.²⁶

§ 782. **Answer to supplemental pleading.**—Where the code provides for supplemental pleadings to show facts which occur after the former pleadings are filed, issue on such facts can only be joined on such supplemental pleadings, unless such pleadings are waived.²⁷

§ 783. **Amendment.**—A supplemental complaint may be amended once of course, and a new cause of action set up by the amendment.²⁸

§ 784. **Effect of supplemental pleading.**—The legislature, in allowing supplemental complaints and answers, intended to follow the former chancery rule, and thus chose terms which import something additional or amendatory to what has gone before.²⁹ It is, therefore, not allowable to a defendant, as a general rule, without special permission, to answer anew, or further the original complaint.³⁰ Leave to file the supplemental complaint does not establish the plaintiff's right to sue for the original cause

²³ *Calderwood v. Pyser*, 31 Cal. 333.

²⁴ *California Farm etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593.

²⁵ *McMinn v. O'Connor*, 27 Cal. 246; *Moss v. Shear*, 30 Cal. 468.

²⁶ *Id.*

²⁷ *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

²⁸ *Devine v. Duncan*, 52 How. Pr. 446.

²⁹ *Slauson v. Englehart*, 34 Barb. 198.

³⁰ *Dann v. Baker*, 12 How. Pr. 521.

of action, and decides nothing as to the plaintiff's rights.³¹ A new cause of action cannot be set up by supplemental complaint. The matter must be consistent with and in aid of the original proceeding.³² Nor can the nature of the plaintiff's claim be changed,³³ or the rights of a substituted defendant enlarged so as to enable him to traverse a fact submitted by his predecessor.³⁴ The statute of limitations runs in favor of a new party brought in by supplemental complaint to the date of its filing.³⁵

FORMS OF SUPPLEMENTAL PLEADINGS.

§ 784a. Supplemental complaint.

Form No. 247a.

[TITLE OF COURT AND CAUSE.]

The plaintiff for his supplemental complaint herein, served under and pursuant to an order of this court duly made, dated on the . . . day of . . . , 19 . . . , to which reference is hereby made, alleges:

[Set forth new and additional facts.]

§ 784b. Notice of motion for leave to continue action and serve supplemental complaint.

Form No. 247b.

[TITLE.]

Take notice, that on the affidavit of C. D. and the proposed supplemental complaint, of which copies are herewith served upon you, and on the pleadings in this action, C. D., as executor of the plaintiff, will move the court, at a special term thereof, to be held at . . . , in . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, for leave to continue this action in the

³¹ Robbins v. Wells, 26 How. Pr. 15.

³² Wattson v. Thibou, 17 Abb. Pr. 184; Cordier v. Cordier, 26 How. Pr. 187.

³³ Cheeseman v. Sturges, 19 Abb. Pr. 293.

³⁴ Forbes v. Waller, 25 N. Y. 430.

³⁵ Matteson v. Wagoner, 147 Cal. 739, 82 Pac. 436.

name of the said [executor] as plaintiff, and to serve and file said supplemental complaint in this action; and for such other or further relief as may be just.

. . . , Attorney for C. D., Executor.

§ 784c. Order allowing supplemental complaint.

Form No. 247c.

[TITLE.]

[At a special term, etc.]

On reading and filing [describe motion papers], and on motion of E. F. for the plaintiff, and after hearing G. H. [or, no one appearing] in opposition:

Ordered, that the plaintiff have leave to serve, within . . . days after this date, a copy of the supplemental complaint filed upon this motion, on payment to the [defendant] of . . . dollars, costs.

[Or, Ordered, that the plaintiff have leave to make and file the proposed supplemental complaint herein, upon payment of . . . dollars, costs of motion to the defendant; and further, that upon such payment being made, the service of said supplemental complaint heretofore made stand as the completed service thereof, and that the defendant have time to plead to said supplemental complaint until and including . . . , 19 . . .]

§ 784d. Order granting leave to make supplemental answer.

Form No. 247d.

[TITLE.]

On reading and filing [describe motion papers], and on motion of E. F. for the plaintiff, and after hearing G. H. [or, no one appearing] in opposition:

Ordered, that the defendant be allowed to make a supplemental answer herein, setting up payment of the note in suit [or, as proposed by him], upon payment to the plaintiff of . . . dollars, motion costs; such answer [or complaint] to be served upon the attorney for the plaintiff [or defendant] within . . . days from the entry of this order [the issue to stand as of the . . . day of . . . , 19 . . .].

[Or provide that supplemental answer already served stand without further service as in case of supplemental complaint.]

§ 784e. General form of supplemental pleading.

Form No. 247e.

[TITLE.]

The plaintiff [or, defendant], for a supplemental complaint [or, answer] herein, pursuant to an order of this court, dated . . . , 19 . . . , alleges, etc.

[Or, when the proposed supplemental complaint is served with the motion for leave:]

The plaintiff [or, defendant], for a proposed supplemental complaint [or, answer] herein, alleges, etc.

CHAPTER XXXII.

AMENDMENTS.

§ 785. **In general.**—In California, as in most states having codes of civil procedure, it is provided that courts must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties.¹ Unless some other restricted meaning can be given to this section, it is plainly unconstitutional and void. Under this rule, any and all trial courts may refuse to be governed by the law of procedure and evidence solemnly enacted by legislature, and, unless we can determine from the record both that the party complaining has suffered substantial injury and that a different result would have been probable if the law of procedure had been followed, there could be no reversal.² If the error is such that it may not be disregarded, the question whether it may be cured by amendment is always important and sometimes difficult. Under the restrictions or limitations named in the statute, a court has power to amend its process, the pleadings in the cause, and the proceedings therein, including orders and the judgment or decree. The granting of amendments is largely in the discretion of the court, and must depend upon the circumstances of the particular case, and the consideration whether it is in furtherance of justice.^{2a} Amendments are never allowable for the purpose of defeating justice;³ and leave to amend a pleading is of no effect unless the order is complied with.⁴

§ 786. **Amendment of process.**—The Code of Civil Procedure of California provides that “every court has power to amend and control its process and orders so as to make them conformable

¹ Cal. Code Civ. Proc., § 475; N. Y. Code Civ. Proc., § 723; Stockton v. Glenn Falls Ins. Co., 121 Cal. 167, 53 Pac. 565.

² San Jose R. Co. v. San Jose L. & W. Co., 126 Cal. 322, 58 Pac. 824.

^{2a} As to exercise of discretion by trial court in granting amendments,

see Horn v. Reitler, 15 Colo. 317, 25 Pac. 501; Davis v. Johnson, 4 Colo. App. 545, 36 Pac. 887.

³ Heegaard v. Trust Co., 3 S. Dak. 569, 54 N. W. 656.

⁴ Kimball v. Gearhart, 12 Cal. 46; Briggs v. Bruce, 9 Colo. 282, 11 Pac. 204.

to law and justice.”⁵ In New York, the court may upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice, amend any process, pleading, or other proceeding, in certain specified particulars.⁶ Similar provisions are found in all the codes. But a summons is not amendable of course. It can only be amended by permission of the court.⁷ The particulars in which the court may authorize an amendment of process are numerous. A summons may be amended by inserting a notice of the cause of action.⁸ Leave has been granted to amend a summons by increasing the amount, although as to the increased amount the effect was to deprive the defendant of the benefit of the statute of limitations.⁹ And where by setting aside a summons and complaint as irregular the plaintiff would have been barred by the statute of limitations, the court, instead of setting the proceedings aside, permitted an amendment on payment of costs.¹⁰ An amendment of summons by referring to the complaint as annexed, when it is omitted, may be allowed.¹¹ All mistakes may be corrected by amendment under section 723 of the New York code. Section 473 of the California Code of Civil Procedure is also very broad, though not so comprehensive as section 128, above quoted. If a writ be amendable, it will be accorded the same effect, with reference to acts done in execution of it, as if it had been amended.¹²

§ 787. Amendment of pleadings.—Any pleading may be amended once by a party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter to answer or demur to the amended pleading.¹³ In Idaho, great liberality in the allowance of amendments to pleadings, in the furtherance of justice between the

⁵ Code Civ. Proc., § 128, subd. 8.

⁶ See N. Y. Code Civ. Proc. (1877), § 723.

⁷ *McCrane v. Moulton*, 3 Sandf. 736; *Walkenshaw v. Perzel*, 32 How. Pr. 310, 5 Rob. (N. Y.) 648.

⁸ *Polock v. Hunt*, 2 Cal. 193.

⁹ *Deane v. O'Brien*, 13 Abb. Pr. 11. See, also, *Sluyter v. Smith*, 2 Bosw. 673.

¹⁰ *Weir v. Slocum*, 3 How. Pr. 397.

¹¹ *Foster v. Wood*, 1 Abb. Pr. (N. S.) 150, 30 How. Pr. 284. Amendment of return of summons. *Allison v. Thomas*, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309.

¹² *Brann v. Blum*, 138 Cal. 644, 72 Pac. 168.

¹³ Cal. Code Civ. Proc., § 472; N. Y. Code Civ. Proc., § 542. See *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133.

parties, is required.¹⁴ Except as provided in these sections, leave to amend must be obtained. An amendment must be substantial, not merely colorable.¹⁵ Adding a verification to a complaint is not an amendment;¹⁶ and it will not be allowed where the original pleading was not verified. But it has been held to be no abuse of discretion for the trial court to allow an amended complaint to be amended by adding a verification, though neither the original nor the amended complaint was verified.¹⁷ Amendments can only be allowed where there is a defect in the parties, in its prayers for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case.¹⁸ Where a complaint praying for legal relief states a cause of action entitling the plaintiff to equitable relief, the court may on the trial permit the prayer to be amended, so as to ask for the appropriate equitable relief.¹⁹ Courts should allow amendments with great liberality at any time before trial, if the amendment is essential to a fair trial on the legal merits of the case and does not occasion injurious delays.²⁰ Amendments are to be allowed or denied in furtherance of substantial justice,—that is, such justice as the law administers when correctly applied.²¹ The right to amend is not an absolute, unconditional one, but is to be allowed in furtherance of justice, upon equitable terms, and must be one which will not change substantially the claim or defense.²² A plaintiff is not permitted, under the guise of an amendment, to substitute for the original cause of action a new and different one.²³ Motions to amend are not to be granted as matter of course, but only when good cause is shown therefor;²⁴ and the party should have a reasonable opportunity to amend, if he desires to do so, upon demurrer being sustained.²⁵

¹⁴ *Kroetch v. Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868.

¹⁵ *Snyder v. White*, 6 How. Pr. 321.

¹⁶ *George v. McAvoy*, 6 How. Pr. 200.

¹⁷ *Ruffatti v. Lexington Min. Co.*, 10 Utah, 386, 37 Pac. 591. See *Buell v. Beckwith*, 59 Cal. 480; *Case v. Edson*, 40 Kan. 161, 19 Pac. 635.

¹⁸ *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 46; *Story's Eq. Pl.* 884; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158.

¹⁹ *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673.

²⁰ *McMillan v. Dana*, 18 Cal. 349; *Kirstein v. Madden*, 38 Cal. 163.

²¹ *Stringer v. Davis*, 30 Cal. 321.

²² *Kelsey v. Chicago etc. R. R. Co.*, 1 S. Dak. 80, 45 N. W. 204.

²³ *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887; *People v. Mt. Shasta Mfg. Co.*, 107 Cal. 256, 40 Pac. 391.

²⁴ *Hayden v. Hayden*, 46 Cal. 333.

²⁵ *Payne v. Baehr*, 153 Cal. 441, 95 Pac. 895.

§ 788. **Changing form of action.**—An amended complaint setting up a cause of action at law in place of an equitable action should not be permitted.²⁶ Where an application to amend a complaint is made during the trial of the cause, and the amendment is such as to change the action from one against the defendant to an action against the defendant and another party jointly, a denial of such motion is not an abuse of discretion.²⁷ It is not error to permit a petition in a suit to quiet title to be amended before answer, so as to change the action to one in ejectment, where no prejudice is shown,²⁸ or from *quantum meruit* to express contract.²⁹

§ 789. **When allowable.**—Amendments will be allowed to any extent, provided no new cause of action in substance is added;³⁰ as amendments substantially changing the claim or defense cannot properly be granted at any time,³¹ and the court should not allow a new and wholly different case to be made.³² Amendments to pleadings should be liberally allowed;³³ but where objections are raised in the court below, and parties, instead of applying for leave to amend, succeed in procuring rulings in their favor by the trial court, they do so at their peril.³⁴ An amendment made of course may add a new cause of action.³⁵ In an action for breach of contract, an amendment of the com-

²⁶ *Gibbons v. Denver Brokerage etc. Co.*, 17 Colo. App. 167, 67 Pac. 913.

²⁷ *Petterson v. Stockton & T. C. R. Co.*, 134 Cal. 244, 66 Pac. 304.

²⁸ *Curtis v. Schmehr*, 69 Kan. 124, 76 Pac. 434.

²⁹ *Cummings v. Weir*, 37 Wash. 42, 79 Pac. 487.

³⁰ *Hollister v. Livingston*, 9 How. Pr. 140.

³¹ *Bailey v. Johnson*, 1 Daly, 61; *Woodruff v. Dickie*, 31 How. Pr. 164; *Ransom v. Wetmore*, 39 Barb. 104; *Whitcomb v. Hungerford*, 42 Barb. 177; *Foste v. Standard Ins. Co.*, 26 Or. 449, 38 Pac. 617.

³² *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 46; *Roush v. Fort*, 3 Mont. 175; *Story's Eq. Pl.* 884; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Schofield v. Fitzhugh*, 1 Cranch C. C. 108, Fed. Cas. No.

12474; *The Harmony*, 1 Gall. 123, Fed. Cas. No. 6081.

³³ See *Gould v. Stafford*, 101 Cal. 32, 35 Pac. 429; *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86; *Wixon v. Devine*, 91 Cal. 477, 27 Pac. 777; *McCausland v. Ralston*, 12 Nev. 195, 28 Am. Rep. 781; *Carson v. Railsback*, 3 Wash. T. 168, 13 Pac. 618; *Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709; *Baldock v. Atwood*, 21 Or. 73, 26 Pac. 1058; *Foste v. Standard Ins. Co.*, 26 Or. 451, 38 Pac. 617.

³⁴ *Robinson etc. Min. Co. v. Johnson*, 13 Colo. 258, 22 Pac. 459, 5 L. R. A. 769.

³⁵ *Mason v. Whitely*, 4 Duer, 611, 1 Abb. Pr. 85; *Wyman v. Remond*, 18 How. Pr. 272; *Macqueen v. Babcock*, 13 Abb. Pr. 268. But see *Woodruff v. Dickie*, 5 Rob. (N. Y.) 619; *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887.

plaint by inserting the words "for a valuable consideration" was not a statement of a new cause of action.³⁶ Where a complaint was amended by striking out the words "wrongfully and unlawfully," and the demand for an injunction, the cause of action was not so changed that the amended complaint should be stricken out.³⁷ A complaint setting up a cause of action based on fraudulent representation cannot, over defendant's objection, be amended so as to set up a cause of action based on mutual mistake.³⁸ The amendment of a petition in an action for damages by the addition of the name of a party plaintiff does not substantially change the claim or defense.³⁹

A court of chancery should rarely if ever permit amendments so changing the character of the pleadings as to make substantially a new case after the cause has been set for hearing, much less after it has been tried.⁴⁰ Plaintiff may amend by a new count, introductive of a new cause of action, if it correspond in character with the original count in a kindred cause, admitting the same pleading and defense, and which might have been included in the original declaration.⁴¹ The plaintiff, before issue joined, may, by an amended pleading, state the facts on which an action is based, though there is a conflict between the facts as then alleged and as alleged in the original pleading.⁴² For the purpose of determining whether new matter is entirely foreign to the cause of action in the original complaint, the original complaint must be liberally construed.⁴³ Plaintiff cannot amend so as to change an action *ex contractu* to one *ex delicto*;⁴⁴ nor to change the mode of trial;⁴⁵ nor can the plaintiff

³⁶ Frey v. Vignier, 145 Cal. 251, 78 Pac. 733.

³⁷ St. Clair v. San Francisco etc. Ry. Co., 142 Cal. 647, 76 Pac. 485; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Frey v. Vignier, 145 Cal. 251, 78 Pac. 733; Kilham v. Western Bank & Safe Deposit Co., 30 Colo. 365, 70 Pac. 409; Tanner v. Harper, 32 Colo. 156, 75 Pac. 404; Bremen Min. Co. v. Bremen, 79 Pac. 806, 13 N. Mex. 111.

³⁸ Connell v. El Paso Gold Min. etc. Co., 33 Colo. 30, 78 Pac. 677.

³⁹ Hucklebridge v. Atchison etc. Ry. Co., 66 Kan. 443, 71 Pac. 814.

⁴⁰ Walden v. Bodley, 14 Pet. 156, 10 L. Ed. 398.

⁴¹ Tiernan v. Woodruff, 5 McLean, 135, Fed. Cas. No. 14027.

⁴² Keenan v. Washington Liquor Co., 8 Idaho, 383, 69 Pac. 112.

⁴³ Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673.

⁴⁴ 1 Van Santv. Pl. 768; Ramirez v. Murray, 5 Cal. 222; Lane v. Beam, 19 Barb. 51, 1 Abb. Pr. 65. Or, vice versa, Hackett v. Bank of California, 57 Cal. 335; Baldwin v. Rood, 49 Hun, 605, 1 N. Y. Supp. 713; Mea v. Pierce, 63 Hun, 400, 18 N. Y. Supp. 293.

⁴⁵ McCarty v. Edwards, 24 How. Pr. 236; Craig v. Hyde, 24 How. Pr. 313.

in ejectment set up title acquired after commencement of suit.⁴⁶ So, also, facts which occur subsequent to filing the complaint, and which change the liabilities of the defendants, cannot be incorporated by amendment.⁴⁷

An amendment may strike out a cause of action.⁴⁸ An amended pleading cannot set up matter which occurred after suit brought.⁴⁹ It must be presented by supplemental pleading. The fact that new matter set up by way of amendment was known to the defendant at the time of filing his original answer is no reason why the amendment should not be permitted.⁵⁰ In an action for a fraudulent sale of a mine, an amendment striking out the offer to return the deed does not change the issues tendered.⁵¹ A plaintiff may amend by filing a more full and particular account.⁵² The complaint may be amended within the time limited, by setting forth a new cause of action, and is not restricted to a cause of action of the same class as that in the original complaint, though all the causes set forth in the amended complaint must be of the same class and of a class to which the summons is appropriate.⁵³ In California, as a rule, the courts are extremely liberal as to amendments.

§ 790. Amendments of course.—Amendments of course may be made, without costs to either party, to a pleading at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon,⁵⁴ but not after.⁵⁵ But a party shall not so amend more than once. If defendant demurs to the complaint, it is an error for the court to refuse the plaintiff leave

⁴⁶ *Smith v. Billett*, 15 Cal. 26.

⁴⁷ *Van Maren v. Johnson*, 15 Cal. 308; *Woodruff v. Dickie*, 31 How. Pr. 164; *Sheldon v. Adams*, 18 Abb. Pr. 405, 41 Barb. 54, 27 How. Pr. 179.

⁴⁸ *Watson v. Rushmore*, 15 Abb. Pr. 51.

⁴⁹ *Hornfager v. Hornfager*, 6 How. Pr. 13; *Lampson v. McQueen*, 15 How. Pr. 345.

⁵⁰ *Sharon v. Sharon*, 77 Cal. 102, 19 Pac. 230. See *Dorn v. Baker*, 96 Cal. 206, 31 Pac. 37.

⁵¹ *Ahrens v. Adler*, 33 Cal. 608.

⁵² *Estate of Hidden*, 23 Cal. 362; *Valencia v. Couch*, 32 Cal. 339; 91 Am. Dec. 589. How far the dis-

cretion of the court in allowing amendments so as to change the form of action is restricted by the code, discussed in *Brown v. Babcock*, 3 How. Pr. 305; *Spalding v. Spalding*, 3 How. Pr. 297; *Forniss v. Brown*, 8 How. Pr. 59.

⁵³ *Brown v. Leigh*, 49 N. Y. 78, 12 Abb. Pr. (N. S.) 193.

⁵⁴ Cal. Code Civ. Proc., § 472; N. Y. Code Civ. Proc., § 542; 1 Van Santv. Pl. 792; 1 Whitt. Pr. 611; 1 Barb. Ch. 206; *Allen v. Marshall*, 34 Cal. 165; *Lord v. Hopkins*, 30 Cal. 76; *Barber v. Reynolds*, 33 Cal. 497.

⁵⁵ *Manha v. Union Fertilizer Co.*, 151 Cal. 581, 91 Pac. 393.

to amend his complaint before the decision on the demurrer;⁵⁶ but he cannot amend a second time without leave of the court.⁵⁷ After demurrer, and before argument and submission of the issue thereon, either party may amend a pleading, by filing the same as amended, and serving a copy on the adverse party or his attorney, who has ten days to answer or demur thereto.⁵⁸ A judgment by default within ten days after filing, but more than ten days after service of an amended complaint, is error; for defendant is entitled to the full ten days after filing in which to answer.⁵⁹ If the complaint states a cause of action, the face of the record shows abuse of discretion in sustaining a demurrer without leave to amend, even for the second time.⁶⁰

The right to amend as of course is absolute, and cannot be interfered with, unless the amendment is merely colorable, and made for purposes of delay only.⁶¹ And though absolute, it may be waived, either by express notice or noticing cause for trial.⁶² A party may amend of course where the same amendment would be allowed at the trial.⁶³ An amendment that would have the effect of changing the parties to the action will not be allowed, unless there is something in the record to amend by.⁶⁴ A complaint may be amended by changing a party from defendant to plaintiff, under the Oregon practice,^{64a} by permitting pleadings to be amended by striking out or adding the name of a party.⁶⁵ Without amending the summons, the names of additional defendants cannot be introduced.⁶⁶ And a summons cannot be amended without leave of court.⁶⁷ An amendment of course will not be allowed which sets up a different claim. By claim is meant the particular relief sought; though the cause of

⁵⁶ *Lord v. Hopkins*, 30 Cal. 76.

⁵⁷ *Sands v. Calkins*, 30 How. Pr. 1; *Jeroliman v. Cohen*, 1 Duer, 631; *White v. Mayor of N. Y.*, 5 Abb. Pr. 322, 14 How. Pr. 495.

⁵⁸ Cal. Code Civ. Proc., § 472.

⁵⁹ *Billings v. Palmer*, 2 Cal. App. 432, 83 Pac. 1077.

⁶⁰ *Schaake v. Eagle etc. Can. Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

⁶¹ *Griffin v. Cohen*, 8 How. Pr. 451; *Rogers v. Rathbun*, 8 How. Pr. 466; *Thompson v. Minford*, 11 How. Pr. 273; *Spencer v. Tooker*, 12 Abb. Pr. 353.

⁶² 1 *van Santv. Pl.* 796; *Cusson v. Whalon*, 5 How. Pr. 305.

⁶³ *Getty v. Hudson River R. R. Co.*, 6 How. Pr. 269.

⁶⁴ *Lake v. Morse*, 11 Ill. 587; *Chase v. Dunham*, 1 Paige, 572. But see Cal. Code Civ. Proc., § 473; N. Y. Code Civ. Proc., § 542.

^{64a} Hill's Code, § 101.

⁶⁵ *Liggett v. Ladd*, 23 Or. 26, 31 Pac. 81. As to amendment of complaint by dropping names of parties, see *Ware v. Walker*, 70 Cal. 591, 12 Pac. 475.

⁶⁶ *Follower v. Langhlin*, 12 Abb. Pr. 105.

⁶⁷ *Walkenshaw v. Purzel*, 32 How. Pr. 310.

action—that is, the statement of facts—may be amended.⁶⁸ But an amendment could be allowed by inserting a count for goods sold and delivered without terms, and allowing the trial to proceed; such is not a case changing substantially the claim.⁶⁹ In an action on a non-negotiable note, refusal to permit defendant to amend his pleadings, so as to show that the collection of the note has been enjoined in a suit between the original parties is reversible error.⁷⁰ And “other allegations material to the case” may be introduced.⁷¹

§ 791. Amendment by leave of court.—The judge presiding at the trial has full power of amendment of pleadings.⁷² But a referee cannot order an amendment. And after the case is submitted the referee cannot allow the plaintiff to introduce an amended complaint and compel the defendant to file an amended answer.⁷³ In the furtherance of justice, amendments to pleadings should be liberally allowed;⁷⁴ and if such amendment does not deprive the complaining party of some substantial right, it is not error to permit it.⁷⁵ In New York, the power of the referee to allow amendments at the trial is the same as that of the judge, and his exercise of discretion will rarely be interfered with.⁷⁶

Amendments should be liberally allowed by the court, in furtherance of justice.⁷⁷ But the refusal to allow them is presumed to be right, unless the character of the proposed amend-

⁶⁸ Chapman v. Webb, 6 How. Pr. 390.

⁶⁹ Harrington v. Slade, 22 Barb. 161; Troy etc. R. R. Co. v. Tibbits, 11 How. Pr. 168; Vibbard v. Roderick, 51 Barb. 616.

⁷⁰ Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946.

⁷¹ Jeroliman v. Cohen, 1 Duer, 632; Baldoek v. Atwood, 21 Or. 73, 26 Pac. 1058. The above are not all good authority in California, but may be consulted with profit.

⁷² See Cal. Code Civ. Proc., §§ 469, 470.

⁷³ De La Riva v. Berreyesa, 2 Cal. 195.

⁷⁴ Kindall v. Lincoln Hardware etc. Co., 10 Idaho, 13, 76 Pac. 992; Dunbar v. Griffiths, 14 Idaho, 120, 93 Pac. 654.

⁷⁵ Idaho Placer Min. Co. v. Green, 14 Idaho, 294, 94 Pac. 161.

⁷⁶ Brady v. Pinal Co., 8 Ariz. 114, 71 Pac. 910; Tanner v. Harper, 32 Colo. 156, 75 Pac. 404; Small v. Harrington, 10 Idaho, 499, 79 Pac. 461; Baines v. Coos Bay R. & E. R. & Nav. Co., 45 Or. 307, 77 Pac. 400; N. Y. Code Civ. Proc., § 1018; Dougherty v. Valloton, 6 Jones & Sp. 455; Smith v. Pelott, 63 Hun, 632, 18 N. Y. Supp. 301; Hall v. Abells, 57 Hun, 589, 10 N. Y. Supp. 581.

⁷⁷ 1 Van Santv. Pl. 809; McMillan v. Dana, 18 Cal. 339; Roland v. Kreyenhagen, 18 Cal. 455; Pierson v. McCahill, 22 Cal. 127; Stringer v. Davis, 30 Cal. 321; Vanderbilt v. Accessory Transit Co., 9 How. Pr. 352.

ment is shown on the record.⁷⁸ Amendments are within the discretion of the court, and cannot be controlled by *mandamus*,⁷⁹ and are governed by their own rules and modes of practice.⁸⁰ An application to amend a pleading is addressed to the sound discretion of the trial court;⁸¹ and will not be reviewed on appeal, except for an abuse of such discretion.⁸² Where the pleading is defective, demurrer should be sustained, and leave be granted to amend; and if the plaintiff then declines, final judgment should be given,⁸³ unless the complaint is so defective that it cannot be made good by amendment.⁸⁴ If a complaint has been amended twice, the refusal of the court to allow a third amendment is not an abuse of discretion.⁸⁵ And leave to the plaintiff to amend his complaint may be refused, if the court is able to see that it cannot be so amended as to state a good cause of action.⁸⁶ After demurrer sustained, amendments may be made upon motion.⁸⁷ The party desiring amendment after demurrer sustained must make his motion to the court, and he cannot object on appeal that he was not permitted to amend when he made no offer.⁸⁸ After demurrer sustained, defendant may be allowed to amend.⁸⁹ After demurrer to defendant's answer sustained, it is in the discretion of the court to allow defendant to amend.⁹⁰ Demurrer sustained, and plaintiff amends by making two counts instead of one. He cannot, after trial, complain of

⁷⁸ Jessup v. King, 4 Cal. 331.

⁷⁹ Smith v. Jackson, 1 Paine, 453, Fed. Cas. No. 13064. To the same effect, Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810.

⁸⁰ Wright v. Hollingworth, 1 Pet. 165, 7 L. Ed. 97; United States v. Buford, 3 Pet. 12, 7 L. Ed. 585.

⁸¹ Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Barnes v. Packwood, 10 Wash. 50, 38 Pac. 857; Hammond v. Foster, 4 Mont. 421, 1 Pac. 757; Billings v. Sanderson, 8 Mont. 201, 19 Pac. 307.

⁸² Garrison v. Goodale, 23 Or. 307, 31 Pac. 709; Belmont Min. Co. v. Costigan, 21 Colo. 471, 42 Pac. 647; Buno v. Gomer, 3 Colo. App. 456, 34 Pac. 256; Silsby v. Frost, 3 Wash. T. 388, 17 Pac. 887; Wixon v. Divine, 91 Cal. 477, 27 Pac. 777; Cheney v. O'Brien, 69 Cal. 200, 10

Pac. 479; Wallace v. Baisley, 22 Or. 572, 30 Pac. 432; Hexter v. Schneider, 14 Or. 184, 12 Pac. 668; Gould v. Gleason, 10 Wash. 476, 39 Pac. 123; Lower Kings etc. Ditch Co. v. Kings River Canal Co., 67 Cal. 577, 8 Pac. 91; County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468.

⁸³ Gallagher v. Delaney, 10 Cal. 410.

⁸⁴ Lord v. Hopkins, 30 Cal. 76.

⁸⁵ Balch v. Smith, 4 Wash. 497, 30 Pac. 648.

⁸⁶ People v. Mount Shasta Mfg. Co., 107 Cal. 256, 40 Pac. 391.

⁸⁷ Smith v. Yreka Water Co., 14 Cal. 201; Gallagher v. Delaney, 10 Cal. 410.

⁸⁸ Smith v. Yreka Water Co., 14 Cal. 201.

⁸⁹ Pierson v. McCahill, 22 Cal. 127; Fish v. Reddington, 31 Cal. 186.

⁹⁰ Gillan v. Hutchinson, 16 Cal. 153.

error in sustaining the demurrer.⁹¹ Where a demurrer to a complaint has been properly sustained, and it does not appear that any leave was asked to amend the complaint, the judgment for the defendant, rendered upon the sustaining of the demurrer, will not be reversed, on the ground that leave to amend was not granted.⁹² After demurrer to a complaint is sustained, and the plaintiff, instead of amending, as given leave to do, appeals, the appellate court, in affirming the order, may, unless there has been a judgment rendered which it also affirms, grant leave to amend.⁹³ So, also, if one defendant demurs to a complaint for misjoinder of another defendant, and the complaint is accordingly amended to obviate the objection by omitting the defendant wrongfully joined, a subsequent demurrer for failing to join such omitted defendant should not be sustained.⁹⁴ To test the ruling on the demurrer, he should have gone to trial on the pleadings where the judgment on demurrer left them.⁹⁵ In demurrer overruled to defective complaint, if defendant answers over, the court will treat such complaint as amended.⁹⁶

The filing of a new complaint after demurrer sustained is not the commencement of a new action.⁹⁷ So of an amended answer which supersedes the original.⁹⁸ They simply take the place of the originals;⁹⁹ and copies of the instruments sued on must be annexed thereto.¹⁰⁰ All amendments which are not permitted of course under the sections of the code before quoted must be authorized by the court. Section 473 of the California Code of Civil Procedure provides that "the court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of any party, or a mistake in any other respect; and may upon like terms enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any

⁹¹ *Gale v. Tuolumne Water Co.*, 14 Cal. 25.

⁹² *Barker v. Freeman*, 85 Cal. 533, 24 Pac. 926.

⁹³ *Greely v. McCoy*, 3 S. Dak. 624, 54 N. W. 659; distinguishing *People v. Jackson*, 24 Cal. 630.

⁹⁴ *James v. Leport (Nev.)*, 4 Pac. 1184, 4 West Coast Rep. 584.

⁹⁵ *Gale v. Tuolumne Water Co.*, 14 Cal. 25.

⁹⁶ *Ward v. Moorey*, 1 Wash. T. 104.

⁹⁷ *Jones v. Frost*, 28 Cal. 245.

⁹⁸ *Id.*; *Gilman v. Cosgrove*, 22 Cal. 356.

⁹⁹ *Barber v. Reynolds*, 33 Cal. 497; *Sands v. Calkins*, 30 How. Pr. 1.

¹⁰⁰ *McEwen v. Hussey*, 23 Ind. 395.

pleading or proceeding in other particulars," etc. This section omits the words "upon affidavit showing good cause therefor," contained in section 68 of the Practice Act. Sections 542 and 723 of the New York Code of Civil Procedure correspond substantially with the section above quoted.

It is within the court's discretion, after fixing the probable expense of a continuance occasioned by an amendment of an answer, to make the payment thereof by defendant a condition of allowing the amendment.¹⁰¹ It is not error, when leave to amend an answer is asked after trial begun, to grant it on payment of costs, fixed at one hundred dollars.¹⁰²

§ 792. Manner of amending.—The court may allow plaintiff to amend his complaint by writing changed dates on it.¹⁰³ Where an issue is tendered in the testimony without objection, and testimony thereon is offered by both parties, the court may consider the pleadings amended to embrace the issue, and submit it by instructions.¹⁰⁴ A pleading may be amended by filing a new and separate pleading containing the amendments desired and substituting it for the original pleading, or by interlining the amendment in the original pleading, or by filing a statement of the amendment and designating by reference where the new matter is to be inserted in the original pleading, or what part of the original pleading is to be considered as stricken out.¹⁰⁵ When a petition is amended by filing a statement of the amendment, and designating by reference where the new matter is to be inserted in the original pleading, or what part of the original pleading is to be considered as stricken out, the two together are the amended petition.¹⁰⁶

§ 793. Amendments at trial.—The allowance of amendments at the trial is in the discretion of the court,¹⁰⁷ and that discre-

¹⁰¹ *Gabriel v. Tonner*, 138 Cal. 63, 70 Pac. 1021.

¹⁰² *Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 650.

¹⁰³ *Chamberlin v. Loewenthal*, 138 Cal. 47, 70 Pac. 932.

¹⁰⁴ *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202.

¹⁰⁵ *Turner v. Hamilton*, 13 Wyo. 408, 80 Pac. 664.

¹⁰⁶ *Turner v. Hamilton*, 13 Wyo. 408, 80 Pac. 664.

¹⁰⁷ *Van Santv. Pl.* 812, 818, 1 Whitt. Pr. 617; *Puterbaugh's Ill. Pr.* 526; *Jackson v. Warren*, 32 Ill. 331; *Thornton v. Borland*, 12 Cal. 438; *Gillan v. Hutchinson*, 16 Cal. 153; *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348; *Stearns v. Martin*, 4 Cal. 227. See *Gwynn v. Butler*, 17 Colo.

tion will rarely be revised,¹⁰⁸ but, for its abuse, the appellate court will interfere.¹⁰⁹ Where, from oversights of counsel, committed under pressure of business, pleadings are defective, amendments should be allowed with great liberality. In such cases, when an offer to amend is made at such a stage of the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality.¹¹⁰

Where the defendant lies by until trial before objecting to the sufficiency of the complaint, it is a proper exercise of discretion in the court or referee to allow the necessary allegations to be supplied by amendment, if they do not amount to a new cause of action.¹¹¹ But leave to amend allegations filed against an insolvent debtor, by inserting the name of another creditor, was refused after the jury was sworn.¹¹² No material amendment can be allowed after the cause has been submitted to the jury, or a finding has been announced by a court.¹¹³ Where, in the course of a trial, it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the court should allow amendments on such terms as may be just,¹¹⁴ at any time after the commencement of the trial,¹¹⁵ or after a motion for nonsuit, if it would not operate as a surprise upon the defendant.¹¹⁶ It is always in time when it immediately follows an objection to the pleading, and does not come too late because made after plaintiff has closed his testimony.¹¹⁷ Application for leave to amend the pleadings must be made to the trial court.¹¹⁸ Where an amendment offered to a pleading is not in writing, and there is no verification of the facts referred to in it, leave to amend is within the discretion of the court.¹¹⁹

114, 28 Pac. 466; *Wild v. Oregon R. Co.*, 21 Or. 159, 27 Pac. 954.

¹⁰⁸ *Pierson v. McCahill*, 22 Cal. 127; *Sandoval v. Randolph* (Ariz.), 95 Pac. 119; *Fort Collins Dev. Ry. Co. v. France*, 41 Colo. 512, 92 Pac. 953.

¹⁰⁹ *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348.

¹¹⁰ *Kirstein v. Madden*, 38 Cal. 163.

¹¹¹ *Woolsey v. Trustees of Rondout*, 2 Keyes, 603.

¹¹² *Newton's Case*, 2 Cranch C. C. 467, Fed. Cas. No. 10188.

¹¹³ *Holcraft v. King*, 25 Ind. 352.

¹¹⁴ *Stringer v. Davis*, 30 Cal. 318.

¹¹⁵ *Peters v. Foss*, 16 Cal. 357; *Gavitt v. Doub*, 23 Cal. 79. Amendments during trial. See *Randall v. Greenhood*, 3 Mont. 506; *Palmer v. McMasters*, 6 Mont. 172, 9 Pac. 898; *Wild v. Oregon etc. Ry. Co.*, 21 Or. 159, 27 Pac. 954.

¹¹⁶ *Farmer v. Cram*, 7 Cal. 135; *Valencia v. Couch*, 32 Cal. 339, 91 Am. Dec. 589.

¹¹⁷ *Id.*

¹¹⁸ *Reynolds v. Pascoe*, 24 Utah, 219, 66 Pac. 1064.

¹¹⁹ *Todhunter v. Klemmer*, 134 Cal. 60, 66 Pac. 75.

Where an order permitting the filing of an amended complaint was made after the facts upon which the amendment was based were disclosed on hearing, the filing of a motion and affidavit showing cause for the amendment was unnecessary.¹²⁰ Where notice of a proposed amendment setting up the defense of *res adjudicata* is given before the trial, and the court offers to grant a continuance if the opposite counsel is taken by surprise, the granting of the amendment is not erroneous.¹²¹ And after defendants have closed their case, and before the case is submitted, plaintiffs may be allowed to supply an omission in the testimony occasioned by mistake or inadvertence,¹²² or to plead the bankruptcy of the defendant in bar.¹²³ Amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purposes of justice.¹²⁴ A court may allow a formal amendment to a complaint after the trial and during the argument.¹²⁵ A complaint may be amended before judgment and after verdict, so as to conform to the verdict, but cannot be allowed in the appellate court,¹²⁶ unless the appeal be taken from judgment on demurrer,¹²⁷ or from an order denying a new trial.¹²⁸

§ 794. Amendment at trial—Continued.—Defendant may amend by inserting new matter,¹²⁹ if not entirely foreign to the cause of action.¹³⁰ If an amended answer constitutes no defense to the action, leave to file the same may be properly refused.¹³¹ The fact that such new matter was well known to defendant at the time the original answer was filed is no good reason why the amendment should not be permitted.¹³² Defendant may amend

¹²⁰ *Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045; *Cooke v. Cain*, 35 Wash. 353, 77 Pac. 682.

¹²¹ *Murphy v. Ganey*, 23 Utah, 633. 66 Pac. 190.

¹²² *Priest v. Union Canal Co.*, 6 Cal. 170.

¹²³ *Simpson v. Miller*, 7 Cal. App. 248, 94 Pac. 252.

¹²⁴ *Farmers' etc. Bank v. Stover*, 60 Cal. 388. See *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673; *Doane v. Houghton*, 75 Cal. 360, 17 Pac. 426; *Beronio v. Southern Pacific R. R. Co.*, 86 Cal. 416, 21 Am. St. Rep. 57, 24 Pac. 1093; *Burns v. Walsh*, 10 Misc. 699, 31 N. Y. Supp. 788.

¹²⁵ *Hall v. Rice*, 64 Cal. 443, 1 Pac. 891.

¹²⁶ *Hooper v. Wells Fargo & Co.*, 27 Cal. 11, 85 Am. Dec. 211.

¹²⁷ *Phelan v. Supervisors*, 9 Cal. 15.

¹²⁸ *Argenti v. City of San Francisco*, 30 Cal. 458.

¹²⁹ *Pierson v. McCahill*, 22 Cal. 127.

¹³⁰ *Nevada County etc. Canal Co. v. Kidd*, 28 Cal. 673.

¹³¹ *Bransford v. Norwich Ins. Soc.*, 21 Colo. 34, 39 Pac. 419.

¹³² *Pierson v. McCahill*, 22 Cal. 127; *Manha v. Union Fertilizer Co.*, 151 Cal. 581, 91 Pac. 393.

by striking out the counterclaim, and setting up the defense of the statute of limitations,¹³⁵ or one of two defendants may be permitted severally to plead the statute, by filing a separate plea.¹³⁶ It is not error to refuse to permit the defendant to set up the statute of limitations after he has answered to the merits.¹³⁷

A defendant, by amending his answer, and taking issue on a new cause of action, added to the complaint by amendment, waives all objection to such amendment.¹³⁸ So the filing of an amended answer is a waiver by a defendant of any objection to the ruling of the court sustaining a motion to strike out an original answer.¹³⁹ Under the code of Louisiana, which allows general and special pleas if not inconsistent with each other, an amended answer which but specifies a particular fact in aid of the general denial is allowable.¹⁴⁰ If the plaintiff amends his complaint, and the defendant obtains an order to have his answer on file stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made.¹⁴¹ An answer may be verified even at the close of the plaintiff's case.¹⁴² If the defendant does not know that too many are joined as plaintiffs till after the same appears in evidence, he should then apply for leave to amend his answer.¹⁴³ If testimony offered by defendant is rejected because of a defective denial, defendant should be allowed to amend his denial.¹⁴⁴ If defendant has acquired title to the demanded premises during litigation, and has not pleaded such title in a supplemental answer, it is not error to refuse to permit him on the trial to amend his answer so as to obviate the objection to the introduction of testimony excluded by the court under the original answer.¹⁴⁵ But if the court refuses to allow the amendment, and evidence shows that the amendment would be immaterial, no injury results from the refusal.¹⁴⁶

¹³⁵ *Wyman v. Remond*, 18 How. Pr. 272; *Hibernia etc. Loan Soc. v. Jones*, 89 Cal. 507, 26 Pac. 1089; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054.

¹³⁶ *Robinson v. Smith*, 14 Cal. 254.
¹³⁷ *Stuart v. Lander*, 16 Cal. 375, 76 Am. Dec. 538. See *Owers v. Olathe Min. Co.*, 6 Colo. App. 1, 39 Pac. 980.

¹³⁸ *Secor v. Law*, 9 Bosw. 163. See *Bell v. Waudby*, 4 Wash. 743, 31 Pac. 18.

¹³⁹ *Hexter v. Schneider*, 14 Or. 184, 12 Pac. 668.

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¹⁴⁰ *Andrews v. Hensler*, 6 Wall. 254, 18 L. Ed. 737.

¹⁴¹ *Mulford v. Estudillo*, 32 Cal. 131.

¹⁴² *Arrington v. Tupper*, 10 Cal. 464; *Lattimer v. Ryan*, 20 Cal. 628.

¹⁴³ *Gillam v. Sigman*, 29 Cal. 637; *Ackley v. Tarbox*, 31 N. Y. 564.

¹⁴⁴ *Stringer v. Davis*, 30 Cal. 318.

¹⁴⁵ *McMinn v. O'Connor*, 27 Cal. 238; *Lobb v. Seattle R. & S. Ry.*, 48 Wash. 238, 93 Pac. 420; *Chicago B. & Q. R. R. Co. v. Pollock*, 16 Wyo. 321, 93 Pac. 847.

¹⁴⁶ *Jones v. Block*, 30 Cal. 227.

§ 795. **Amendment to conform to proofs.**—Where, in an action by a judgment creditor to subject land standing in the name of defendant's father to the payment of defendant's debt, the complaint alleged that the father held the land under a resulting trust, and the proof tended to show an express trust, the court did not err in permitting plaintiff to amend its complaint to conform to the proof by alleging such express trust.¹⁴⁷ Such an amendment is in time, if filed after proof and argument and the consideration thereof by the court, but before the filing of findings or judgment.¹⁴⁸

§ 796. **Amendments after trial.**—Amendments after trial are allowed only with great caution, and on good cause shown.¹⁴⁹ In New York, amendments may be made after judgment.¹⁵⁰ In Montana, even after judgment, leave to amend so that the issue in the pleadings should correspond with the proof should be allowed in furtherance of justice, on terms.¹⁵¹ The court, in its discretion, has an extraordinary power, even after judgment, to allow a pleading to be amended by inserting new allegations material to the case, but this power should be very sparingly exercised.¹⁵² Where an amendment to defendant's answer was not offered until after the trial had closed, and its effect would have been to present a new issue, it was not an abuse of the trial court's discretion to refuse to allow it to be filed.¹⁵³ As ordinarily a defendant has the right to rely on plaintiff's allegations as to the amount of his actual damage, a plaintiff desiring to amend by increasing the amount of his demand should do so before the case is submitted for decision, or at least before decision.¹⁵⁴

¹⁴⁷ *Kilham v. Western Bank etc. Co.*, 30 Colo. 365, 70 Pac. 409; *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44.

¹⁴⁸ *Hedstrom v. Union Trust Co.*, 7 Cal. App. 278, 94 Pac. 386; *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348; *Ridings v. Marion County*, 50 Or. 30, 91 Pac. 22.

¹⁴⁹ *Van Santv. Pl.* 814; *Houghton v. Skinner*, 5 How. Pr. 420.

¹⁵⁰ *N. Y. Code Civ. Proc.*, §§ 722, 723.

¹⁵¹ *Hershfield v. Aiken*, 3 Mont. 442; *Ramsey v. Cortland Cattle Co.*, 6 Mont. 500, 13 Pac. 247.

¹⁵² *Field v. Hawxhurst*, 9 How. Pr.

75; *Malcom v. Baker*, 8 How. Pr. 301; *Egerst v. Wicker*, 10 How. Pr. 193. As to amendment after verdict, see *Arrigo v. Catalano*, 7 Misc. 515, 27 N. Y. Supp. 995; *Hopf v. United States Baking Co.*, 21 N. Y. Supp. 589; *Frankfurter v. Home Ins. Co.*, 10 Misc. 157, 31 N. Y. Supp. 3; *Mea v. Pierce*, 63 Hun, 400, 18 N. Y. Supp. 293. Amending pleadings after reversal of judgment, *Horn v. Reitler*, 15 Colo. 316, 25 Pac. 501.

¹⁵³ *Barnes v. Berendes*, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406.

¹⁵⁴ *Clark v. San Francisco etc. Ry. Co.*, 142 Cal. 614, 76 Pac. 507.

Errors in the computation of interest may be corrected by motion in the court below.¹⁵⁵ A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not ground for reversal.¹⁵⁶ A court has the power to make an amendment *nunc pro tunc* by supplying the omission of a clerk to enter the appointment of a guardian *ad litem*.¹⁵⁷ Where the decree is defective in not designating the defendants who are personally liable for the debt, and the record shows who they are, the court has the power to amend the judgment at any time by adding a clause designating the defendants who are personally liable. The proper remedy in such a case is to move to amend the judgment by supplying the omission.¹⁵⁸ When the judgment entered by the clerk does not conform to that pronounced by the court, it will be corrected on motion, even after an appeal and affirmance of the judgment, and the issuing and service of an execution in the cause.¹⁵⁹ Pending an appeal, the trial court has no jurisdiction to allow an amendment to any pleading.¹⁶⁰ But a court has power to vacate a judgment at the term at which it was rendered, and permit the pleadings in the case to be amended, notwithstanding an appeal from the judgment has been perfected.¹⁶¹ An amendment to conform to the proof, made after verdict but before judgment, and while the court retained jurisdiction of the cause, was properly allowed.¹⁶² Where, after the amendment of the complaint, the case was reopened for the introduction of further evidence, and continued for several months, giving defendants ample opportunity to meet its allegations, they were not prejudiced by the allowance of the amendment.¹⁶³ Where the complaint might have been amended on the trial, and proof is given sufficient to constitute a cause of action, the court after the trial will amend the complaint *nunc pro tunc*.¹⁶⁴ The verdict of a jury may be amended where there is no doubt as to the facts.¹⁶⁵

¹⁵⁵ Whitney v. Buckman, 13 Cal. 536.

¹⁵⁶ Anderson v. Parker, 6 Cal. 197.

¹⁵⁷ Sprague v. Litherberry, 4 McLean, 442, Fed. Cas. No. 13251.

¹⁵⁸ Leviston v. Swan, 33 Cal. 480.

¹⁵⁹ Rousset v. Boyle, 45 Cal. 64.

¹⁶⁰ Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119.

¹⁶¹ Higgins v. People, 2 Colo. App. 567, 31 Pac. 951.

¹⁶² Johnson v. Johnson, 30 Colo. 402, 70 Pac. 692.

¹⁶³ Jordan v. Greig, 33 Colo. 360, 80 Pac. 1045; Merrill v. Miller, 28 Mont. 134, 72 Pac. 423; Morrissey v. Faucett, 28 Wash. 52, 68 Pac. 352; Daly v. Everett Pulp etc. Co., 31 Wash. 252, 71 Pac. 1014.

¹⁶⁴ Coleman v. Pleysted, 36 Barb. 27; on appeal, 40 N. Y. 341.

¹⁶⁵ Emerson v. Bleakley, 5 Abb. Pr. (N. S.) 350.

A judgment may be amended by substituting leave to serve a new complaint in place of dismissal without prejudice, so as to save the statute of limitations.¹⁶⁶ Judgment in replevin for value of property, instead of in alternative for delivery or value, may be corrected on motion.¹⁶⁷ Signature to jurat to affidavit of "no answer" may be added after entry of judgment.¹⁶⁸ And a judgment record may be amended by filing affidavit of no answer.¹⁶⁹ The court below, while an appeal is pending in the court of appeals, has control of the judgment for the purpose of making amendments.¹⁷⁰ The supreme court has no power to amend the record brought into it on an appeal from an inferior court.¹⁷¹ An omission of an averment necessary to give jurisdiction cannot be amended after judgment.¹⁷² The common-law right to amend a verdict after the jury is discharged has not been abrogated by the Oregon code.¹⁷³

The court has power to authorize amendments when there is anything in the record to amend by;¹⁷⁴ such as mistakes of law,¹⁷⁵ or clerical errors in its own records, even after a great lapse of time, and without any notice to the parties, and without their presence; and such action cannot be questioned by another court, even upon error.¹⁷⁶ A court may at any time render or amend a judgment *nunc pro tunc*, where the record discloses that it is incorrectly given as the judgment of the court.¹⁷⁷ While the term lasts, the court has power to amend the record. After the term has passed, the record cannot be amended, unless there is something in the record to amend by.¹⁷⁸ Under section 473 of the California Code of Civil Procedure, the court may relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him, through his mistake, inad-

¹⁶⁶ New York Ice Co., v. N. W. Ins. Co., 23 N. Y. 357.

¹⁶⁷ Young v. Atwood, 5 Hun, 234.

¹⁶⁸ Fawcett v. Vary, 59 N. Y. 597.

¹⁶⁹ Tradesman's Nat. Bank v. McFeeley, 3 Hun, 699.

¹⁷⁰ Judson v. Gray, 17 How. Pr. 289. To the contrary, Bryan v. Berry, 8 Cal. 130.

¹⁷¹ Gould v. Glass, 19 Barb. 179.

¹⁷² Smith v. Jackson, 2 Paine, 486, Fed. Cas. No. 13065. Compare Fisher v. Rutherford, 1 Baldw. 188, Fed. Cas. No. 4823.

¹⁷³ Osborne v. Morris, 21 Or. 367,

28 Pac. 70. See, also, Humphreys v. Mayor etc., 48 N. J. L. 588, 7 Atl. 301; Dalrymple v. Williams, 63 N. Y. 361, 20 Am. Rep. 544.

¹⁷⁴ Randolph v. Barrett, 16 Pet. 138, 10 L. Ed. 914.

¹⁷⁵ Dent v. Superior Court, 7 Cal. App. 683, 95 Pac. 672.

¹⁷⁶ Cromwell v. Bank of Pittsburgh, 2 Wall. Jr. 569, Fed. Cas. No. 3409.

¹⁷⁷ Morrison v. Dapman, 3 Cal. 255.

¹⁷⁸ Branger v. Chevalier, 9 Cal. 172.

vertence, surprise, or excusable neglect; and where, for any reason satisfactory to the court or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. Under the same section, a defendant who has not been personally served may be allowed, upon just terms, at any time within one year after the rendition of the judgment, to answer to the merits of the original action. Where, on appeal from any order granting a new trial, the supreme court affirmed the "judgment" below, and the *remittitur* was issued, and then, at a subsequent term, respondent moved the court to amend its judgment by making it read, "the order of the district court granting a new trial is affirmed," instead of "the judgment is affirmed," it was held that the motion will be granted, on the principle that courts have the power to amend clerical errors, and enter a judgment *nunc pro tunc*, where the record itself discloses the error, even though the term has elapsed. Costs of motion are not allowed.¹⁷⁹ It is only cases of orders that are not appealable that can be reached by motion under this section.¹⁸⁰ The word "proceeding" includes any step taken in a case, whether by the court or by one of the parties.¹⁸¹ After an appeal in which judgment on the demurrer sustained is affirmed, plaintiff cannot be granted leave to amend the complaint. Where a demurrer to a complaint is sustained in the court below, and plaintiff declines to amend, and appeals from the judgment and the order sustaining the demurrer, the supreme court, if it affirm the judgment, cannot grant plaintiff leave to amend his complaint.¹⁸² When a final judgment on demurrer to the complaint, sustaining the demurrer, was reversed, the plaintiff had the right to amend on application to the court below.¹⁸³

Upon the trial, every material allegation of the complaint not specifically controverted is to be taken as true; but if the de-

¹⁷⁹ Swain v. Naglee, 19 Cal. 127. As to amendment of writ of error *nunc pro tunc*, as of the date of the writ, see Board of Commissioners etc. v. Atlantic etc. R. R. Co., 3 N. Mex. 352, 9 Pac. 519.

¹⁸⁰ Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467.

¹⁸¹ Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

¹⁸² Bryan v. Berry, 8 Cal. 134; People v. Jackson, 24 Cal. 633.

¹⁸³ Williamson v. Blattan, 9 Cal. 500; Phelan v. City of San Francisco, 9 Cal. 15; McDonald v. Bear River Water etc. Co., 15 Cal. 149.

defendant supposed he had denied material allegations, and the court sustained his view of the answer, the appellate court, when it reverses the judgment, may allow the court below to exercise its discretion in permitting the answer to be amended.¹⁸⁴ Thus, where a judgment in favor of defendant had been reversed by the supreme court on the ground that certain material evidence which had been received in his favor was inadmissible under his answer, and on the second trial defendant moved to amend his answer by inserting averments of new matter obviating the objection, it was held that, as the amendment was evidently necessary to enable the defense to be fully presented, it was properly allowed by the court.¹⁸⁵ But where a defendant admits in his answer, under oath, a material allegation of the complaint, and the case is tried and judgment rendered, and afterwards a new trial is granted by the supreme court, the defendant should not be allowed to amend his answer by changing the admission into a denial.¹⁸⁶ On appeal taken by defendant immediately after judgment on default, on the ground of insufficiency of the affidavit of publication of summons, the appellate court will not disturb the judgment, the defendant having his remedy in the courts below within six months after judgment.¹⁸⁷ Upon the *remittitur* of a cause to the court below, if the plaintiffs desire to amend their complaint so as to present their legal rights for the determination of a jury, they should be permitted to do so.¹⁸⁸

§ 797. **Amendment of judgment or record.**—A court has inherent power to resettle its own order, so as to conform it to the actual adjudication.¹⁸⁹ A trial court has the power, at a subsequent term, to modify or correct a judgment or record to such an extent that the relief granted may be such as was intended to be granted originally.¹⁹⁰ A clerical error in the entry of a judgment, where it is shown by the record, may be corrected on motion, even after an appeal and affirmance of the judgment.¹⁹¹ But a judgment against a party sued by a wrong name, and not

¹⁸⁴ Fish v. Redington, 31 Cal. 186.

¹⁸⁵ Pierson v. McCabill, 22 Cal. 127.

¹⁸⁶ Spanagel v. Reay, 47 Cal. 608.

¹⁸⁷ Guy v. Ide, 6 Cal. 99, 65 Am. Dec. 490.

¹⁸⁸ McDonald v. Bear River etc. W. & M. Co., 15 Cal. 149.

¹⁸⁹ Robertson v. Hay, 12 Misc. 7, 33 N. Y. Supp. 31. See Granite etc.

Assoc. v. McHugh, 88 Hun, 617, 34 N. Y. Supp. 341; Olcott v. Kohlsaat, 55 Hun, 607, 5 N. Y. Supp. 116, 117.

¹⁹⁰ Keene v. Welsh, 8 Mont. 305, 21 Pac. 25; Territory v. Clayton, 8 Mont. 1, 19 Pac. 293.

¹⁹¹ Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. 732; Breene v. Booth, 3 Colo. App. 470, 33 Pac. 1007.

appearing in the action, is a nullity incapable of amendment.¹⁹² Proceedings under sections 989 to 994 of the California Code of Civil Procedure, for the purpose of binding a partner by a judgment recovered against his copartner, are in the nature of an action upon a judgment, and neither the pleadings nor the judgment in the original action can be amended.¹⁹³ Every court of record has inherent power to amend its record to correspond with the actual facts, and this power may be exercised at any time.¹⁹⁴ It may amend its record *nunc pro tunc* so as to make the record express what was done at the time.¹⁹⁵ But a court has no power, under the forms of an amendment, to correct a judicial error, or to make of record an order not in fact given.¹⁹⁶ The rule that after the term there can be no amendment of a record, unless there is something in the record to amend by, does not apply to the amendment of minute entries or orders of court not forming a part of the judgment-roll. These may be amended by the court to correspond with the facts, upon any competent evidence showing what were the facts, and that a mistaken entry was made by the clerk.¹⁹⁷

§ 798. What amendments should be allowed.—Plaintiffs should be permitted so to amend as to present for determination their legal rights; or to express the cause of action originally intended;¹⁹⁸ or to strike out a cause of action;¹⁹⁹ or to strike out a claim for damages;²⁰⁰ or to increase the amount of damages claimed;²⁰¹ to ask for the statutory treble damages upon the same common-law action,²⁰² even after issue joined;²⁰³ or to change the venue.²⁰⁴ If a wife should intervene in an action, or file a

¹⁹² Schoelkopf v. Ohmeis, 11 Misc. 253, 32 N. Y. Supp. 736.

¹⁹³ Waterman v. Lipman, 67 Cal. 26, 6 Pac. 875.

¹⁹⁴ Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; Crim v. Kessing, 89 Cal. 486, 23 Am. St. Rep. 491, 26 Pac. 1074; Frink v. Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172.

¹⁹⁵ Breene v. Booth, 3 Colo. App. 470, 33 Pac. 1007. See Carter v. Koshland, 12 Or. 492, 8 Pac. 556.

¹⁹⁶ Egan v. Egan, 90 Cal. 15, 27 Pac. 22.

¹⁹⁷ Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393.

¹⁹⁸ McDonald v. Bear River etc. W. & M. Co., 15 Cal. 145; Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673.

¹⁹⁹ Watson v. Rushmore, 15 Abb. Pr. 51.

²⁰⁰ Grass Valley Q. M. Co. v. Stackhouse, 6 Cal. 413.

²⁰¹ 1 Van Santv. Pl. 364; Gregg v. Gier, 4 McLean, 208, Fed. Cas. No. 5799; Frankfurter v. Home Ins. Co., 6 Misc. 49, 26 N. Y. Supp. 81.

²⁰² Eklund v. B. R. Lewis Lumber Co., 13 Idaho, 581, 92 Pac. 532.

²⁰³ Merchant v. New York Life Ins. Co., 2 Sandf. 669.

²⁰⁴ Stryker v. New York Exch. Bank, 42 Barb. 511.

separate defense, plaintiff may amend.²⁰⁵ A plaintiff may amend by inserting averments of prior appropriation, a diversion by defendants, with a prayer for an injunction.²⁰⁶ In attachment, pending motion to dissolve the attachment, plaintiff may have leave to amend the complaint.²⁰⁷ Circumstances authorizing an arrest, occurring subsequent to filing the complaint, should be set forth in a supplemental complaint.²⁰⁸ Leave may be granted to fill blanks in the complaint, and reply specially to plea of statute of limitations on payment of full costs.²⁰⁹ A variance between the writ and the complaint in respect to the return-day may be amended.²¹⁰ The assignee may amend the assignment by inserting the words, "For value received, I hereby assign the within account."²¹¹ A garnishee may amend his answer by correcting an error which could not reasonably have been avoided.²¹² Petitions in railroad proceedings may be amended.²¹³ The omission to show an information, in the nature of a writ of *quo warranto*, that the offices usurped are corporate offices, may be amended.²¹⁴ In slander, by amendment, the words charged may be changed.²¹⁵ If the plaintiff mistakes his remedy, and brings an action at law for damages, when it should have been in equity for an accounting, but inserts some averments in the complaint, entitling him to some measure of equitable relief, the appellate court will send the case back with leave to amend the complaint.²¹⁶

Where the proof does not sustain the allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a court of equity if his pleadings had been properly framed, amendments may be allowed to conform the pleadings to the facts proved.²¹⁷ Where the complaint alleges a gift *inter vivos*, and

²⁰⁵ Moss v. Warner, 10 Cal. 296.

²⁰⁶ Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673.

²⁰⁷ Hathaway v. Davis, 33 Cal. 161.

²⁰⁸ Davis v. Robinson, 10 Cal. 411.

²⁰⁹ Ferris v. Williams, 1 Cranch C. C. 281, Fed. Cas. No. 4749.

²¹⁰ Duvall v. Craig, 2 Wheat. 45, 4 L. Ed. 180; Wilder v. McCormick, 2 Blackf. 31, Fed. Cas. No. 17650.

²¹¹ Ryan v. Maddux, 6 Cal. 247.

²¹² Smith v. Browne, 5 Cal. 118.

²¹³ Contra Costa R. R. Co. v. Moss, 23 Cal. 325.

²¹⁴ Gunton v. Ingle, 4 Cranch C. C. 438, Fed. Cas. No. 5870.

²¹⁵ Dougherty v. Bentley, 1 Cranch C. C. 219, Fed. Cas. No. 4024.

²¹⁶ Blood v. Fairbanks, 48 Cal. 171.

²¹⁷ Stringer v. Davis, 30 Cal. 318; Connalley v. Peck, 3 Cal. 82; Tryon v. Sutton, 13 Cal. 494; Valencia v. Couch, 32 Cal. 339, 91 Am. Dec. 589; Bedford v. Terhune, 30 N. Y. 453, 86 Am. Dec. 394; Walsh v. Washington Marine Ins. Co., 32 N. Y. 427; Van Buskirk v. Stow, 42 Barb. 9. Allowance of amendments conforming pleadings to proofs. See Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; Ward v. Waterman, 85 Cal. 488, 24 Pac. 930; Kamm v. Bank

evidence is introduced, without objection, showing a gift *causa mortis*, an amendment of the complaint to conform to the proofs is in furtherance of justice, and is properly allowed.²¹⁸ Where evidence is received, without objection, as to material matters not set up in the pleadings, a refusal of leave to amend so as to conform the pleadings to the real issue tried is reversible error.²¹⁹ If evidence is objected to because the defense under which it is ordered is defectively pleaded, the court should allow the pleading to be amended.²²⁰ In ejectment, amendments are liberally allowed.²²¹ The date of the demise may be amended so as to conform to the title,²²² or may extend the term of the fictitious lease even after judgment.²²³ But amendments by adding a count stating a demise under a new title are not allowed, as distinct ejectments may be brought to try them.²²⁴ A declaration in an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, stated two demises, by citizens of different states. The cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of a citizen of another state; it was held that a judgment upon the new count was valid.²²⁵

§ 799. **Amendment of complaint.**—The right to amend a complaint, even after leave granted, is limited to an accurate and correct expression of a cause of action which theretofore had been inaccurately or insufficiently expressed.²²⁶ Where the complaint

of California, 74 Cal. 191, 15 Pac. 765; Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319; Williston v. Camp, 9 Mont. 88, 22 Pac. 501; Palmer v. Jones, 69 Hun, 240, 23 N. Y. Supp. 584; Herendeen v. De Witt, 49 Hun, 53, 1 N. Y. Supp. 467; Flynn v. Westmayer, 4 N. Y. Supp. 188; Gal-lier v. Cadwell, 3 Wash. T. 501, 18 Pac. 68.

²¹⁸ Walsh v. Bowery Sav. Bank, 7 N. Y. Supp. 97, 7 N. Y. Supp. 669; 15 Daly, 403.

²¹⁹ Cook v. Croisan, 25 Or. 475, 36 Pac. 532. See Palmer v. McMas-ters, 6 Mont. 169, 9 Pac. 898; Greer v. Squire, 9 Wash. 359, 37 Pac. 545.

²²⁰ Carpentier v. Small, 35 Cal. 346.

²²¹ Walden v. Craig, 9 Wheat. 576, 6 L. Ed. 164.

²²² Blackwell v. Patton, 7 Cranch, 471, 3 L. Ed. 408; Smith v. Vaughan, 10 Pet. 367, 9 L. Ed. 457; McDaniel v. Wailes, 4 Cranch C. C. 201, Fed. Cas. No. 8746.

²²³ Walden v. Craig, 14 Pet. 147, 10 L. Ed. 393; Ledgerwood v. Pickett, 1 McLean, 143, Fed. Cas. No. 8175.

²²⁴ Gale v. Babcock, 4 Wash. C. C. 199, Fed. Cas. No. 5188.

²²⁵ Wright v. Holingsworth, 1 Pet. 165, 7 L. Ed. 96.

²²⁶ Rockwell v. Holcomb, 3 Colo. App. 1, 31 Pac. 944; Givens v. Wheeler, 6 Colo. 149.

on file is based upon a written lease and an assignment thereof, the former containing a forfeiture clause binding upon all parties, it is not error when the cause is about to be reached for trial to refuse to permit an amended complaint to be filed by which the written instrument is sought to be set aside or reformed so as to relieve the plaintiff entirely from the effects of the clause of forfeiture.²²⁷ The amendment of the complaint during the progress of the trial is a matter within the discretion of the court, and no error can be founded thereon when it appears that no different answer was thereby required, and that the defendant was not taken by surprise, and did not ask for time to prepare an answer to the matters covered by the amendment.²²⁸ An error in the admission of immaterial evidence is cured by a subsequent amendment of the complaint before the close of the trial, rendering the evidence material.²²⁹ Pending a motion for a nonsuit, it is within the discretion of the court to permit the plaintiff to amend his complaint so as to conform to the evidence.²³⁰ The privilege of amending a complaint after the trial of the issue of law, raised by demurrer, is in the discretion of the trial court, and where the demurrer is sustained without leave to amend, and nothing appears in the record to show an abuse of discretion, or that the plaintiff applied to the trial court for leave to amend, or took an exception to a refusal of the court to grant such leave, it is too late to raise the objection for the first time on appeal that the court failed to grant it.²³¹

The amendment of a complaint after a demurrer sustained thereto is a waiver of any error in sustaining the demurrer.²³² So an error in overruling a demurrer to a complaint is cured if the plaintiff subsequently amend his complaint in the particular to which the demurrer was directed,²³³ as a statement that certain papers were "duly recorded," in place of giving their date of

²²⁷ *Patrick v. Crowe*, 15 Colo. 543, 25 Pac. 985.

²²⁸ *Hulbert v. Brackett*, 8 Wash. 438, 36 Pac. 264.

²²⁹ *Curtiss v. Ætna Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211.

²³⁰ *Kamm v. Bank of California*, 74 Cal. 191, 15 Pac. 765.

²³¹ *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132; *Smith v. Taylor*, 82 Cal.

533, 23 Pac. 217; *Hawthorne v. Siegel*, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114.

²³² *Ganceart v. Henry*, 98 Cal. 281, 33 Pac. 92; *Rockwell v. Holcomb*, 3 Colo. App. 1, 31 Pac. 944.

²³³ *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673. See, also, *Madden v. Occidental S. S. Co.*, 86 Cal. 445, 25 Pac. 5; *Bell v. Waudby*, 4 Wash. 743, 31 Pac. 18.

recording, which in the original complaint was wrongly given.²³⁴ Pending the trial of an action, the court has power, upon such terms as may be just, to permit a second amended complaint to be filed, which embodies substantially the same allegations as the original complaint.²³⁵

§ 800. **The same—Effect of amended complaint.**—When an amended complaint is filed and served, the original ceases to perform any function as a pleading.²³⁶ But an original is not superseded by an amended complaint for all purposes, and the former may be considered as a part of the record of the case for the purpose of showing when the action was commenced, and whether or not a new or different cause of action was introduced by the amendment upon the hearing of a demurrer raising those questions.²³⁷ An amended complaint based upon the same cause of action relates back to the date upon which the original complaint was filed, as regards the statute of limitations.²³⁸ Where the contract sued on provides for payments in monthly installments, a supplemental complaint may be filed to cover installments accruing after the action was commenced.²³⁹

§ 801. **The same—In particular actions.**—In an action of ejectment to recover a quarter-section of land, described as being in "range 19 east," an amendment to the complaint, describing the land as "range 20 east," is not the substitution of a new cause of action, and may properly be allowed.²⁴⁰ In an action of partition, the bringing in of new parties, alleging that they have or claim an interest in the subject-matter of partition, is an amendment in matter of substance, requiring services of the amended complaint upon a defaulting defendant.²⁴¹

²³⁴ *Williamson v. Joyce*, 137 Cal. 151, 69 Pac. 980.

²³⁵ *Riverside Land etc. Co. v. Jensen*, 73 Cal. 550, 15 Pac. 131.

²³⁶ *La Société etc. v. Weidmann*, 97 Cal. 507, 32 Pac. 583; *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715; *Mott v. Mott*, 82 Cal. 413, 22 Pac. 1140.

²³⁷ *Rodington v. Cornwell*, 90 Cal. 49, 27 Pac. 40; *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085; *Dougall v. Schulenberg*, 101 Cal. 154, 35 Pac. 635; *Easton v. O'Reilly*, 63 Cal. 305.

²³⁸ *White v. Soto*, 82 Cal. 654, 23 Pac. 210.

²³⁹ *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209.

²⁴⁰ *Heilbron v. Heinlen*, 72 Cal. 376, 14 Pac. 22. See *Swift v. Mulkey*, 14 Or. 59, 12 Pac. 76.

²⁴¹ *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089. Amendment of complaint in mortgage foreclosure. *Bank of Sonoma County v. Charles*, 86 Cal. 322, 24 Pac. 1019. Amendment by change in

§ 802. **The same—Objection to original complaint.**—Where an amended complaint which is unobjectionable has been filed in an action, an objection upon appeal from a judgment therein that the original complaint failed to state a cause of action is untenable.²⁴²

§ 803. **The same—Time to answer.**—Where the complaint is amended upon the trial, by the addition of a few lines, to obviate an objection to the admission of evidence upon a point which the pleader had evidently intended to make by the original complaint, it is not an abuse of discretion to require the defendant to answer the amendment immediately, if the answer could be easily made at once without inconvenience to the defendant.²⁴³

§ 804. **Verification of complaint.**—Defendant waives any objection to pleading on grounds that it is not verified, unless he makes a motion to strike it from the files,²⁴⁴ and it cannot be objected for the first time on appeal that the complaint was not verified.²⁴⁵

§ 805. **Amendment of answer.**—Liberality in allowing amendments to pleadings is particularly applicable to amendments to an answer.²⁴⁶ But it is not an abuse of discretion for the trial court to refuse to allow an amended answer to be filed, when the matters set out therein are not substantially different from those already pleaded in the answer on file.²⁴⁷ It is not an abuse of discretion to permit an answer to be amended after the jury is impaneled, where it does not appear that the plaintiff was taken by surprise, or suffered any injury therefrom;²⁴⁸ or to allow an answer to be amended at the trial after the introduction of testi-

allegation of partnership, *Bogart v. Crosby*, 91 Cal. 278, 27 Pac. 603. Amendment of allegations of creditors' bill. *Perea v. De Gallegos*, 3 N. Mex. 151, 3 Pac. 246. Amendment of complaint in action by assignee of promissory note. *Brisbois v. Lewis*, 9 Colo. 494, 13 Pac. 179.

²⁴² *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51.

²⁴³ *Ellen v. Lewison*, 83 Cal. 253, 26 Pac. 109.

²⁴⁴ *Turner v. Hamilton*, 13 Wyo. 408, 80 Pac. 664.

²⁴⁵ *Pryor v. Walkerville*, 31 Mont. 618, 79 Pac. 240.

²⁴⁶ *Gould v. Stafford*, 101 Cal. 32, 35 Pac. 429.

²⁴⁷ *Heilbron v. Kings River Canal Co.*, 76 Cal. 11, 17 Pac. 933; *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437. See *Dorn v. Baker*, 96 Cal. 206, 31 Pac. 37.

²⁴⁸ *Beronio v. Southern Pacific R. Co.*, 86 Cal. 415, 21 Am. St. Rep. 57, 24 Pac. 1093. See *Jorgenson v. Butte Commercial Co.*, 13 Mont. 288, 34 Pac. 37.

mony, where the same is allowed upon terms, and no objection is made that it was without notice.²⁴⁹ Amendments to the answer to enable the defendant to prove facts which will constitute a defense to the plaintiff's demand should be allowed, and if by reason of such amendments the court is satisfied that the plaintiff is taken by surprise, and requires further time to meet the defense, it can continue the case, and impose such terms as will compensate the plaintiff for the expense and delay caused thereby.²⁵⁰ Where no cross-complaint was filed, or affirmative relief sought until after the case had been tried, and it appeared that the case had been pending some three or four years, it was not an abuse of discretion to refuse to allow the filing of a cross-complaint asking affirmative relief.²⁵¹ It is within the discretion of the trial court to allow the filing of an amended answer upon the merits by the defendant, after a finding against him upon his answer setting up the pendency of another suit between the parties in relation to the same subject-matter.²⁵² A defendant may amend an answer which has been demurred to before trial of the issue of law, as of course and without entry of an order permitting it, provided he serves the opposite party with notice and copy of the amendment, as required by the Colorado statute.²⁵³ Refusal of leave to file an amended answer is not error, when the motion therefor is made on the eve of the trial, and the jury is in attendance, and especially when the case is afterwards tried as if all the matters set forth in the amended answer were pleaded.²⁵⁴ And the erroneous refusal to allow an amendment to the answer becomes immaterial if the defendant was allowed to introduce all the evidence which he could have introduced under the proposed amendment, and such evidence shows no defense.²⁵⁵ Refusal to allow the defendant to amend

²⁴⁹ Publishing Co. v. Fisher Co., 10 Utah, 147, 37 Pac. 259.

²⁵⁰ Guidery v. Green, 95 Cal. 630, 30 Pac. 786. See Culverhouse v. Cro-san, 94 Cal. 544, 29 Pac. 1100; Skagit etc. Lumber Co. v. Cole, 2 Wash. 57, 25 Pac. 1077; Storch v. McCain, 85 Cal. 304, 24 Pac. 639.

²⁵¹ Kendall v. Lincoln Hardware etc. Co., 10 Idaho, 13, 76 Pac. 992.

²⁵² State v. Superior Court, 9 Wash. 366, 37 Pac. 454. Amending answer by setting up the pendency of another action involving the same

cause of action. Courbrough v. Adams, 70 Cal. 374, 11 Pac. 634. Amendment allowing the introduction of written evidence by the defendant. Hart v. British etc. Ins. Co., 80 Cal. 440, 22 Pac. 302.

²⁵³ McDonald v. Hallicy, 1 Colo. App. 303, 29 Pac. 24. Further amendment of answer during second trial. McPherson v. Weston, 85 Cal. 90, 24 Pac. 733.

²⁵⁴ Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403.

²⁵⁵ Southern Pacific R. R. Co. v.

his answer after the plaintiff's testimony has been introduced is not an abuse of the court's discretion.²⁵⁶ And refusal to allow a defendant to file an amended answer setting up matters which could be proved under the averments of the original answer is not erroneous.²⁵⁷ When a new answer is filed the former answer is in effect withdrawn, and ceases to be a part of the record, and all motions and demurrers relating thereto accompany it.²⁵⁸

§ 806. Amendment of demurrer.—A defendant, after filing a demurrer to the complaint, and before the trial of the issues of law thereon, has a right as of course to file an amended demurrer.²⁵⁹ Section 4429 of the Revised Statutes of Idaho, relating to the amendments of pleading, is sufficient to authorize the court, on proper showing, to permit the withdrawal of an amended cross-complaint and the filing of an amended demurrer to the complaint.²⁶⁰ And so long as judgment has not been entered on an order sustaining a demurrer, the court has jurisdiction to permit amendments, either to the complaint or to the demurrer.²⁶¹

§ 807. Amendment—Relief against mistake.—The discretionary power of the court conferred by section 473 of the California Code of Civil Procedure extends to relief against a mistake in any respect, whether the obstruction to the disposition of cases upon their substantial merits be a mistake of fact or a mistake as to the law. The fact that the proposed amendment is based mainly upon a mistake of law is immaterial, though it may be that the court should require a stronger showing to justify relief from the effect of a mistake in law than in case of a mistake as to matter of fact.²⁶²

Purcell, 77 Cal. 69, 18 Pac. 886. See, also, Peck v. Rees, 7 Utah, 467, 27 Pac. 581, 13 L. R. A. 714.

²⁵⁶ Price v. Scott, 13 Wash. 574, 43 Pac. 634.

²⁵⁷ Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704. See Wixon v. Devine, 91 Cal. 477, 27 Pac. 777. Amendment of answer upon trial in an action for a dissolution and accounting of an alleged partnership. Guidery v. Green, 95 Cal. 630, 30 Pac. 786.

²⁵⁸ Wells v. Applegate, 12 Or. 203,

6 Pac. 770; Hexter v. Schneider, 14 Or. 184, 12 Pac. 668.

²⁵⁹ Cal. Code Civ. Proc., § 472; Hedges v. Dam, 72 Cal. 520, 14 Pac. 133; Perrin v. Mallory, 8 Ariz. 404, 76 Pac. 476.

²⁶⁰ Murphy v. Russell, 8 Idaho, 133, 67 Pac. 421.

²⁶¹ Dent v. Superior Court, 7 Cal. App. 683, 95 Pac. 672.

²⁶² Ward v. Clay, 82 Cal. 502, 23 Pac. 50; Gould v. Stafford, 101 Cal. 32, 35 Pac. 429.

§ 808. **Amendment of affidavits.**—Amendments of defects in affidavits are liberally allowed in most of the states.²⁶³ Under the California statute,^{263a} the trial court has power, in the exercise of its discretion, to allow an insufficient affidavit of merits, which has been filed in due time, upon a motion to change the place of trial, to be amended after the time for filing the original affidavit has expired, and the filing of the amended affidavit relates back to the time of the filing of the original affidavit.²⁶⁴ An affidavit in attachment which is merely defective may be amended the same as any other pleading in the case.²⁶⁵

§ 809. **Amendment on appeal from justice's court.**—Under the Oregon practice,^{265a} the circuit court can try nothing but the issues made up in the justice's court, and has no authority on appeal to allow any change to be made in the issues, as by filing an answer.²⁶⁶ Though a superior court may, on its own motion, award a *certiorari* to a justice's court to correct a transcript on appeal, when an inspection thereof discloses that important parts of the record have been omitted, yet the general rule is that it will not do so if, through neglect of appellant, the transcript does not show affirmatively the grounds of error on which he intends to rely.²⁶⁷

§ 810. **Practice on amendments.**—An amended complaint may be filed without prejudice to an injunction issued on the original complaint.²⁶⁸ If the complaint is amended, a copy of the amendments must be filed, or the court may in its discretion require the complaint as amended to be filed, and a copy of the amendments to be served upon the defendants affected thereby. The defendant must answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer as in other cases.²⁶⁹ The provision of section 432 of the California code requiring an amended complaint to be served on the defend-

²⁶³ See *Avery v. Good*, 114 Mo. 290, 21 S. W. 815; *Reese v. Walker*, 89 Ga. 72, 14 S. E. 888; *Green v. Boon*, 57 Miss. 617; *Stone v. Miller*, 60 Iowa, 243, 14 N. W. 781; *Cusick's Appeal*, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228; *McKichan v. Follett*, 87 Ill. 103.

^{263a} Cal. Code Civ. Proc., § 473.

²⁶⁴ *Palmer v. Barelay*, 92 Cal. 199, 28 Pac. 226. See *Burnham v. Hays*, 3 Cal. 115, 58 Am. Dec. 389.

²⁶⁵ *Reister v. Land*, 14 Okla. 34, 76 Pac. 156.

^{265a} Hill's Code, §§ 581, 2130; Or. B. & C. Codes, §§ 593, 2263.

²⁶⁶ *Forbis v. Inman*, 23 Or. 68, 31 Pac. 204; *Currie v. Southern Pacific Co.*, 21 Or. 566, 28 Pac. 884.

²⁶⁷ *Hager v. Knapp*, 45 Or. 512, 78 Pac. 671.

²⁶⁸ *Barber v. Reynolds*, 33 Cal. 497.

²⁶⁹ Cal. Code Civ. Proc., § 432.

ants affected thereby has reference to amendments made after the parties have been brought into court, and does not require a mode of service of summons differing from other cases.²⁷⁰ An objection that an amended complaint was served on the defendants personally, and not on their attorneys, must be taken in the lower court by motion, and, in the absence of such motion, the appellate court will not reverse a judgment against the defendants for such merely technical error.²⁷¹ If the time for answer is not fixed, then the defendant should answer within the same time required in case of service of the original complaint.²⁷² When a demurrer to a pleading is sustained, the adverse party shall have ten days from service of notice of the entry of the order in which to amend the pleading demurred to, and to file and serve such amended pleading. The party whose demurrer has been sustained shall have ten days from such service in which to answer or demur to such amended pleading. The court may impose such terms as it may deem proper on granting leave to file such amended pleadings.²⁷³ It is within the discretion of the court to limit to only twenty-four hours the time in which to file an amended complaint.²⁷⁴ In cases where the right to amend any pleading is not of course, the party desiring to amend, together with the notice of application to amend, shall serve an engrossed copy of the pleading, with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where the amendment is to be inserted, and, if the pleadings were verified, shall verify such amended pleading, or such proposed amendment, before the application shall be heard. No pleading shall be amended by verifying the same when the original was not verified. So when defendant is allowed time to answer until plaintiff elects upon which count of the complaint he will go to trial, the plaintiff should serve a copy of complaint with the notice of his election.²⁷⁵

In New York, the defendant in an action has the right to serve an amended answer within twenty days after the service of the original, and to include therein a new defense, and this without

²⁷⁰ Dowling v. Comerford, 99 Cal. 204, 33 Pac. 853.

²⁷¹ Campbell v. West, 93 Cal. 653, 29 Pac. 219.

²⁷² People v. Rains, 23 Cal. 128.

²⁷³ See Cal. Code Civ. Proc., § 476; Forni v. Yoell, 99 Cal. 176, 33 Pac.

887; Elder v. Spinks, 53 Cal. 293; McGary v. De Pedrorena, 58 Cal. 91; Schuttler v. King, 12 Mont. 149, 30 Pac. 25.

²⁷⁴ Schultz v. McLean, 109 Cal. 437, 42 Pac. 557.

²⁷⁵ Willson v. Cleaveland, 30 Cal. 192.

regard to the nature of the defense.²⁷⁶ Under the code, it is the practice, where a party amends his pleadings, either of course or after obtaining consent or leave, to serve a new pleading; and it supersedes the original. It is the practice, too, to designate it on its face as an amended complaint or answer, as the case may be; though it has been held that the omission to designate it does not render it void.²⁷⁷ Where amendments are made without authority, a motion to strike them out can be made at any time.²⁷⁸ As a general rule, a party cannot judge for himself of the sufficiency of a pleading, or of the materiality of an amendment, but must bring the question before the court. But when an amended pleading, in which the amendments are clearly frivolous or immaterial, is served immediately before the circuit, and obviously for the mere purpose of delay, it may be disregarded.²⁷⁹ Where the court has allowed the plaintiff, after the defendant has filed a plea in abatement, to amend his writ and declaration to meet the case presented by the plea, the defendant who has appeared for the purpose of pleading in abatement only is thereby put out of court; and a judgment by default may be rendered against him if he fail to appear again and plead to the action.²⁸⁰

§ 811. **The same—Continued.**—The statutes allowing amendments should be liberally construed;²⁸¹ and it is not necessary that mistakes be mutual.²⁸² The relief may be invoked, even though the party was present at the trial.²⁸³ To authorize the allowance of any amendment, except one which is merely formal, there should be an affidavit showing good cause.²⁸⁴ Without a showing of good cause by affidavit, the allowance of an amendment of a demurrer to a complaint by which the statute of limitations is interposed as a bar to the action, is erroneous.²⁸⁵ Where the defendant desires to amend a verified answer by cor

²⁷⁶ *McQueen v. Babcock*, 3 Keyes, 428.

²⁷⁷ *Hurley v. Second Building Assoc.*, 15 Abb. Pr. 206, note.

²⁷⁸ *Church v. Syracuse Co.*, 32 Conn. 372.

²⁷⁹ *Vanderbilt v. Bleeker*, 4 Abb. Pr. 289.

²⁸⁰ *Randolph v. Barrett*, 16 Pet. 138, 10 L. Ed. 914.

²⁸¹ *Milde v. Reynolds*, 129 Cal. 308, 61 Pac. 932; *Nicoll v. Weldon*, 130 Cal. 666, 63 Pac. 63.

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²⁸² *Palace Hardware Co. v. Smit*, 134 Cal. 381, 66 Pac. 474.

²⁸³ *Bernheim v. Cerf*, 123 Cal. 170, 55 Pac. 759.

²⁸⁴ *Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709; *People v. Barton*, 4 Colo. App. 455, 36 Pac. 299; *Canfield v. Bates*, 13 Cal. 606. See *Wabash etc. R. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; *Caldwell v. Meshew*, 53 Ark. 263, 13 S. W. 761.

²⁸⁵ *People v. Barton*, 4 Colo. App. 455, 36 Pac. 299.

tradicting certain portions thereof, he should by his affidavit in support of the motion explain why he swore to the statements in the original answer, if they were not true.²⁸⁶ Where a party desires to amend his pleadings by withdrawing a damaging admission, the application for leave to do so should be made the instant the error is discovered, and a broad, substantial showing of mistake is essential to entitle him to relief in the premises.²⁸⁷ The court may affix conditions to whatever order it makes in response to an application to amend, and, unless its discretion in this particular has been abused, error cannot be predicated on its action.²⁸⁸ Adequate terms should be enforced, not merely as a matter of justice to the parties, but to the end that there may be more diligence in the preparation of causes, and the public business be thereby expedited.²⁸⁹ As a general rule in ordinary cases, the party amending his pleading will be required to pay all taxable costs up to the time of amending, and also costs for opposing the motion.²⁹⁰

§ 812. Right to answer amended pleadings.—The right to answer an amended pleading is one of which a party cannot be deprived, even after entry of default against him on the original pleading. The amendment of a pleading in matter of substance opens the default on the original pleading, and the amended pleading must be served upon a defaulting defendant.²⁹¹

§ 813. Statement in order.—An order granting leave to amend generally, without specifying in what particular, is improvident.²⁹²

§ 814. Statement in motion.—Motions to strike out must specifically point out the objectionable matter.²⁹³ Motions to strike out immaterial portions of the pleadings are not parts of

²⁸⁶ *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284.

²⁸⁷ *Buno v. Gomer*, 3 Colo. App. 456, 34 Pac. 256.

²⁸⁸ *Miller v. Thorpe*, 4 Colo. App. 559, 36 Pac. 891. See *McHenry v. Grant*, 84 Wis. 311, 54 N. W. 626; *Bausch v. Ingersoll*, 61 Hun, 627; 16 N. Y. Supp. 336; *Culverhouse v. Crosan*, 94 Cal. 544, 29 Pac. 1100; *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86; *Stallings v. Barrett*, 26 S. C. 474, 2 S. E. 483.

²⁸⁹ *Saint v. Guerrero*, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335.

²⁹⁰ *Smith v. Dragert*, 65 Wis. 507, 27 N. W. 317; *Coleman v. Davis*, 13 Colo. 98, 21 Pac. 1018.

²⁹¹ *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089.

²⁹² *Thompson v. Malone*, 13 Rich. L. 252.

²⁹³ *People v. Empire etc. Min. Co.*, 33 Cal. 171.

the judgment-roll. They are no part of a record on appeal, unless made so by a statement.²⁹⁴ It is not error to allow a motion for a new trial to be amended after it is made.²⁹⁵

§ 815. Irrelevant pleading defined.—A pleading is irrelevant which has no substantial relation to the controversy between the parties to the action.²⁹⁶ It includes prolixity or needless details of material matter.²⁹⁷ An amendment changing the nature of the action cannot be objected to by way of answer setting up such change as a defense, and such answer may be stricken out as irrelevant.²⁹⁸ Matter contained in an amended complaint is not irrelevant or redundant to a cause of action set out in the original complaint in the same action.²⁹⁹

§ 816. Amendment of undertaking.—The amendment of an undertaking in attachment was not authorized by statute,³⁰⁰ but the California legislature of 1909 granted the privilege to amend the writ of attachment, or the affidavit, or undertaking upon which the writ is based any time at or before the hearing of an application for a discharge of the writ.^{300a}

§ 817. What may be stricken out.—Sham and irrelevant answers, and irrelevant and redundant matter, inserted in a pleading, may be stricken out on such terms as the court may in its discretion impose.³⁰¹ Redundant or irrelevant pleadings may be objected to by motion, but not by demurrer.³⁰² An answer which is evasive, frivolous, and largely made up of legal conclusions, may be properly stricken from the files on motion.³⁰³ A motion by the defendant to strike out certain portions of the plaintiff's complaint as irrelevant and redundant was granted, with leave also to the plaintiff "to amend his summons and complaint as he should be advised." The plaintiff thereupon amended his sum-

²⁹⁴ *Sutter v. City and County of San Francisco*, 36 Cal. 112.

²⁹⁵ *Kreielshheimer v. Nelson*, 31 Wash. 406, 72 Pac. 72.

²⁹⁶ *Seward v. Miller*, 6 How. Pr. 313.

²⁹⁷ *Lee Bank v. Kitching*, 11 Abb. Pr. 435; *Russ v. Brooks*, 4 E. D. Smith, 644.

²⁹⁸ *Wheeler v. West*, 78 Cal. 95, 20 Pac. 45.

²⁹⁹ *Nevada County etc. Canal Co. v. Kidd*, 28 Cal. 673.

³⁰⁰ *Tibbett v. Sue*, 122 Cal. 206, 54 Pac. 741.

^{300a} Cal. Code Civ. Proc., § 558, as amended March 10, 1909, Statutes of 1909, p. 253.

³⁰¹ Cal. Code Civ. Proc., § 453.

³⁰² *Kinyon v. Palmer*, 18 Iowa, 377.

³⁰³ *Crane v. Andrews*, 10 Colo. 265, 15 Pac. 331. See *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976.

mons in pursuance of such leave, and at the same time gave notice of his election not to amend his complaint under the leave given. The defendant thereupon answered the complaint; and within twenty days after receiving such answer, the plaintiff served an amended complaint. It was held that the plaintiff was entitled to amend the complaint again of course, after defendant had thus answered.³⁰⁴ It seems that the right to move to strike out an answer for irrelevancy, and the right to demur to an answer for insufficiency, were not designed for the same purpose; and it is not optional with the plaintiff whether he will resort to a demurrer or to a motion to test the sufficiency of the answer.³⁰⁵ If irrelevancy is not palpable, it should not be stricken out, but demurrer will lie.³⁰⁶ Irrelevant matter in a complaint may be stricken out on motion;³⁰⁷ or immaterial matter;³⁰⁸ or averments of deraignments of title;³⁰⁹ or superfluous matter, when inserted by itself,³¹⁰ such as the name of plaintiff's wife;³¹¹ and, in general, every fact not essential to a claim or defense.³¹² If a copy of a written contract sued on be attached to the complaint, and the averments of the complaint put a false construction of law upon the terms of the contract, such averments may be regarded as surplusage.³¹³ Allegations in the complaint which are absurd or impossible may be stricken out.³¹⁴ Where the facts stated in the complaint constitute a sufficient cause of action, other unnecessary matter may be stricken out, and demurrer will not lie. But an entire pleading cannot be stricken out as irrelevant or redundant.³¹⁵ To strike out a pleading which is susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action or defense, is a harsh proceeding, and

³⁰⁴ *Ross v. Dinsmore*, 12 Abb. Pr. 4.

³⁰⁵ *Littlejohn v. Greeley*, 13 Abb. Pr. 311.

³⁰⁶ *Id.*; *Struver v. Ocean Ins. Co.*, 9 Abb. Pr. 23; *Waddell v. Cook*, 2 Hill, 47; *Littlejohn v. Greeley*, 22 How. Pr. 345. See, however, *Lee Bank v. Kitching*, 11 Abb. Pr. 439. See, also, as to notice, *Bailey v. Lane*, 13 Abb. Pr. 354; and as to pendency of motion, *Kellogg v. Baker*, 15 Abb. Pr. 286.

³⁰⁷ *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *Bowen v. Aubrey*, 22 Cal. 566.

³⁰⁸ *Larco v. Casaneuava*, 30 Cal. 560.

³⁰⁹ *Id.*; *Willson v. Cleaveland*, 30 Cal. 192.

³¹⁰ *Boles v. Cohen*, 15 Cal. 150.

³¹¹ *Warner v. Steamship Uncle Sam*, 9 Cal. 697.

³¹² *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

³¹³ *Stoddard v. Treadwell*, 26 Cal. 294.

³¹⁴ *Sacramento County v. Bird*, 31 Cal. 67.

³¹⁵ *Benedict v. Dake*, 6 How. Pr. 352. But see Cal. Code Civ. Proc., § 453.

should only be resorted to in extreme cases.³¹⁶ Where the answer contains several defenses, some of which are verified and others not, it is not error to strike out the unverified portion of the answer, with leave to defendants to further answer as to such portion, if they should so desire.³¹⁷

§ 818. **Election between counts.**—When the defendant is allowed time to answer until the plaintiff elects on which count of the complaint he will go to trial, the plaintiff should serve a copy of the complaint, with the notice of his election.³¹⁸

§ 819. **Statement in motion.**—A plaintiff may, on one motion, ask: 1. To strike out defenses as sham and irrelevant; 2. For judgment on a demurrer as frivolous; 3. To strike out irrelevant and redundant matter; 4. To have the allegations made definite and certain.³¹⁹ The proper mode of taking advantage of defects in an answer which improperly blends and defectively states matters set forth therein is by motion to strike out either the whole of it or such parts as are defectively pleaded.³²⁰

§ 820. **Cost-bill.**—Whether or not a party is entitled to amend a cost-bill, he must make a showing of excuse on grounds mentioned in section 473 of the California Code of Civil Procedure.³²¹

§ 821. **Ambiguous answer.**—If an answer is ambiguous, and does not sufficiently disclose the particulars of a transaction relied on as a defense, the plaintiff's remedy is by motion, under section 546 of the New York Code of Civil Procedure, to make the answer more definite and certain. He cannot accept the plea and go to trial upon it, and then interpose the objection for the first time that it is not sufficiently descriptive of the particulars relied on.³²² In California, under subdivision 3 of section 444 of the Code of Civil Procedure, demurrer would lie in such a case.

§ 822. **Answer with denials only.**—Although a general denial to the allegations of the complaint may, if falsely pleaded, be

³¹⁶ Burns v. Scooffy, 98 Cal. 271, 33 Pac. 86. And see Hatch v. Tacoma R. R. Co., 6 Wash. 1, 32 Pac. 1063; Walter v. Fowler, 85 N. Y. 621.

³¹⁷ Nichols v. Jones, 14 Colo. 61, 23 Pac. 89.

³¹⁸ Willson v. Cleaveland, 30 Cal. 192.

³¹⁹ People v. McCumber, 15 How. Pr. 186, 18 N. Y. 315, 72 Am. Dec. 515.

³²⁰ Kinney v. Miller, 25 Mo. 576.

³²¹ Galindo v. Roach, 130 Cal. 389, 62 Pac. 597.

³²² Farmers' etc. Bank v. Sherman, 33 N. Y. 69.

characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the court as to the good faith of the defendant in pleading it, nor can it be stricken out as sham on the application of the plaintiff.³²³ A verified answer of denial should not be stricken out as sham, even after the defendant, on examination before trial, has admitted what the answer denies.³²⁴ Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground that it is sham. If some of the denials are deemed good and the others bad, he may move to strike out the latter. Answers consisting of denials which do not explicitly traverse the material allegations of the complaint we hold so far sham and irrelevant, within the meaning of the statute.³²⁵

§ 823. **Tardy answer—Discretion of court.**—An answer filed without leave, after time for answering has expired, but before default has been entered, is not a nullity, but at most an irregularity, and the court, in its discretion, may strike it out or retain it.³²⁶ The motion to strike out answers, because denying on information and belief, and for judgment on the complaint, is held to be properly overruled.³²⁷

§ 824. **Informal answers.**—If the answer has the signature of the attorney of record and that of an associate attorney attached to it, the court will not strike it out. The court will not try the question whether the signature of the attorney of record was put there by himself or by his associate without his authority.³²⁸ If an answer tends to constitute a defense, it is not irrelevant, however informal or inartificial.³²⁹

§ 825. **Proceedings on motion to strike out.**—When plaintiff moves on affidavit to strike out a defense as “sham,” the affidavit

³²³ *Fay v. Cobb*, 51 Cal. 313. See, also, *Amador County v. Butterfield*, 51 Cal. 526; *Wayland v. Tysen*, 45 N. Y. 281; reversing 9 Abb. Pr. (N. S.) 79; *Claffin v. Jaroslauskis*, 64 Barb. 463; *Strong v. Sproul*, 53 N. Y. 497; reversing 4 Daly, 326.

³²⁴ *Schultze v. Rodewald*, 1 Abb. N. C. 365.

³²⁵ *Gay v. Winter*, 34 Cal. 153.

³²⁶ *Bowers v. Dickerson*, 18 Cal. 420.

³²⁷ *Comerford v. Dupuy*, 17 Cal. 308.

³²⁸ *Willson v. Cleaveland*, 30 Cal. 192.

³²⁹ *Wallace v. Bear River Water & Min. Co.*, 18 Cal. 461; *Gregory v. Wright*, 11 Abb. Pr. 417; *Dovan v. Dinsmore*, 33 Barb. 86; *De Forest v. Baker*, 1 Abb. Pr. (N. S.) 34.

of defendant that his defense is *bona fide* will defeat the motion.³³⁰ When, to resist a motion to strike out as sham a defense good on its face, admissions on the part of the plaintiff are positively sworn to, which are neither contradicted, qualified, nor questioned, and which tend to sustain the defense, the motion should be denied.³³¹ On motion to strike out as sham an answer of joint defendants, where it appears that some of the defendants may have a valid defense, they may be permitted to serve an amended answer, which would be denied to the other defendants who show no merits.³³² Irrelevant averments and surplusage cannot be reached by motion to strike out the defense, but must be reached by motion to strike out such averments only.³³³

§ 826. **Sham answers defined.**—A sham answer is one good in form, but false in fact, and not pleaded in good faith. It sets up new matter which is false.³³⁴ A defense is a sham which is so clearly false as not to present any substantial issue.³³⁵ To sustain the motion, falsity and bad faith should both be established;³³⁶ as there is a distinction between a false answer and a frivolous answer.³³⁷ Falsity is the test of a sham answer. An answer taking issue only on an immaterial issue of the complaint is frivolous.³³⁸ A false answer, not verified, is a sham answer.³³⁹

³³⁰ Gostorfs v. Taaffe, 18 Cal. 385; Beebe v. Marvin, 17 Abb. Pr. 194. See Wedderspoon v. Rogers, 32 Cal. 569, where authorities are collected.

³³¹ Hadden v. New York Silk Mfg. Co., 1 Daly, 388.

³³² Burrall v. Bowen, 21 How. Pr. 378. As to proceedings on motion to strike it out generally, see Grogan v. Ruckle, 1 Cal. 193; Kellogg v. Baker, 15 Abb. Pr. 286; Speer v. Craig, 16 Colo. 478, 27 Pac. 891; Nichols v. Jones, 14 Colo. 61, 23 Pac. 89. On motion denied: Seward v. Miller, 6 How. Pr. 312; Miln v. Vose, 4 Sandf. 660. On motion granted: Aymar v. Chase, 1 Code Rep. (N. S.) 141; Burrall v. Bowen, 21 How. Pr. 378. On leave to file amended answer: Musini v. Stillman, 13 Abb. Pr. 93.

³³³ Continental B. & L. Assoc. v. Boggess, 145 Cal. 30, 78 Pac. 245. See Du Clos v. Batcheller, 17 Wash. 389, 49 Pac. 483.

³³⁴ Piercy v. Sabin, 10 Cal. 22, 70

Am. Dec. 692; Gostorfs v. Taaffe, 18 Cal. 385; Leach v. Boynton, 3 Abb. Pr. 1; Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. 291.

³³⁵ Brewster v. Hall, 6 Cow. 34; Oakley v. Devoe, 12 Wend. 196; People v. McCumber, 18 N. Y. 315, 323, 72 Am. Dec. 515.

³³⁶ Hadden v. New York Silk Manufacturing Co., 1 Daly, 388; Kellogg v. Baker, 15 Abb. Pr. 286; Lockwood v. Salhenger, 18 Abb. Pr. 136.

³³⁷ Hecker v. Mitchell, 5 Abb. Pr. 453; Hull v. Smith, 8 How. Pr. 150; Davis v. Potter, 4 How. Pr. 155.

³³⁸ Goldstein v. Krause, 2 Idaho, 294, 13 Pac. 232.

³³⁹ Brewster v. Hall, 6 Cow. 34; Slack v. Cotton, 2 E. D. Smith, 398; Oakley v. Devoe, 12 Wend. 196; Nichols v. Jones, 6 How. Pr. 355; Ostrom v. Bixby, 9 How. Pr. 57; Walker v. Hewitt, 11 How. Pr. 398; People v. McCumber, 18 N. Y. 320, 72 Am. Dec. 515.

Sham pleading is the setting up of a defense which has not only no foundation in fact, but which, it is manifest, was interposed for vexation or delay.³⁴⁰

§ 827. **Sham defense, how tested.**—Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground that it is a sham.³⁴¹ Under the power to strike out the court cannot determine the truth or falsity of a plea upon conflicting evidence.³⁴² An answer will not be adjudged to be sham simply upon an affidavit that it is false; for this would be trying the merits of the defense upon affidavits. But the court must be satisfied from an inspection of the pleading, or from circumstances brought to its knowledge, that the object of the pleader was to delay or annoy the plaintiff, or to trifle with the court.³⁴³ To warrant striking out a pleading as frivolous, it must be clearly bad on inspection merely.³⁴⁴ The right of a defendant to have the issues tried by a jury depends on the existence of a real issue, and the court has power to try, on motion, the question whether there is a substantial issue, or only a sham and fictitious one.³⁴⁵

§ 828. **Sham answers may be stricken out.**—Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, or immaterial, may be stricken out, upon motion, upon such terms as the court, in its discretion, may impose.³⁴⁶ These provisions apply equally to mere denials of allegations of the complaint and to affirmative matter, and equally to verified and to unverified answers;³⁴⁷ as the verification of an answer is no bar to the motion.³⁴⁸

³⁴⁰ *Hadden v. New York Silk Mfg. Co.*, 1 Daly, 388.

³⁴¹ *Gay v. Winter*, 34 Cal. 153.

³⁴² *Patrick v. McManus*, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90.

³⁴³ *Mayor etc. v. Dias*, 1 East, 237; *Smith v. Oriell*, 1 East, 369; *White v. Howard*, 3 Taunt. 339; *The King v. Woolf*, 1 Chit. Pl. 424 and note a; *Bones v. Bunter*, 1 Chit. Pl. 564 and note a; 5 Barn. & Adol. 750 and note a; *Brewster v. Hall*, 6 Cow. 34; *Hadden v. New York Silk Mfg. Co.*, 1 Daly, 388; *McDonald v. Pincus*, 13 Mont. 83, 32 Pac. 283.

³⁴⁴ *Smith v. Mead*, 14 Abb. Pr. 262; *Continental B. & L. Assoc. v. Boggess*, 145 Cal. 30, 78 Pac. 245.

³⁴⁵ *People v. McCumber*, 18 N. Y. 315, 323, 72 Am. Dec. 515.

³⁴⁶ Cal. Code Civ. Proc., § 453; *Johnson v. Tabor*, 4 Colo. App. 183, 35 Pac. 199. A counterclaim, if sham, may be stricken out upon motion. *Patrick v. McManus*, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90.

³⁴⁷ *People v. McCumber*, 18 N. Y. 315, 323, 72 Am. Dec. 515.

³⁴⁸ *Lawrence v. Derby*, 24 How. Pr.

§ 829. **Unverified answers.**—An answer unverified to a verified complaint may be stricken out on motion; for if the complaint is sworn to, a general denial in the answer admits all its material allegations.³⁴⁹ On information and belief will be treated as positive affirmance of the truth of the allegations in the answer, none of which is made on information and belief.³⁵⁰ And though the inability of counsel to obtain defendant's verification in time may be good ground for an extension of time to answer, yet it cannot avail in resisting a motion to strike out, and for judgment after the answer is filed.³⁵¹ But it was held that the objection should have been raised in the court below and been passed upon, and that plaintiff having rested his cause at the trial, on the ground of want of an affidavit, he will not be permitted to say here for the first time that the answer does not in a proper form controvert the allegations of the complaint.³⁵² To a complaint against three persons, upon a promissory note executed under a firm name, one of the defendants answered, denying his liability, and that he was one of the firm by whom the note was executed. Neither of the pleadings were verified. When the cause came on for trial, plaintiff moved to strike out defendant's answer for want of verification, and, pending the motion, defendant asked leave to then verify the answer. The court denied defendant's motion, and struck out the answer. It was held that the refusal by the court to allow the verification was such an abuse of discretion as to amount to error.³⁵³ By verification of the complaint, the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange by requiring a sworn answer.³⁵⁴

§ 830. **What may be stricken out of answer.**—A denial of a legal conclusion.³⁵⁵ The denial of immaterial averments of the complaint. So a denial, on want of any knowledge or information sufficient to form a belief, of matter presumptively within

133, 15 Abb. Pr. 346, note. This principle was questioned in *Gostorfs v. Taafe*, 18 Cal. 385.

³⁴⁹ *Pico v. Colimas*, 32 Cal. 578; *Hearst v. Hart*, 128 Cal. 327, 60 Pac. 846; *McCullough v. Clark*, 41 Cal. 298; *Speer v. Craig*, 16 Colo. 478, 27 Pac. 893.

³⁵⁰ *Christopher v. Condodge*, 128 Cal. 581, 61 Pac. 174.

³⁵¹ *Drum v. Whiting*, 9 Cal. 422.

³⁵² *Grogan v. Ruckle*, 1 Cal. 193.

³⁵³ *Lattimer v. Ryan*, 20 Cal. 628.

³⁵⁴ *Brooks v. Chilton*, 6 Cal. 640.

³⁵⁵ *Wedderspoon v. Rogers*, 32 Cal. 569; *Seeley v. Engell*, 17 Barb. 530.

the knowledge of the defendant.³⁵⁶ A defense of a verbal agreement, contemporaneous with making of note, to renew it at maturity.³⁵⁷ An objection which ought to have been taken by demurrer, but is taken only by allegation in the answer, should be stricken out.³⁵⁸ The objection that the allegations of an answer are hypothetical is not available on demurrer,³⁵⁹ but on motion to strike out. So the unessential parts of an answer may be stricken out;³⁶⁰ or the denial only of what is non-essential in the complaint; for this is an admission of all that is essential to a recovery.³⁶¹ The action of the trial court in striking an answer from the files and giving judgment on the pleadings, for the reason that the answer had been once ruled as demurrable, and had been again filed after the sustaining of a demurrer to an amended answer, will not be disturbed, although such procedure may not be strictly regular.³⁶² If inconsistent defenses be set up, the defect must be reached by motion to strike out, or, in some cases, by demurrer; and if no objection be taken to the answer on this ground, defendant on the trial may rely on any of his defenses, as under the old system.³⁶³ An averment in an answer to a complaint on a bill of exchange, providing for the payment of attorney's fees in case of suit, that such fees were not due at the time the suit was filed, is properly stricken out as sham.³⁶⁴ One defendant cannot answer for another who does not join in the answer, and an allegation in the answer of one defendant that a co-defendant is working the mine in controversy as an employee may be stricken out as surplusage.³⁶⁵ But it is error for the court to strike the defendant's answer from the files

³⁵⁶ *Lawrence v. Derby*, 15 Abb. Pr. 346, note, 24 How. Pr. 134; *Beebe v. Marvin*, 17 Abb. Pr. 194; *Sloane v. Southern California R. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

³⁵⁷ *Bailey v. Lane*, 13 Abb. Pr. 354, 21 How. Pr. 475; *Shoe & Leather Bank v. Camp*, 21 How. Pr. 443. As to what matters may be struck out of an answer as scandalous, immaterial, etc., see *Griswold v. Hill*, 1 Paine, 390, Fed. Cas. No. 5835; *Langdon v. Goddard*, 3 Story, 13, Fed. Cas. No. 8061; *Thomas v. Berry*, 17 Colo. 322.

³⁵⁸ *Gassett v. Crocker*, 10 Abb. Pr. 133.

³⁵⁹ *Nye v. Ayres*, 1 E. D. Smith, 532; *Wies v. Fanning*, 9 How. Pr. 543; *Taylor v. Richards*, 9 Bosw. 679.

³⁶⁰ *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

³⁶¹ *Leffingwell v. Griffing*, 31 Cal. 231.

³⁶² *Noyes v. Longhead*, 9 Wash. 325, 37 Pac. 452.

³⁶³ *Klink v. Cohen*, 13 Cal. 623; *Uridias v. Morrill* (No. 2), 25 Cal. 35.

³⁶⁴ *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588.

³⁶⁵ *Wheeler v. West*, 78 Cal. 95, 20 Pac. 45.

because of disobedience of a *subpœna duces tecum*, where the disobedience is by an illiterate person, without the advice of counsel, and where defendant's counsel before the making of the order offer to admit everything that could be shown by the papers sought to be produced.³⁶⁶ The correctness of an order striking out a part of an answer is to be tested by reference to the state of the pleadings at the time it was made.³⁶⁷

§ 831. When motion should be made.—An answer cannot be stricken out after issue joined. If an answer is filed, raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it cannot then strike out the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint.³⁶⁸ An answer having been filed under leave of court, it is not competent for another judge to order it stricken from the files because not filed in apt time.³⁶⁹ Where certain material averments of the plaintiff's complaint were so defectively denied that, upon motion, such denials might properly have been stricken out as sham and irrelevant, yet, without such objection made thereto, the plaintiff introduced proof at the trial in their support, it was held that by introducing said proof the plaintiff waived all objection to the sufficiency of said denials, and the court properly refused an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of said trial.³⁷⁰ Where a party sets up matter in his answer not recognized by law as a defense to the action, it may be taken advantage of at any time.³⁷¹ If the defendant files his answer at the same time he does his demurrer, the court, after overruling the demurrer, has no right to strike out an answer which raises a defense, because the defendant fails to pay the plaintiff twenty dollars, required by a rule of court to be paid for the privilege of answering when a demurrer is overruled.³⁷² Amending an answer waives error in striking the original from the files.³⁷³ But it was held that

³⁶⁶ *Frazer v. Lynch*, 88 Cal. 621, 26 Pac. 344.

³⁶⁷ *De Baker v. Southern Pacific R. Co.*, 106 Cal. 257, 39 Pac. 610.

³⁶⁸ *Abbott v. Douglass*, 28 Cal. 295.

³⁶⁹ *Godding v. Live Stock Co.*, 4 Colo. App. 15, 34 Pac. 942.

³⁷⁰ *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

³⁷¹ *Case v. Maxey*, 6 Cal. 276; *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98.

³⁷² *People v. McClellan*, 31 Cal. 101.

³⁷³ *Gale v. James*, 11 Colo. 540.

the filing of a substituted answer by the defendant did not operate as a waiver of his exception to an order striking out an affirmative defense in his original answer.³⁷⁴

§ 832. Order not appealable.—Orders striking out immaterial portions of pleadings are not appealable.³⁷⁵

§ 833. Mistakes in names, how corrected.—Mistakes in names of parties in a writ may be amended as a clerical misprision, even after the adjournment of the term, but the record itself must show the error.³⁷⁶ But where there is a mistake in the Christian name of one of the plaintiffs throughout the proceedings, the court cannot amend the judgment upon evidence *aliunde*.³⁷⁷ A declaration in the name of a firm may be amended by inserting the names of the members of the firm.³⁷⁸ A corporate name may be substituted for an individual name.³⁷⁹ A formal variance, in suing a defendant by a wrong name, is amendable at any time.³⁸⁰ On a plea of misnomer, the court may allow the plaintiff to amend the writ and declaration.³⁸¹ Leave to amend the writ by changing the name of one of the plaintiffs may be refused.³⁸² A complaint may, in furtherance of justice, and on such terms as may be proper, be amended by adding the name of a party plaintiff.³⁸³ And although an objection for misnomer of the plaintiff is waived by filing an answer to the merits, yet it is not prejudicial error for the court to order the filing of an amended complaint, after issue joined, where the complaint is

³⁷⁴ Schulte v. Littlejohn, 2 Wash. 129, 26 Pac. 79.

³⁷⁵ Sutter v. San Francisco, 36 Cal. 112; Briggs v. Bergen, 23 N. Y. 162; Beach v. Hodgdon, 66 Cal. 187, 5 Pac. 77.

³⁷⁶ Hegeler v. Henckell, 27 Cal. 491; Furniss v. Ellis, 2 Brock. Marsh. 15, Fed. Cas. No. 5162; Elliott v. Holmes, 1 McLean, 466, Fed. Cas. No. 4392; Gillett v. Robbins, 12 Wis. 319.

³⁷⁷ Albers v. Whitney, 1 Story, 310, Fed. Cas. No. 137; Jackson v. Warren, 32 Ill. 331; Johnson v. Adelman, 35 Cal. 265. But see Henckler v. County Court, 27 Ill. 39.

³⁷⁸ Tibbs v. Parrott, 1 Cranch C. C. 177, Fed. Cas. No. 14022.

³⁷⁹ Jackson v. Warren, 32 Ill. 331. Leave granted to correct the corporate name of the plaintiff. Corporation of Georgetown v. Beatty, 1 Cranch C. C. 234, Fed. Cas. No. 5344. See Cal. Code Civ. Proc., § 473.

³⁸⁰ Scull v. Bridgell, 2 Wash. C. C. 200, Fed. Cas. No. 12570; Craig v. Brown, Pet. C. C. 139, Fed. Cas. No. 3326; Shinn v. Cummins, 65 Cal. 97, 3 Pac. 133; McDonald v. Swett, 76 Cal. 257, 18 Pac. 324.

³⁸¹ Randolph v. Barrett, 16 Pet. 141, 10 L. Ed. 914; Nelson v. Barker, 3 McLean, 379, Fed. Cas. No. 10101.

³⁸² Comegyss v. Robb, 2 Cranch C. C. 141, Fed. Cas. No. 3049.

³⁸³ Rawles v. People etc., 2 Colo. App. 501, 31 Pac. 941.

amended without any considerable delay or expense.³⁸⁴ Where a general leave to amend has been obtained, the plaintiff has a right to join other proper parties as defendants without special permission so to do.³⁸⁵ If a defendant sued under a wrong name discloses his true name in his answer, he cannot object to the court's giving leave, after the evidence is in, to amend the complaint accordingly.³⁸⁶ Where the plaintiff sued three persons as partners, and on the trial, by leave of court, amended his complaint by striking out the name of one of them, and dismissed as to him, it was held that the other defendants were not prejudiced by the amendment.³⁸⁷

§ 834. Adding or striking out parties.—The court may in furtherance of justice, and on such terms as may be proper, amend any pleading by adding or striking out parties.³⁸⁸ The court will take notice of the want of necessary parties, and will ordinarily allow an amendment on just terms.³⁸⁹ The refusal of a trial court to allow an amendment substituting entirely new parties plaintiff is not such an abuse of discretion as would authorize the appellate court to interfere.³⁹⁰

Where an application to amend a complaint is made during the trial of the cause, and the amendment is such as to change the action from one against the defendant to an action against the defendant and another party jointly, a denial of such motion is not an abuse of discretion.³⁹¹

§ 835. Discretion.—When the court perceives that necessary and indispensable parties are wanting,³⁹² it may grant leave to amend and bring them in,³⁹³ in its discretion,³⁹⁴ and on such

³⁸⁴ *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355.

³⁸⁵ *Louvall v. Gridley*, 70 Cal. 507, 11 Pac. 777. See *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661.

³⁸⁶ *Ramsey v. Cortland Cattle Co.*, 6 Mont. 498, 13 Pac. 247.

³⁸⁷ *Brown v. Pickard*, 4 Utah, 292, 9 Pac. 573, 11 Pac. 512.

³⁸⁸ Cal. Code Civ. Proc., § 473; *Heslep v. Peters*, 3 Scam. 45; *Jackson v. Warren*, 32 Ill. 331; *Curtis v. Sage*, 35 Ill. 22; *Hamill v. Ashley*, 11 Colo. 180, 17 Pac. 502.

³⁸⁹ *Beals v. Cobb*, 51 Me. 348.

³⁹⁰ *Liebman v. McGraw*, 3 Wash. 520, 28 Pac. 1107.

³⁹¹ *Pettersson v. Stockton & T. C. R. Co.*, 134 Cal. 244, 66 Pac. 304.

³⁹² *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

³⁹³ *Harrison v. Rowan*, 4 Wash. C. 202, Fed. Cas. No. 6143; *Dwight v. Humphreys*, 3 McLean, 104, Fed. Cas. No. 4216.

³⁹⁴ *Van Epps v. Van Deusen*, 4 Paige, 75, 25 Am. Dec. 516; *Vanderwerker v. Vanderwerker*, 7 Barb. 221; *Greenleaf v. Queen*, 1 Pet. 138, 7 L. Ed. 85.

terms as may be prescribed.³⁹⁵ But such an amendment cannot be made without leave of court.³⁹⁶ But it has been held that an entire change of parties cannot be allowed on amendment.³⁹⁷

§ 836. **Motion, when made.**—Whether, after striking out a party from the pleadings, the court can reinstate him, *quære*.³⁹⁸ On motion for nonsuit at the trial, plaintiff may be allowed to amend complaint by adding the name of a co-plaintiff, on such terms as may be just,³⁹⁹ even after the close of plaintiff's testimony.⁴⁰⁰ The court may at any time allow an amendment by inserting the name of a firm, where an action is brought in the name of one partner only.⁴⁰¹

§ 837. **Special cases.**—In an action of *assumpsit* against two defendants tried by the court, the plaintiff, after a verdict against him upon the ground that a joint promise was not proved, cannot amend by striking out one of the defendants.⁴⁰² A suit may be amended by inserting the name of a partner of the firm.⁴⁰³ In suit by a sheriff, for the use of execution creditors, the complaint may be amended by adding other execution creditors.⁴⁰⁴ In ejectment, complaint may be amended by making new parties plaintiff.⁴⁰⁵ Or judgment creditors, as subsequent incumbrancers, may be made parties to the action.⁴⁰⁶ In a suit on a foreclosure of mortgage, the complaint may be amended by making the original vendor a party defendant.⁴⁰⁷

§ 838. **Striking out parties.**—The misjoinder of parties may be corrected by amendment.⁴⁰⁸ Such amendment may be made

³⁹⁵ Cal. Code Civ. Proc., § 473; *Vanderwerker v. Vanderwerker*, 7 Barb. 221.

³⁹⁶ *Russell v. Spear*, 5 How. Pr. 142.

³⁹⁷ *Wright v. Storms*, 3 N. Y. Code Rep. 138; *Davis v. Schermerhorn*, 5 How. Pr. 440; *Vanderwerker v. Vanderwerker*, 7 Barb. 221.

³⁹⁸ *Beach v. Covillaud*, 2 Cal. 237.

³⁹⁹ 1 *Van Santv. Pl.* 134; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *Acquital v. Crowell*, 1 Cal. 191; *Heath v. Lent*, 1 Cal. 412; *Farmer v. Cram*, 7 Cal. 135; *Browner v. Davis*, 15 Cal. 9; *Gavitt v. Doub*, 23 Cal. 78; *Valencia v. Couch*, 32 Cal. 340, 91 Am. Dec. 589

⁴⁰⁰ *Polk v. Coffin*, 9 Cal. 56; *Hurley v. Second Building Assoc.*, 15 Abb. Pr. 206, note.

⁴⁰¹ *Dixon v. Dixon*, 19 Iowa, 512.

⁴⁰² *Griffin v. Simpson*, 45 N. H. 18.

⁴⁰³ *Stuart v. Corning*, 32 Conn. 105.

⁴⁰⁴ *Glenn v. Black*, 31 Ga. 393.

⁴⁰⁵ *Chapin v. Curtenius*, 15 Ill. 427.

⁴⁰⁶ *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569. As to effect of adding new parties, see *Hurley v. Second Building Assoc.*, 15 Abb. Pr. 206, note; *Elmore v. Vallette*, 16 Abb. Pr. 249.

⁴⁰⁷ *Roddy v. Elam*, 12 Rich. Eq. 343.

⁴⁰⁸ *Heath v. Lent*, 1 Cal. 410; *Beach v. Covillaud*, 2 Cal. 237.

so as to exclude parties irregularly included,⁴⁰⁹ even after judgment rendered.⁴¹⁰ Plaintiffs may be allowed to amend before trial by striking out the name of one of the defendants.⁴¹¹ The court may allow an amendment of a complaint striking out the name of a plaintiff who was dead at the commencement of the suit.⁴¹²

The amendment of a complaint by striking out of the caption the names of certain of the defendants who were not proper parties, without filing an amended complaint, while not commendable as a method of amending, is without prejudice to other defendants who are properly parties.⁴¹³

§ 839. Striking out demurrer—Grounds of.—Under California practice, a demurrer cannot be stricken out for want of proof of service, if filed in time, and the only possible grounds of striking out such a demurrer is the insertion of irrelevant and redundant matter in it, as a pleading under section 53 of the Code of Civil Procedure, which cannot apply when it states only one or more of the grounds enumerated in section 430 of that code.⁴¹⁴ Under Oregon practice, a demurrer cannot be stricken out on motion.⁴¹⁵

§ 840. Complaint—Striking out evidentiary matter.—It is proper to strike from a complaint the statement of matter which, though it may be proper to be shown in evidence upon the trial of the action, adds nothing to the ultimate and issuable facts alleged in the complaint.⁴¹⁶

§ 841. Striking out—Miscellaneous points of practice.—Where a complaint contains an immaterial averment which ought to have been stricken out on motion, but the party making such motion answered over, and the court made no declaration of law upon the trial respecting such immaterial averment, and it did not appear that the appellant was in any manner prejudiced by such error of the court in refusing to strike such imma-

⁴⁰⁹ Mulliken v. Hull, 5 Cal. 246.

⁴¹⁰ Browner v. Davis, 15 Cal. 9.

⁴¹¹ Bell v. Davis, 8 Barb. 210; Tobey v. Claflin, 3 Sumn. 379, Fed. Cas. No. 14066.

⁴¹² Jemison v. Smith, 37 Ala. 185.

⁴¹³ Doane v. Houston, 75 Cal. 360, 17 Pac. 426.

⁴¹⁴ Davis v. Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270.

⁴¹⁵ Cohen v. Ottenheimer, 13 Or. 220, 10 Pac. 20. See The Victorian, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040.

⁴¹⁶ County of San Joaquin v. Budd, 96 Cal. 47, 30 Pac. 967.

terial matter from the pleading, the judgment will not be reversed.⁴¹⁷

A motion to strike out material portions of a judgment cannot be made after the judgment has been affirmed on appeal, and the *remittitur* filed in the lower court, where all the questions involved in the motion might have been brought before the court and determined on the appeal.⁴¹⁸

Where an answer has been amended and different facts presented, the denial of a motion to strike out new matter in the first answer does not establish the law of the case so as to control the court in a ruling upon a motion for judgment on the pleadings made after such amendment.⁴¹⁹

FORMS FOR AMENDMENTS.

§ 842. Notice of motion to amend complaint by striking out co-plaintiffs and making them defendants.

Form No. 248.

[TITLE.]

Take notice, that on the affidavit of C. D., herewith served, and on all the pleadings and proceedings in this action, the undersigned will move the court, at the courtroom thereof, at . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, that the plaintiffs may be at liberty to amend their complaint by striking out the names of A. B. and C. D. as plaintiffs, and making them defendants, without costs as to the other defendants; and for such other relief as may be just.

[DATE.]

[SIGNATURE.]

[ADDRESS.]

§ 843. Notice of motion for leave to amend.

Form No. 249.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit herewith served, and on all the papers on file in this action, the undersigned will

⁴¹⁷ Thomas v. Herrall, 18 Or. 546, 23 Pac. 497.

⁴¹⁸ Parker v. Bernal, 68 Cal. 122, 8 Pac. 696.

⁴¹⁹ Fisher v. Briscoe, 10 Mont. 124, 25 Pac. 30; distinguishing Newell v. Meyendorff, 9 Mont. 254, 18 Am. St. Rep. 746, 23 Pac. 333, 8 L. R. A. 440.

move the court, at the courtroom thereof, at . . . on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, for leave to amend his complaint herein, by the insertion of the following clause, to-wit [here insert proposed amendment], after the word " . . . ," on line . . . , of page . . . thereof, and for such other and further relief as may be just.

[DATE.]

[SIGNATURE.]

§ 844. Order giving leave to amend.

Form No. 250.

[TITLE.]

On reading and filing the affidavit of A. B., and the notice of this motion, and the proof of due service thereof, and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

It is hereby ordered that the plaintiff have leave to amend his complaint, on file in this action, by inserting the following, to-wit [here insert amendment], after the word " . . . ," on line . . . , of page . . . thereof.

[DATE.]

[SIGNATURE.]

§ 845. Notice of motion to strike out irrelevant or redundant matter.

Form No. 251.

[TITLE.]

[ADDRESS.]

Please take notice that on [the affidavit herewith served, and] the pleadings on file in this action, the undersigned will move the court, at the courtroom thereof, at . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, to strike out matter contained in the complaint [or answer] herein, from and after the word " . . . ," on line . . . , of page . . . , down to and including the word " . . . ," on line . . . , of page . . . , as irrelevant [or redundant], and for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

§ 846. Order to strike out irrelevant or redundant matter.

Form No. 252.

[TITLE.]

On reading and filing [designate motion papers], and on motion of G. H., for the defendant, and after hearing E. F., attorney for plaintiff, in opposition thereto:

It is ordered that the matter contained in the complaint [or answer] in this action, from the word “ . . .,” on line . . . , of page . . . , down to and including the word “ . . .,” on line . . . , of page . . . , be stricken out as redundant [or irrelevant].

[DATE.]

[SIGNATURE.]

§ 847. Notice of motion to require plaintiff to elect between several counts of complaint, in certain cases.

Form No. 253.

[TITLE.]

[ADDRESS.]

Please take notice that upon the pleadings on file in this action, and on an affidavit, of which a copy is herewith served, the undersigned will move the court, at the courtroom thereof, at . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, that the plaintiff be compelled to elect between the cause of action stated in the first count and the cause of action stated in the second count in the complaint, and state which he will rely on; and that on such election the other be stricken out; or in default of so electing, then that the second stated cause of action be stricken out as redundant; and for such other or further relief as may be just, and for the costs of this motion.

[DATE.]

[SIGNATURE.]

§ 848. Affidavit on motion to compel plaintiff to elect between several counts of complaint.

Form No. 254.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. I am the defendant in the above-entitled action [or show in some way deponent's knowledge of the facts].

II. That only one transaction of the nature mentioned in either of the alleged causes of action set forth in the complaint ever

occurred between deponent and the plaintiff, and that the transactions mentioned in both of the said alleged causes of action are in fact one and the same.

[JURAT.]

[SIGNATURE.]

§ 849. Notice of motion to strike out sham answer.

Form No. 255.

[TITLE.]

[ADDRESS.]

Take notice that on the affidavit herewith served, and on the pleadings on file in this action, the undersigned will move the court, at the courtroom thereof, at . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, to strike out the second defense in the answer herein as sham, and the third defense as irrelevant; or for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

§ 850. Notice of motion to strike out irrelevant answer.

Form No. 256.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit, a copy of which is herewith served, and the pleadings on file in this action, the undersigned will move the court, at the courtroom thereof, at . . . , on the . . . day of . . . , 19.., at the hour of . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, to strike out the answer herein as irrelevant; or for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

§ 851. Order striking out irrelevant answer.

Form No. 257.

[TITLE.]

On reading and filing [designate motion papers], and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

It is ordered, that the answer of C. D., the defendant in this action, be stricken out as irrelevant, with . . . dollars costs to plaintiff.

[DATE.]

[SIGNATURE.]

§ 852. Notice of motion for leave to correct fictitious name.

Form No. 258.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit herewith served, and on all the pleadings and proceedings on file in this action, the undersigned will move this court, at the courtroom thereof, at . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, for leave to amend his complaint by substituting the name of . . . as the real name of the [defendant] in this action, wherever the name John Doe occurs in the papers filed in this action; or for such other relief as may be just.

[DATE.]

[SIGNATURE.]

§ 853. Affidavit to obtain leave to correct fictitious name.

Form No. 259.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. I am the plaintiff in the above-entitled action:

II. I was not acquainted with the real name of the defendant therein until after the commencement of this action, and about . . . days ago.

III. That the defendant was sued in said action under the fictitious name of . . . , and that his real name is . . .

[JURAT.]

[SIGNATURE.]

§ 854. Order giving leave to correct fictitious name.

Form No. 260.

[TITLE.]

On reading and filing the affidavit of A. B., and the notice of this motion, with proof of due service thereof, and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

It is ordered that the name of . . . be substituted in the place of . . . , as the real name of the defendant in this cause.

[DATE.]

[SIGNATURE.]

§ 855. Notice of motion to amend complaint by adding defendant.

Form No. 261.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit herewith served, and on all the proceedings on file in this action, the undersigned will move the court, at the courtroom thereof, at . . . on the . . . day of . . . , 19 . . . , at . . . o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the plaintiff may have leave to amend his summons and complaint in this action, by adding L. M. as a defendant therein, with proper words to charge him, and for such other and further relief as may be just.

[DATE.]

[SIGNATURE.]

§ 856. Order of court granting leave to amend.

Form No. 262.

[TITLE.]

On motion of E. F., attorney for plaintiff in this action, notice thereof being duly served on the defendant's counsel, and after hearing thereon, it is hereby ordered that plaintiff have leave to amend his complaint filed herein.

§ 857. The same—By striking out and making new parties.

Form No. 263.

I. [Insert as in previous form.]

II. By striking out E. B. and E. D. from being plaintiffs, and by making them defendants in said action; or by adding E. F. as a defendant herein; or by substituting the name of Christian Doe as the real name of the defendant, instead of Charles Doe, wherever the same occurs in said complaint.

§ 858. Affidavit for consolidation of actions.

Form No. 264.

[Give titles separately of the various causes.]

[VENUE.]

C. D., being duly sworn, says that he is the defendant [or, one of the defendants; or, if the action be against a corporation, president of the corporation defendant] in each and all of the

above-entitled actions, which are all pending in the . . . court aforesaid; that each of said actions is founded upon a promissory note alleged to have been made by defendant and owned by the plaintiff [or, otherwise, state the nature of the various actions, so as to show that they are all of a class which the statute permits to be joined].

That the defendant has no defense to said actions and does not intend to defend the same [or, that the defenses are identical in all of said actions, namely: stating briefly the defenses; as, that the said notes were executed by defendant to plaintiff under duress, as more fully set forth in the answer of the defendant, a copy of which is hereto attached, and that the issues which will arise and be tried are the same in all of said actions; or, otherwise, state the nature and identity of the defenses, according to the fact].

[State whether causes are at issue, and, if so, when issue was joined; and if plaintiff has refused to consent to consolidation, state the fact.]

[JURAT.]

C. D.

§ 859. Notice of motion to consolidate actions.

Form No. 265.

[Give titles of all the actions separately.]

[VENUE.]

Take notice, that upon the affidavit of C. D., herewith served, and upon the pleadings heretofore filed and served in the above-entitled actions, the defendant will move the court, at a . . . term thereof to be held at the courthouse in the city of . . . in said county, on the . . . day of . . . next, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order consolidating the two above-entitled actions into one, with costs of motion.

[DATE.]

G. H., Defendant's Attorney.

[ADDRESS.]

CHAPTER XXXIII.

ENLARGING TIME TO PLEAD.

§ 860. **In general.**—When an act to be done, as provided in the Code of Civil Procedure, relates to the pleadings in the action, the undertakings to be filed, the justification of sureties, the preparation of statements, or of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by the code may be extended, upon good cause shown, by the judge of the superior court, in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days, without the consent of the adverse party. When it appears to the judge to whom such application is made that the attorney of record for the party applying for the extension is actually engaged in attendance upon a session of the legislature of this state, as a member thereof, it shall be his duty to extend said time until the session of the legislature adjourns and thirty days thereafter, but not more without consent of the adverse party.¹

The court may, in furtherance of justice, and on such terms as may be proper, enlarge the time for answer or demurrer;² or may allow an answer to be made after the time limited by this code.³ This section is limited by its terms to cases where time is allowed by some provision of the code for the doing of some act, and is designed to enable the court to grant time additional to that allowed by the code, upon good cause shown.⁴ The party must take the initiatory steps to obtain relief before the expiration of the term at which final judgment is rendered in all cases except those mentioned in the statute.⁵ Where a demurrer to a complaint is overruled, and an application is subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the court, subject to review in case

¹ Cal. Code Civ. Proc., §§ 1005, 1054; Idaho Rev. Codes, §§ 4229, 4932; Mont. Rev. Codes, §§ 7141, 7190; Utah Rev. Stats., §§ 3325-3329.

² Cal. Code Civ. Proc., § 473.

³ Id. See, also, Cal. Code Civ. Proc., § 1054.

⁴ Vestal v. Young, 147 Cal. 715, 82 Pac. 381.

⁵ Casement v. Ringgold, 28 Cal. 338.

of its arbitrary or unreasonable exercise. The exercise of this power by the court must in a degree depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice. Time to file an amended pleading is not affected by this section, but it is a matter lying entirely in the discretion of the court, and, there being no statutory provision forbidding it, the court may therefore allow more than thirty days for filing such amended pleading.⁶ In such case, where no application was made to the court for leave to answer, and no meritorious defense was asserted, this court will not reverse the judgment and open the case for another trial.⁷

§ 861. **Computation of time.**—A stipulation extending the time for one week, ending Saturday, July 4th, in which to answer, as both that day and the day following were legal holidays, has the effect of extending the time to July 6th, inclusive, and a default entered on that day is premature.⁸ In case of an extension until after ruling on a motion to strike out the complaint, the time would, by analogy, be the statutory time allowed for answering.⁹ A fraction of a day is not to be considered in computing time from one day to another, but only when the time of the successive acts performed on the same day is material.¹⁰

§ 862. **More than one extension.**—That the court is only prohibited from granting an extension of more than thirty days at any one time, but may make several extensions of thirty days each, is in direct violation of the language of the section and of the construction thereof by the supreme court.¹¹ An order granting thirty days, in addition to the ten days allowed for preparing the bill of exceptions on the judgment, exhausts the power of the court to extend the time for that purpose.¹²

§ 863. **Excessive extension.**—An extension of time to plead for a certain time after the receipt of the *remittitur* in another case is void, and is beyond the power of the court to any extent

⁶ Vestal v. Young, 147 Cal. 715, 82 Pac. 381.

⁷ Thornton v. Borland, 12 Cal. 438.

⁸ Crane v. Crane, 121 Cal. 99, 53 Pac. 433.

⁹ Willson v. Cleaveland, 30 Cal. 192.

¹⁰ Seoville v. Anderson, 131 Cal. 590, 63 Pac. 1013.

¹¹ Cameron v. Arcata & M. R. R. Co., 129 Cal. 279, 61 Pac. 955.

¹² Id.

beyond the thirty days permitted by this section.¹³ An extension of time to plead one day after the decision of the motion to set aside the service of the summons and dismiss the action is void as to any period of time it purports to allow after the expiration of the thirty days, in addition to the time allowed by law.¹⁴ An extension of time to plead for a certain number of days after the decision of the pending motion to dismiss is void as to any period of time beyond thirty days.¹⁵ That the defendant relied upon the order extending the time to plead, which was in excess of the jurisdiction of the court, is the important fact to be considered on motion to open the default.¹⁶ Limitations upon the power to extend the time contained in this section apply only to cases therein enumerated, among which the filing of affidavits on motion for new trial is not included, and therefore the power to extend the time in such cases is found in subdivision 1 of section 659 of the California Code of Civil Procedure, and an extension for more than thirty days may be granted.¹⁷

§ 864. **Justice court.**—This section has no application to acts required to be done in the justice court to perfect the appeal to the superior court. Hence, an order by the superior court extending the time for justification of sureties on an undertaking on appeal filed in the justice court is void.¹⁸

§ 865. **Costs and appeal.**—The service and filing of a memorandum of costs is fairly within the proper construction of this section, being substantially “a notice other than of appeal.”¹⁹ Notice of intention to move for a new trial is included within notices provided for in this section, and the court may, before expiration of the ten days allowed by the statute, extend the time for serving and filing the notice for a period not to exceed thirty days.²⁰ Time to prepare and serve the statement on motion for a new trial may be extended by the court or judge, but not longer than thirty days, without the consent of the adverse party, and any

¹³ *Baker v. Superior Court*, 71 Cal. 583, 12 Pac. 685.

¹⁴ *Kennedy v. Mulligan*, 136 Cal. 556, 69 Pac. 291.

¹⁵ *Gibson v. Superior Court*, 83 Cal. 643, 24 Pac. 152.

¹⁶ *Kennedy v. Mulligan*, 136 Cal. 556, 69 Pac. 291.

¹⁷ *Oberlander v. Fixen & Co.*, 129 Cal. 690, 62 Pac. 254.

¹⁸ *McCracken v. Superior Court*, 86 Cal. 74, 24 Pac. 845.

¹⁹ *Beilby v. Superior Court*, 138 Cal. 51, 70 Pac. 1024.

²⁰ *Burton v. Todd*, 68 Cal. 485, 9 Pac. 663.

extension beyond that time is void, as the power of the court or judge is exhausted by the thirty days' extension.²¹ The time for preparing the statement on motion for a new trial may be extended not to exceed thirty days without the consent of the adverse party, but any extension for a greater period gives no right to the moving party.²²

§ 866. **Stipulations.**—A stipulation extending the time does not prohibit an order further extending the time, under the provisions of this section.²³ The extension of time by stipulation does not preclude the court from granting thirty days' extension after the expiration of the time granted by the stipulation.²⁴

§ 867. **Order must be made in time.**—Extension of time must be made within the period allowed for the doing of the act and while the right to do it is still alive. After the right is gone, giving further time could not be called an extension of time, but would be in effect reviving a right which no longer existed. When such an order is given, there is no period of time to extend, and the court has no further jurisdiction in the matter.²⁵

§ 868. **Shortening time.**—In some cases the court may shorten the time for service of notices and doing of certain acts, such as taking depositions, making sales, etc.²⁶

²¹ Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301.

²² Freese v. Freese, 134 Cal. 48, 66 Pac. 43.

²³ Curtis v. Superior Court, 70 Cal. 390, 11 Pac. 652.

²⁴ Reclamation Dist. v. Hamilton, 112 Cal. 603, 44 Pac. 1074.

²⁵ Clark v. Crane, 57 Cal. 629; Em-eric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Freese v. Freese, 134 Cal. 48, 66 Pac. 43; Matter of Clary, 112 Cal. 292, 44 Pac. 569; Estate of Clary, 112 Cal. 292, 44 Pac. 569; Connor v. Southern California M. R. Co., 101

Cal. 429, 35 Pac. 990; Tregambo v. Comanche M. & Min. Co., 57 Cal. 501; Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780.

²⁶ Cal. Code Civ. Proc., §§ 1005, 2031; Alaska Codes, pt. 4, ch. 64, §§ 642-658; Ariz. Civ. Code, pars. 2506-2532; Idaho Rev. Codes, §§ 4229, 6062; Mont. Rev. Codes, §§ 7141, 8007; Nev. Comp. Laws, § 3503; N. Mex. Comp. Laws, §§ 3041, 3067; Or. B. & C. Codes, § 835; Utah Rev. Stats., §§ 3325, 3456; Wash. Bal. Codes, § 6020.

FORMS FOR ENLARGING TIME TO PLEAD.

§ 869. Affidavit for extension of time to plead, pending delivery of copy of account.

[TITLE.] Form No. 266.

[VENUE.]

G. H., being first duly sworn, says that he is the attorney for the defendant in this action; that the same was commenced by the service of a summons and complaint, on the . . . day of . . . , 19 . . . , and is brought to recover the sum of . . . dollars, alleged to be due from the defendant to the plaintiff upon account for goods sold [or, otherwise, state what action is brought for]; that the items of said alleged account are not set forth in said complaint, and on the . . . day of . . . , 19 . . . , this affiant served a written demand on the plaintiff's attorney, of which demand a copy is hereto annexed and made part hereof; that said account has not yet been served on this affiant; that the time for answering the said complaint expires on the . . . day of . . . , 19 . . . , and that the affiant is unable to prepare the answer to said complaint without said account; that the defendant has instructed this affiant to prepare an answer, and has expressed to affiant a purpose in good faith to defend the action, and, from a statement of the case in this action made by the defendant to him, the affiant verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof.

[JURAT.]

G. H.

§ 870. Order extending time to plead, pending service of copy of account.

Form No. 267.

[TITLE.]

On reading and filing the affidavit of L. M., hereto annexed, and the complaint in this action, and on motion of G. H., attorney for the defendant:

Ordered, that the time for answering the complaint herein be extended for . . . days after the plaintiff shall have delivered

to the defendant's attorney a copy of the account referred to in said complaint.

And meanwhile let all proceedings herein, on the part of the plaintiff, be stayed.

Dated, . . ., 19 . .

J. K., Circuit Judge.

§ 871. Notice of motion for extension of time to answer.

Form No. 268.

[TITLE.]

Take notice, that on the affidavit of C. D., a copy of which is herewith served, and upon the complaint heretofore served and filed, the undersigned will move the court, in the courtroom of Department No. . . . at . . . on the . . . day of . . ., 19 . . ., at . . . o'clock in the . . . noon, to enlarge the time to answer herein . . . days, or for such other relief as may be just.

Dated, . . ., 19 . .

G. H., Defendant's Attorney.

To E. F., Esq., Plaintiff's Attorney.

§ 872. Affidavit on motion to enlarge time to plead.

Form No. 269.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. I have fully and fairly stated the case in this cause to G. H., my counsel herein, who resides at . . . [or, at No. . . ., . . . street, in the city of . . .]; and I have a good and substantial defense, on the merits, to said action, as I am advised by my counsel, after such statement so made to him as aforesaid, and verily believe.

III. [State excuse for desiring enlargement of time.]

IV. That the complaint was served on the . . . day of . . ., 19 . . ., and the time to answer will expire on the . . . day of . . ., 19 . . ., that no extension of such time has been had, and . . . days further time are necessary to prepare and file said answer.

[JURAT.]

[SIGNATURE.]

§ 873. Order enlarging time to plead.

Form No. 270.

On the annexed affidavit of C. D., and on motion of G. H., his attorney, it is ordered that said defendant have . . . days further time from and after the . . . day of . . . , 19 . . . , to answer the complaint of plaintiff herein.

[DATE.]

[SIGNATURE OF JUDGE.]

CHAPTER XXXIV.

NOTICES, AFFIDAVITS, AND ORDERS IN GENERAL.

§ 874. **Motions and notices in general.**—It is prescribed by the statute of California that “every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.”¹ Mere declaration by the judge—e. g. that the injunction is no longer in force—does not constitute an order.² The decision of a justice of the peace under proceedings supplementary to an execution is a mere order, and does not constitute a judgment within the meaning of section 974 of the California Code of Civil Procedure.³ It may be defined to be the judgment or conclusion of the court, upon any motion or proceeding; and includes cases where affirmative relief is granted, and cases where relief is denied.⁴ An order is a direction of a court or judge made or entered in writing, and not included in a judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment.⁵ A party in court must take notice of all orders in the case, and of pleadings filed in pursuance thereof.⁶ The effect of an order, general in its terms at its close, may be determined or ascertained by reference to the motion upon which it was made, when such motion is recited in the order at its commencement.⁷ A motion is an application for an order or a direction of the court not included in the judgment.⁸ In practice, a motion is an oral argument to the court, showing why a certain order should be made; while a notice is a written information given

¹ Cal. Code Civ. Proc., § 1003; *Peters v. Vawter*, 10 Mont. 201, 25 Pac. 438.

² *Devlin v. Rydberg*, 132 Cal. 324, 64 Pac. 396.

³ *Wells v. Torrance*, 119 Cal. 437, 51 Pac. 626.

⁴ *Gilman v. Contra Costa County*, 8 Cal. 57, 68 Am. Dec. 290; *In re Smith*, 98 Cal. 640, 33 Pac. 744.

⁵ *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312.

⁶ *Williams v. Miller*, 1 Wash. T. 88.

⁷ *McKinley v. Tuttle*, 34 Cal. 248; *Byrne v. Hoag*, 126 Cal. 283, 58 Pac. 688.

⁸ *Estate of Harrington*, 147 Cal. 124, 109 Am. St. Rep. 118, 81 Pac. 546.

to the opposite party, that at a certain time and place the party giving the same will move the court for a certain order, stating what. It is also necessary for the moving party to state in such notice the grounds or particular points upon which the motion will be made.⁹ Written notice of motions is required in all cases except those made during the progress of a trial;¹⁰ and also upon what the motion will be founded, as upon affidavits, papers on file, etc. The attention of the court must be called to the relief asked. Mere filing of a written application is not sufficient as a motion.¹¹ It is also provided by our statute that motions must be made in the county in which the action is brought, or in an adjoining county within the same district.¹² Thus the practitioner may readily know where the motion must be made. The title of the action must also be correctly given, with the date and hour of the day when it will be made, and the particular place—e. g. the city hall, courthouse, etc.

§ 875. The true practice is to be very specific in all questions of time, place, and object of the motion. There are certain motions which are termed contested motions, and certain others termed *ex parte* motions. The former always require previous notice, the latter never. An order made without notice may be vacated or modified without notice.¹³ When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of each party has his office, five days before the time appointed for the hearing, otherwise ten days. When served by mail one day must be added for every twenty-five miles of distance between the place of deposit and the place of service, such increase not to exceed thirty days in all; but in all cases the court, or a judge thereof, may prescribe a shorter time.¹⁴ Notice of motion is not neces-

⁹ Freeborn v. Glazer, 10 Cal. 337; Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462.

¹⁰ Colo. Civ. Code, § 372; Taylor v. Derry, 4 Colo. App. 109, 35 Pac. 60; Mallan v. Higenbotham, 10 Colo. 264, 15 Pac. 352.

¹¹ Wallace v. Lewis, 9 Mont. 403, 24 Pac. 22.

¹² Cal. Code Civ. Proc., § 1004; Alaska Codes, pt. 4, ch. 49, §§ 491, 494; Ariz. Civ. Code, pars. 1567-

1578; Idaho Rev. Codes, § 4881; Mont. Rev. Codes, § 7140; Nev. Comp. Laws, §§ 3586, 3594; N. Mex. Comp. Laws, § 2685, subds. 97-102; Or. B. & C. Codes, §§ 534-546; Utah Rev. Stats., §§ 3323-3329; Wash. Bal. Codes, §§ 4888-5080; Wyo. Rev. Stats., §§ 3595-3600.

¹³ Cal. Code Civ. Proc., § 937; Coburn v. Pacific L. & M. Co., 46 Cal. 31.

¹⁴ Cal. Code Civ. Proc., § 1005.

sary except when the statute requires it, or when directed by a court or judge in pursuance thereof.¹⁵ This is the statutory rule, but the court, in the exercise of sound discretion, may extend or even shorten the time. These are questions which arise in the course of the action, and only relate to the practice, and, so far as allowable by the statute, are generally regulated by the rules of each particular court, a full knowledge of which is too frequently not regarded by the profession as essential.

§ 876. Service of notice.—The question of service of notice, where important rights are to be affected, must be carefully considered. The statute must be strictly followed to insure due and legal service, as nothing will be left to implication. Unless the statute be strictly followed, the court will not have acquired jurisdiction to make the order asked for, and the entire proceedings will be illegal. Frequently notice is waived by stipulation of attorneys not in writing. This may be sufficient among honorable practitioners, but it is not the true practice, as it sometimes fails of its object; whereas, if the directions of the statute be strictly followed, no misunderstanding can arise.

§ 877. Appearance.—Service of notice of appearance must antedate or be contemporaneous with the service of all other notices and papers.¹⁶ Appearance and motion to set aside a judgment upon which it is admitted the defendant was actually served with summons cures a misnomer of the defendant in the return of service.¹⁷ A party intending to appear specially and move to set aside a default and judgment upon the ground that the court has no jurisdiction over his person, because there has been no valid service of summons, must carefully occupy that ground exclusively, and must keep out of court for all other purposes, if he would refrain from making a general appearance.¹⁸ Service of summons after the three years prescribed by section 581 of the California code, entry of its default, and appearance solely for the purpose of asking that the action be dismissed, cannot be held voluntary appearance such as will defeat the right to dismissal under said section.¹⁹ Special appearance may

¹⁵ Bush v. Geisey, 16 Or. 267, 19 Pac. 122.

¹⁶ Steinbach v. Leese, 27 Cal. 297.

¹⁷ Thompson v. Alford, 135 Cal. 52, 66 Pac. 983; Thompson v. Alford, 128 Cal. 227, 60 Pac. 686.

¹⁸ Security L. & T. Co. v. Boston & S. R. F. Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296.

¹⁹ Sharpstein v. Eells, 132 Cal. 507, 64 Pac. 1080.

be made for the purpose of quashing summons or proof of service, and such is not a general submission to the jurisdiction of that court.²⁰ A stipulation extending the time to plead, if it could in any event be considered an appearance, must be made before the expiration of three years, or it could not be held a bar to dismissal under that section.²¹

§ 878. Computation of time.—The time within which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.²² When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or the service of notices other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days without the consent of the adverse party; except that when it appears to the judge to whom said application is made, that the attorney of record for the party applying for said extension is actually engaged in attendance upon a session of the state legislature, as a member thereof; in which case it will be the duty of said judge to extend said time until the legislature adjourns, and thirty days thereafter.²³ Shortening the time of notice by the judge will in absence of any showing to the contrary, be deemed made for sufficient cause.²⁴

§ 879. Consolidation of actions.—Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.²⁵ The su-

²⁰ McDonald v. Agnew, 122 Cal. 448, 55 Pac. 125.

²¹ Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

²² Cal. Code Civ. Proc., § 12. See Derby v. City of Modesto, 104 Cal. 522, 38 Pac. 900; Hoyt v. San Francisco etc. R. R. Co., 87 Cal. 610, 25 Pac. 160, 1066.

²³ Cal. Code Civ. Proc., § 1054, as amended by act of January 31, 1895.

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See Reay v. Butler, 99 Cal. 477, 480, 33 Pac. 1134. As to extension of time for filing notices under this section, see Burton v. Todd, 68 Cal. 485, 9 Pac. 663.

²⁴ Cal. M. & S. Bank v. Graves, 129 Cal. 649, 62 Pac. 259.

²⁵ Cal. Code Civ. Proc., § 1048; N. Y. Code Civ. Proc., § 817; Putnam v. Lyon, 3 Colo. App. 144, 32 Pac. 492.

preme court will not consolidate suits brought upon distinct causes of action.²⁶

§ 880. **Construction.**—If there is any ambiguity in the terms of a notice rendering its meaning doubtful, the construction must be most strongly against the party giving the notice.²⁷

§ 881. **Discretion.**—All the proceedings in a case are supposed to be within the control of the court while they are in paper, and before a jury is sworn or judgment given. Therefore, orders may be revised, and such as in the judgment of the court may have been irregular or improperly made may be set aside.²⁸ A question whether a party had a right to proceed summarily on motion to vacate a decree in the circuit court is merely one of practice, to be governed by the rules prescribed by the supreme court, and the established principle and usage of a court of chancery.²⁹ When granting of a motion is proper upon one of the grounds stated, the court may disregard other grounds.³⁰

§ 882. **Contents of notice.**—A notice of motion must state the grounds thereof; hence, an appeal will not be dismissed for failure to file an undertaking, where such is not made the ground of the motion, as, had such ground been stated, it might have been made to appear that the undertaking was waived.³¹ Grounds need not be stated at length in making oral motions; but the court must in some way be informed thereof; this may be done by reference to some paper on file.³² Grounds of motion for judgment on pleadings are sufficiently stated as follows: That a motion will be made “upon the pleadings, papers, files, and records in said action, and upon the ground that the answer on file herein constitutes no defense to the cause of action or any portion thereof stated in the complaint.”³³ In the justice’s

²⁶ Wallace v. Eldredge (No. 2), 27 Cal. 498.

²⁷ Carpentier v. Thurston, 30 Cal. 123.

²⁸ Breedlove v. Nicolet, 7 Pet. 413, 8 L. Ed. 731. An order obtained “by means of an artifice and trick practiced upon the court” may be set aside by the court which made it. Page v. Page, 77 Cal. 83, 19 Pac. 183.

²⁹ Wiggins v. Gray, 24 How. 303, 16 L. Ed. 688.

³⁰ Toy v. Haskell, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89.

³¹ Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176.

³² Williams v. Hawley, 144 Cal. 97, 77 Pac. 762.

³³ Hearst v. Hart, 128 Cal. 327, 60 Pac. 846.

court, notice of setting a cause for trial is jurisdictional, and must be in writing.³⁴

§ 883. **Due notice.**—Due notice cannot be defined. Circumstances must control each case.³⁵ Notice to a deputy marshal is equivalent to notice to the marshal himself.³⁶

§ 884. **Notice essential.**—An amendment of a judgment to correct a mere clerical misprision may be made by the court of its own motion, and with or without notice.³⁷ Notices should specify the ground of motion and give information to the adverse party as to the character of the objections which will be taken,—e. g. notice of motion to dissolve attachment, “because said writ was improperly issued,” is insufficient; it should specify, as the grounds of the motion, wherein it would be urged that the writ was improperly issued.³⁸ Special motions, unlike those granted of course, require allowance by the judge, and previous notice to the adverse party.³⁹ Upon application by counsel for the plaintiff, a day was assigned to argue the question of the jurisdiction of the court to proceed in the cause, upon the condition that notice should be given to the defendant, to enable him to employ counsel in the interim, as the court would not feel bound by its decision in an *ex parte* argument if the defendant should desire to have the question again argued.⁴⁰ Previous notice of a motion for the appointment of a receiver is unnecessary when the parties to be affected are in court by counsel.⁴¹ A motion to produce a paper in the possession of the plaintiff, which is necessary to enable the plaintiff to plead, may be granted, in the discretion of the court, although no notice has been given; otherwise, when possession of a paper is desired to be used in evidence.⁴² The above references are more especially applicable to the practice in the United States courts.⁴³ It is prescribed by the Code of Civil

³⁴ *Elder v. Justice's Court*, 136 Cal. 364, 68 Pac. 1022.

³⁵ *Lawrence v. Bowman*, 1 McAll. 419, Fed. Cas. No. 8134.

³⁶ *United States v. Bank of Arkansas, Hempst.* 460, Fed. Cas. No. 14515.

³⁷ *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321, 45 Pac. 15; *Scamman v. Bonslett*, 118 Cal. 93, 62 Am. St. Rep. 226, 50 Pac. 272.

³⁸ *Freeborn v. Glazer*, 10 Cal. 337.

³⁹ *United States v. Parrott*, 1 McAll. 447, Fed. Cas. No. 15999; *Nevitt v. Crow*, 1 Colo. App. 453, 29 Pac. 749.

⁴⁰ *New Jersey v. New York*, 3 Pet. 461, 7 L. Ed. 741.

⁴¹ *McLean v. Lafayette Bank*, 3 McLean, 503, Fed. Cas. No. 8887.

⁴² *Bronson v. Kensey*, 3 McLean, 180, Fed. Cas. No. 1927.

⁴³ See Cal. Code Civ. Proc., §§ 449, 1938.

Procedure of California that after appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him, unless he be imprisoned for want of bail.⁴⁴ A party cannot render himself unable to receive a notice, and then be heard to complain because notice is not given.⁴⁵ Notices must be in writing, and if any paper upon which the motion is based has not previously been served upon the party to be notified, and was not filed by him, a copy of such paper must accompany the notice. It may be served upon the party or his attorney.⁴⁶ Where notice of a decision is required to be given, written notice is usually intended.⁴⁷

§ 885. **Notice to attorney.**—It is the duty of an attorney to communicate to his client whatever information he acquires in relation to the subject-matter of the suit, and he will be presumed to have performed his duty, and notice to him is constructive notice to his client.⁴⁸ The control of the course of the action in the court rests exclusively with the attorney, where the party appears with an attorney, and the court has no authority to recognize any one else in the conduct or disposition of that case, and, therefore, a stipulation signed by the party himself providing for certain steps in the action will be disregarded by the court.⁴⁹ Where a party changes his attorney in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record.⁵⁰ Notice of motion for new trial must be given by the attorney of record.⁵¹

§ 886. **Order of court—Entry nunc pro tunc.**—A court has no power, after the adjournment of a term, to direct the clerk to enter in the minutes, *nunc pro tunc*, an order alleged to have been made at the adjourned term, when there is nothing in the record to show that such order was made.⁵² An order *nunc pro*

⁴⁴ Cal. Code Civ. Proc., § 1014.

⁴⁵ Orr Water Co. v. Reno Water Co., 19 Nev. 60, 6 Pac. 72.

⁴⁶ Cal. Code Civ. Proc., § 1010.

⁴⁷ Forni v. Yoell, 99 Cal. 173, 176, 33 Pac. 887.

⁴⁸ Bierce v. Red Bluff Hotel Co., 31 Cal. 160. See Weeks on Attorneys, § 237.

⁴⁹ Toy v. Haskell, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89.

⁵⁰ Grant v. White, 6 Cal. 55.

⁵¹ Prescott v. Salthouse, 53 Cal. 221. Must be served upon the attorney of record. Frost v. Meetz, 52 Cal. 664. See, also, Cal. Code Civ. Proc., § 1015.

⁵² Hegeler v. Henckell, 27 Cal. 491.

tunc may be made to correct a mistake in failing to enter an order which was actually made, or which should have been made as a matter of course.⁵³ Notice of motion to enter an order *nunc pro tunc* is made by the party to whom the notice should have been given, being present in court at making of the motion, and without objection taking part in and arguing the same.⁵⁴

§ 887. **Order to show cause.**—An order to show cause why a judgment should not be vacated must be served, or it will be error to vacate the judgment on such order.⁵⁵ An order to show cause why a commission should not issue to take a deposition is, if served upon the adverse party, a sufficient notice to him to justify the issuance.⁵⁶

§ 888. **Order, when granted.**—Motion for any rule or order is not allowed when the court is equally divided. If an affirmative decision be indispensable, the case stops and the parties go out of court; otherwise, the case stands as if no motion had been made.⁵⁷ A motion made at one term, not being decided nor continued, the court will order a continuance *nunc pro tunc*, and the defendant will not be required to take up the motion at that term, as he had the right to suppose that it was abandoned.⁵⁸

§ 889. **Res adjudicata.**—In its strictest sense it does not apply to mere orders made on motion in a proceeding.⁵⁹

§ 890. **Restitution of rights after reversal of judgment.**—Where the judgment of a lower court is reversed or modified on appeal, although the supreme court may restore the property or rights lost by the erroneous judgment or order, this does not exclude the lower court from exercising the same power. The party aggrieved may proceed in the lower court by motion, against which there seems to be no statute of limitations where there is no unreasonable delay.⁶⁰

⁵³ Estate of Skerrett, 80 Cal. 62, 22 Pac. 85. See, also, Crim v. Kes-sing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

⁵⁴ Herman v. Santee, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509.

⁵⁵ Vallejo v. Green, 16 Cal. 160.

⁵⁶ Dambmann v. White, 48 Cal. 439.

⁵⁷ Goddard v. Coffin, 2 Ware, 382, (Davis, 381), Fed. Cas. No. 5490.

⁵⁸ Hurd v. Williams, 4 McLean, 239, Fed. Cas. No. 6918.

⁵⁹ Estate of Harrington, 147 Cal. 124, 109 Am. St. Rep. 118, 81 Pac. 546.

⁶⁰ Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459. See, also, Pico v. Cuyas, 48 Cal. 639.

§ 891. **Rule to show cause.**—It has been held by the supreme court of the United States that the rule on the judge of a district court to show cause is a rule upon the judge to explain his conduct; and furnishes a case by implication which makes it proper that the supreme court should know the reason for his decision. The rule ought not to be granted when the record does not show mistake, misconduct, or omission of duty on the part of the court, unless a *prima facie* case be made out by affidavit.⁶¹ Malicious conduct of an officer in executing process cannot be reached by motion.⁶² But when a sheriff, having received an execution on which costs are due, fails to make them when practicable, he becomes responsible, and may be reached by motion. An order of the client or attorney cannot change this liability.⁶³

§ 892. **Service, how made.**—Service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows: 1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of not less than eighteen years of age, if his residence is in the same county with his office; and if his residence is not known or is not in the same county with his office, or, being in the same county, it is not open, or there is not found thereat any person of not less than eighteen years of age, then by putting the same, inclosed in a sealed envelope, into the post-office, directed to such attorney at his office, if known; otherwise, to his residence, if known; and if neither his office nor residence is known, then by delivering the same to the clerk of the court for the attorney; 2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person; and if his residence is not known, by delivering the same to the clerk of the court for such party.⁶⁴ The "delivery," which constitutes a personal service

⁶¹ Postmaster-General v. Trigg, 11 Pet. 173, 9 L. Ed. 676.

⁶² Smith v. Miles, Hempst. 34, Fed. Cas. No. 13079a.

⁶³ Lewis v. Hamilton, Hempst. 21, Fed. Cas. No. 8324a.

⁶⁴ Cal. Code Civ. Proc., § 1011, as amended 1907.

under this section, need not be made by the party attempting to make the service, but can be effected through a clerk or messenger, or through any agency by which a delivery can be made.⁶⁵ In the absence of an attorney from his office, the service of a notice on him is sufficiently made by depositing a copy thereof through the door of his office into a postal box which had been placed there for reception of documents.⁶⁶ Such person being in charge of an office must be understood to be in charge of the whole of it, and, therefore, a paper placed before his eyes in a conspicuous place on a desk therein is, in contemplation of the law, left "with a person having charge of the office."⁶⁷ The power of a clerk of an attorney or a person in charge of his office, by leaving notice with whom service may be made, is not by implication sufficient to bind his principal by any agreement with reference to the case.⁶⁸ An affidavit which states that affiant "left a true copy at the office of C. & B., the attorneys for the defendant," is insufficient.⁶⁹ In all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt.⁷⁰ Reading an order of court to the party to be served is not a compliance with a statute which requires that such party shall have reasonable notice in writing of the order.⁷¹ A notice can lawfully be served on Sunday,⁷² although it need not be served until the following day. Service of notice is not "judicial business," within the meaning of the constitution (art. VII, § 5) of California.⁷³ Notice of setting a cause for trial in a justice's court is jurisdictional, and must be served as prescribed in this chapter. Proof of such service should be required. The justice should not accept verbal statement that the notice has been served upon the defendant; nor can waiving of service of such notice be made by talking over a telephone.⁷⁴

⁶⁵ *Heinen v. Heilbron*, 94 Cal. 636, 30 Pac. 8.

⁶⁶ *January v. Superior Court*, 73 Cal. 537, 15 Pac. 108.

⁶⁷ *People v. Perris Irr. Dist.*, 142 Cal. 601, 76 Pac. 381.

⁶⁸ *Page v. Superior Court*, 122 Cal. 209, 54 Pac. 730.

⁶⁹ *Gallardo v. Atlantic & P. T. Co.*, 49 Cal. 510.

⁷⁰ Cal. Code Civ. Proc., § 1015.

⁷¹ *Hart v. Gray*, 3 Sumn. 339, Fed. Cas. No. 6152.

⁷² *Chesapeake etc. Canal Co. v. Bradley*, 4 Cranch C. C. 193, Fed. Cas. No. 2646.

⁷³ *Reclamation Dist. v. Hamilton*, 112 Cal. 603, 44 Pac. 1674.

⁷⁴ *Elder v. Justice's Court*, 136 Cal. 364, 68 Pac. 1022.

§ 893. **Proof of service.**—Proof of service of notice of appeal originally defective may be cured by an affidavit filed in pursuance of leave for that purpose.⁷⁵ The fact of service of notice, rather than evidence thereof, gives the court jurisdiction, and service of notice of appeal may be shown in other modes than by being incorporated in the transcript.⁷⁶ Service of notice, if not shown by official certificate or by admission of parties served, must be proved by affidavit of some competent person. An affidavit of a third person is entitled to as much weight as that of the party or his attorney.⁷⁷ Affidavit of service in cases other than actual personal service must show all requirements of law, to the effect that service has been complied with, and also the existence of conditions authorizing service in the mode adopted.⁷⁸

§ 894. **Service by mail.**—Service by mail may be made where the person making the service and the person on whom it is to be made reside or have their offices in different places, between which there is a regular communication by mail.⁷⁹ In such case, the notice or other paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address, such extension not to exceed thirty days in all.⁸⁰ This does not apply to time set for justification of sureties upon appeal-bond,⁸¹ nor to time for filing a paper, such as a notice of appeal.⁸² Distance is a question of fact, to be determined by proof.⁸³ A party relying upon a service of notice by mail must show strict compliance with the statute.⁸⁴ Service by mail cannot

⁷⁵ *Schloesser v. Owen*, 134 Cal. 546, 66 Pac. 726; *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509.

⁷⁶ *Sutter County v. Tisdale*, 128 Cal. 180, 60 Pac. 757; *Martin v. De Arnelas*, 139 Cal. 41, 72 Pac. 440.

⁷⁷ *Moore v. Besse*, 35 Cal. 184.

⁷⁸ *Mohr v. Byrne*, 131 Cal. 288, 63 Pac. 341.

⁷⁹ Cal. Code Civ. Proc., § 1012.

⁸⁰ Cal. Code Civ. Proc., § 1013. See, also, Cal. Code Civ. Proc., 1005.

⁸¹ *Brown v. Rouse*, 115 Cal. 619, 47 Pac. 601.

⁸² *McDonald v. Lee*, 132 Cal. 252, 64 Pac. 250.

⁸³ *Neely v. Naglee*, 23 Cal. 152.

⁸⁴ *Matter of Tracey*, 136 Cal. 385, 69 Pac. 20; *People v. Alameda Turnpike Co.*, 30 Cal. 182; *Heinlen v. Heilbron*, 94 Cal. 636, 30 Pac. 8. As

be made by a deposit in the post-office in the place where the attorney on whom the service is to be made resides.⁸⁵

§ 895. Service on non-residents.—When a plaintiff or defendant who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. If his sole attorney has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place.⁸⁶ Special appearance of an attorney for the purpose of motion before demurrer or answer does not entitle him to a notice of subsequent motions and proceedings.⁸⁷ But the absence of a purchaser at sheriff's sale from the state does not excuse service on him of notice of a motion to set aside the execution and sale.⁸⁸

§ 896. Motions—Knowledge of judge.—In all motions before a judge during the progress of a trial, he may act on his own knowledge in regard to things which, in their nature, are better known to himself than they could be to others.⁸⁹ Where the judge had knowledge of matters involved in a decision on a motion, it will be presumed, if necessary to support the judgment or order, that he acted upon such knowledge.⁹⁰ Amendment of a judgment, to correct a mere clerical misprision, may be made by the court of its own motion, and with or without notice.⁹¹

§ 897. The same—Renewal of.—In all ordinary motions, where the jurisdiction is not limited by statute, it is in the discretionary power of the court or judge hearing and denying a motion to

to sufficiency of service of notice by mail, see *Eltzroth v. Ryan*, 91 Cal. 584, 27 Pac. 932; *Murdock v. Clarke*, 73 Cal. 25, 14 Pac. 385; *Hogs Back etc. Min. Co. v. New Basil Co.*, 63 Cal. 121.

⁸⁵ *Thompson v. Brannan*, 76 Cal. 618, 18 Pac. 783. As to sufficient publication of notice in newspaper, see *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71; *Richardson v. Tobin*, 45 Cal. 30.

⁸⁶ Cal. Code Civ. Proc., § 1015.

⁸⁷ *Wood v. Herman Min. Co.*, 139 Cal. 713, 73 Pac. 588.

⁸⁸ *Eckstein v. Calderwood*, 34 Cal. 658.

⁸⁹ *Southern California etc. Road Co. v. San Bernardino Nat. Bank*, 100 Cal. 316, 34 Pac. 711.

⁹⁰ *Southern California M. R. Co. v. San Bernardino Nat. Bank*, 100 Cal. 316, 34 Pac. 711.

⁹¹ *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321, 45 Pac. 15.

grant leave for its renewal.⁹² In a case where a motion is made to vacate a judgment entered without findings, the court has jurisdiction, and it is within its discretion to allow a motion to vacate the judgment to be renewed, although it had previously been denied.⁹³ Motion to open default and motion to vacate judgment may be separate and distinct from each other, depending upon a different record and seeking different relief. A party is not precluded from making one of these motions because the other has been denied.⁹⁴

§ 898. **The same—Dilatory, not favored.**—Dilatory motions based upon special appearances are not favored, being contrary to the policy of the reformed procedure.⁹⁵

§ 899. **The same—Abandonment of.**—The failure of the defendant to appear upon the hearing of his motion for leave to file a supplemental answer will be considered an abandonment of the motion.⁹⁶

§ 900. **The same—In transcript, when considered.**—Motions copied into the transcript and entries by the clerk of rulings thereon are not parts of the record, and will not be considered on appeal unless properly brought before the court.⁹⁷

§ 901. **Waiver of written notice.**—Written notice of the overruling of a demurrer is waived by the presence in court of the attorney for the demurring party at the time of the ruling, and the time to amend or answer runs in such case from the time when the ruling is made.⁹⁸ Waiver of notice may be made by the party entitled to it.⁹⁹ Appearance in court and hearing order overruling demurrer announced does not waive the right to notice of order.¹⁰⁰

⁹² *Hitchcock v. McElrath*, 69 Cal. 639, 11 Pac. 487; *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592; *Kenney v. Kelleher*, 63 Cal. 442. The judge may at chambers grant leave to renew the motion. *Id.*

⁹³ *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721.

⁹⁴ *Thompson v. Alford*, 128 Cal. 227, 60 Pac. 686.

⁹⁵ *Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730.

⁹⁶ *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627.

⁹⁷ *Fisher v. United States*, 1 Okla. 252, 31 Pac. 195.

⁹⁸ *Wall v. Heald*, 95 Cal. 364, 30 Pac. 551.

⁹⁹ *Forni v. Yoell*, 99 Cal. 173, 33 Pac. 887; *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123; *Gardner v. Stare*, 135 Cal. 118, 67 Pac. 5.

¹⁰⁰ *McCord & N. M. Co. v. Glenn*, 6 Utah, 139, 21 Pac. 500; *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123.

§ 902. **Orders—Order made during vacation.**—An order during vacation dismissing attachment proceedings, and ordering the attached property released, upon a motion therefor, filed and argued during term, is void, and the motion is thereafter still pending.¹⁰¹ The general rule is that all judicial business must be transacted in court, and authority to transact such business out of court is exceptional, and does not exist, unless expressly authorized by statute.¹⁰²

§ 903. **The same—Presumption in favor of.**—If an order of the trial court is warranted by any possible state of facts not negatived by the record upon appeal, it must be presumed, in justification of the order, that such a state of facts existed.¹⁰³

§ 904. **The same—Entry of in minutes.**—The duty of the clerk is to enter the motion and order made thereon in the minutes of the court, and the entry should state the grounds on which the motion is based, in substance, as stated by counsel making it. These grounds need not in all cases be entered in the minutes in full. If reference to any document filed is made in the statement of grounds, the entry may, and for the sake of brevity should, refer to the same document.¹⁰⁴ The action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk.¹⁰⁵ An order entered upon consent cannot be assigned as error.¹⁰⁶

§ 905. **Title of action.**—An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.¹⁰⁷

§ 906. **Transfer of motions and orders.**—When a notice of motion is given, or an order to show cause is made returnable

¹⁰¹ Colter v. Marriage, 3 N. Mex. 351, 9 Pac. 383.

¹⁰² Carpenter v. Nutter, 127 Cal. 61, 59 Pac. 301.

¹⁰³ Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888.

¹⁰⁴ Williams v. Hawley, 144 Cal. 97, 77 Pac. 762.

¹⁰⁵ Niles v. Edwards, 95 Cal. 47, 30 Pac. 134; Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109.

¹⁰⁶ Putnam v. Lyon, 3 Colo. App. 144, 32 Pac. 492.

¹⁰⁷ Cal. Code Civ. Proc., § 1046; Mills v. Dunlap, 3 Cal. 94; Butler v. Ashworth, 100 Cal. 334, 34 Pac. 780.

before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge, before whom it might originally have been brought.¹⁰⁸

§ 907. Denial of execution.—When a copy of a written instrument is contained in an answer or annexed thereto, to avoid an admission of its genuineness and due execution, the plaintiff must file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant.¹⁰⁹ But the execution of such instrument is not deemed admitted by failure to deny the same on oath if the party desiring to controvert the same is, upon demand, refused an inspection of the original.¹¹⁰

§ 908. Actions for real property.—The court in which an action is pending for the recovery of real property, or a judge thereof, or a county judge, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts thereon, for the purpose of the action.¹¹¹

§ 909. Service of order.—The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property he is liable therefor.¹¹²

§ 910. Costs, security of.—After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking has been filed, the court or judge may order the action to be dismissed.¹¹³ Where notice requiring security for costs was given, unaccompanied by an order staying proceedings, and judgment was rendered for defendant, and

¹⁰⁸ Cal. Code Civ. Proc., § 1006.

¹⁰⁹ Cal. Code Civ. Proc., § 448. See *In re Garcelon*, 104 Cal. 581, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595.

¹¹⁰ Cal. Code Civ. Proc., § 449. As

to order for an inspection, see Cal. Code Civ. Proc., § 1000.

¹¹¹ Cal. Code Civ. Proc., § 742.

¹¹² Cal. Code Civ. Proc., § 743.

¹¹³ Cal. Code Civ. Proc., § 1037.

plaintiff appealed, it was held that the motion to dismiss the action came too late after judgment, and that the motion to dismiss the appeal must be denied, the undertaking on appeal being sufficient.¹¹⁴ The foregoing decision seems to take it for granted that an order for a stay of proceedings would be proper, but whether it is necessary, *quære*.¹¹⁵

§ 911. **Costs, security of—From whom required.**—Security for costs and charges which may be awarded against the plaintiff, not exceeding three hundred dollars, may be required by the defendant when the plaintiff resides out of the state or is a foreign corporation.¹¹⁶ After the undertaking or bond, in the form specified, is given, a new or additional undertaking may be required by the court, when the first is deemed insufficient; but the court has no power to dispense with the giving of the first bond or undertaking.¹¹⁷ The contest of the probate of a will is not an action provided for in this section, and therefore a non-resident contestant need not give this security.¹¹⁸ In New York, a plaintiff who is a non-resident at the time of commencing his action is not excused from filing security for costs by the fact that he afterwards became a resident.¹¹⁹ The defendant has the right to security for costs only, where all the plaintiffs are non-residents.¹²⁰ A foreign government suing in a court of the state may be required to file security for costs.¹²¹ The principal office or place of business of a corporation may be said to be its residence.¹²² In California, a new or additional undertaking may be ordered, upon proof that the original undertaking is insufficient.¹²³ It was formerly held otherwise in New York.¹²⁴

¹¹⁴ Comstock v. Clemens, 19 Cal. 77.

¹¹⁵ See Cal. Code Civ. Proc., § 1036.

¹¹⁶ Id.

¹¹⁷ Meade Co. Bank v. Bailey, 137 Cal. 447, 70 Pac. 297.

¹¹⁸ Estate of Joseph, 118 Cal. 660, 50 Pac. 768.

¹¹⁹ Ambler v. Ambler, 8 Abb. Pr. 340.

¹²⁰ Ten Broeck v. Reynolds, 13 How. Pr. 462. See, as to security for

costs, Swift v. Stine, 3 Wash. T. 518, 19 Pac. 63; Robinson v. Haller, 8 Wash. 309, 36 Pac. 134; Marsh v. Kinna, 2 Mont. 547.

¹²¹ Republic of Mexico v. Arrangois, 3 Abb. Pr. 470.

¹²² Jenkins v. California Stage Co., 22 Cal. 537.

¹²³ Cal. Code Civ. Proc., § 1036.

¹²⁴ Hartford Quarry Co. v. Pen-dleton, 4 Abb. Pr. 460.

FORMS OF NOTICES OF MOTIONS, AFFIDAVITS, ETC.

§ 912. Form of notice.

Form No. 271.

[TITLE.]

To . . . , Attorney for . . . :

Please take notice that I will move this honorable court, at the courtroom thereof, in the city hall of the city of . . . on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, for an order [state the substance of order], and for such other and further order as may be just. Said motion will be made upon the ground that [state particularly the grounds upon which the motion is founded], and will be supported by the affidavit, a copy of which is herewith served upon you, and the pleadings, papers, and records in the above cause.

[DATE.]

[SIGNATURE.]

Attorney for . . .

§ 913. Affidavit denying genuineness and due execution of written instrument in a pleading.

Form No. 272.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled cause.

II. The note [or, bill, or other written instrument], set forth in the answer of the defendant herein, is not my note [or was not made or indorsed or accepted by me, or otherwise denying the making or executing of the instrument].

[JURAT.]

[SIGNATURE.]

§ 914. Notice of motion for order allowing party to enter on land and make survey, etc., in actions concerning real property.

Form No. 273.

[TITLE.]

To G. H., Attorney for Defendant:

Please take notice that A. B., the plaintiff herein, will, on the . . . day of . . . , 19 . . . , at the hour of . . . o'clock, A. M.,

or as soon thereafter as counsel can be heard, at the courtroom of said court in the city hall, in the city of . . . , move said court to grant the plaintiff herein an order allowing him the right to enter upon the property in controversy in this action, hereinafter described, and to make survey and measurement thereof for the purpose of [state particularly the object for which the survey is desired]. Said motion will be made upon the affidavit herewith served upon you, and upon the pleadings, records, and papers in the cause. The property to be affected by such order is described as follows [description].

[DATE.]

[SIGNATURE.]

§ 915. Order allowing party to enter for survey.

Form No. 274.

[TITLE.]

The motion for an order allowing the plaintiff to enter upon the lands in controversy in this action, and hereinafter described, coming on to be heard this day, on the affidavits introduced by the respective parties, and the pleadings, records, and papers in the cause, E. F. appearing as attorney for the plaintiff, and J. H. appearing for the defendant and opposing said motion, and it appearing to the court that good cause exists therefor, it is hereby ordered that plaintiff herein be and he is hereby allowed to enter into and upon the land hereinafter described, with the necessary surveyors and their assistants, and to make survey and measurement thereof, for the purpose of [state purpose]. The land upon which plaintiff is so allowed to enter is described as follows: [description].

[DATE.]

[SIGNATURE OF JUDGE.]

§ 916. Notice requiring security for costs.

Form No. 275.

[TITLE.]

To . . . , Attorney for Plaintiff:

Please take notice that the defendant, C. D., requires security on the part of the plaintiff, A. B., for the costs and charges which may be awarded against said plaintiff in this action, in accordance with the statute in such case made and provided, on the ground that said plaintiff is a non-resident of this state [or a foreign corporation].

[DATE.]

[SIGNATURE.]

§ 917. Notice of application to perpetuate testimony.

Form No. 276.

[TITLE.]

To C. D., of . . . county of . . . , state of . . . ; Y. Z., of . . . county of . . . , state of . . . ; [and to O. P., whose residence is unknown]:

You and each of you are hereby notified that upon the written application of A. B., the deposition of M. N., of . . . , will be taken before the undersigned, judge of the . . . court for the county of . . . , state of . . . , at his chambers in the courthouse in the city of . . . , in said county, on the . . . day of . . . , 19 . . . , at . . . o'clock A. M. of that day, for the purpose of perpetuating the testimony of the said M. N. concerning the matter mentioned in the said application of said A. B.

[In California, in case it appears that any of the persons to be notified are non-residents of the state, or are unknown, add:] And it appearing satisfactorily that by reason of the non-residence of the said O. P. [or other cause] it will be impossible to serve this notice upon him personally, it is ordered that this motion be served upon the clerk of the county of [name county wherein property is situated] and be published once a week for two months in the . . . , a newspaper printed and published in the city of . . . , county of . . . [county where applicant resides], which service and publication, when completed, shall be equivalent to personal service thereof upon said O. P.

Dated . . . , 19 . . .

J. K., Judge . . . Court.

§ 918. Notice of perpetuation of testimony, as against all persons, to be given by commissioner.

Form No. 277.

[TITLE.]

To C. D., of . . . , state of . . . , [name all others known or supposed to be interested], and to all other persons:

You and each of you are hereby notified that the deposition of M. N., for the purpose of perpetuation of the testimony of said M. N. concerning the matter hereinafter named, will be taken by and before the undersigned, as commissioner, at [name place], on the . . . day of . . . , 19 . . . , at . . . o'clock . . . M., and that you and each of you may attend at said time and place and propose cross-interrogatories to said witness.

You are further notified that the subject-matter of said deposition, and of the testimony of said M. N., will be the claim of A. B. that he is the owner, and entitled to possession, of that certain parcel of land [describe same], and that C. D. and Y. Z. wrongfully occupy and withhold the same [or, state nature of subject, according to the fact].

[DATE.]

P. Q., Commissioner.

§ 919. Allegation of waiver of demand and notice before or at maturity.

Form No. 278.

I. That heretofore one M. N. [or, M. N. & Co.] made his [their] promissory note in writing, dated on the . . . day of . . . , 19 . . . , and thereby promised to pay to the defendant [or, to the defendants, under their firm name of Y. Z. & Co., or order] . . . dollars, . . . days after said date [or, on etc.].

II. That the defendant [indorser] [or, the defendants indorsers, under their said firm name] then and there [or, thereafter, and before this action] indorsed and delivered the same to the plaintiff [for value].

III. That thereafter, and before maturity [or, at maturity] of said note, said indorser [defendant] duly waived [in writing upon the back of said note] presentment to and demand of payment from said [maker] and notice to the defendant of the non-payment thereof.

§ 920. Notice of acceptance of order to allow judgment.

Form No. 279.

Take notice that the plaintiff accepts the offer of the defendant dated . . . , 19 . . . , allowing him to take judgment in this action [for . . . dollars], with costs.

[SIGNATURE OF PLAINTIFF'S ATTORNEY.]

[Address to defendant's attorney.]

§ 921. Affidavit to enter judgment thereon.

Form No. 280.

[TITLE.]

[VENUE.]

E. F., being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action, and that the annexed offer

to allow judgment, made by the defendant, was served on him on the . . . day of . . . last; and that within ten days thereafter, to-wit, on the . . . day of . . . last, he served upon the defendant's attorney, G. H., Esq., the foregoing notice that plaintiff accepted the same, by delivering to and leaving with said G. H. personally a true copy of the said last-named notice, at the office of the said G. H. in the city of . . . , county of . . . aforesaid.

[JURAT.]

E. F.

§ 922. Judgment thereon.

Form No. 281.

This action having been duly commenced and defendant, C. D. having been personally served with summons with a copy of the complaint attached thereto and the said defendant L. M. having appeared, and said defendants having offered in writing to allow the plaintiff to take judgment against them for [state the judgment offered], which offer the plaintiff, within ten days thereafter, duly accepted in writing; now, on motion of M. N., plaintiff's counsel: It is adjudged, that said plaintiff recover of said defendants . . . dollars [or other relief, according to the offer], with . . . dollars costs and disbursements, making together the sum of . . . dollars.

Dated, . . . , 19 . . .

By the court:

N. O., Clerk.

§ 923. Notice of acceptance of offer to liquidate damages.

Form No. 282.

[TITLE.]

Take notice, that the plaintiff hereby accepts the offer of the defendant, that if he fail in his defense in this action, the damages of the plaintiff be assessed at the sum of . . . dollars.

[SIGNATURE OF PLAINTIFF'S ATTORNEY.]

[Address to defendant's attorney.]

§ 924. Judgment after trial of appeal from award.

Form No. 283.

[TITLE.]

This action being at issue and coming on for trial on [date] upon the appeal of A. B. from the award of the commissioners

appointed in the matter of the application of the . . . railroad company for the condemnation of certain lands in said county for railroad purposes, which award bears date . . . , 19 . . . , and was filed on the . . . day of . . . , 19 . . . , and said action having been tried before said court and a jury, and the jury having rendered their verdict, wherein they find that the plaintiff has sustained damages in the sum of . . . dollars by reason of the taking for railroad purposes of the following described lands [describe same];

And it appearing that the appellant has been successful upon said appeal, and that the sum awarded him by said verdict is larger than the award of said commissioners in the sum of . . . dollars;

It is adjudged, that the amount of damages payable to said A. B. by said [name petitioner] be and the same is hereby fixed and determined in accordance with said verdict at the sum of . . . dollars, upon payment of which sum, with interest from . . . , 19 . . . , [date of commissioner's report, and costs taxed at . . . dollars], the said [name petitioner] shall have the right to take for railroad purposes [or, for public use] the following described lands, viz.: [insert description; if entire estate is not condemned, but only an easement or special rights, describe same], and may take possession of said premises and appropriate the same to the public uses for which they have been taken, subject to the provisions of this judgment.

By the court:

L. M., Clerk.

§ 925. Notice of application for additional security.

Form No. 284.

[TITLE OF COURT AND CAUSE.]

Sir: Please take notice, that upon the affidavit of C. D., attached hereto, and upon the record and proceedings in said action, the above-named defendant, by his counsel, will apply to the Hon. I. K., judge, [or, court commissioner,] of said court, at . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, for an order requiring the plaintiff to give additional security in this action, upon the execution or the writ of attachment issued herein, and such further order as may be proper in the premises.

Dated, . . . , 19 . . .

E. F., Defendant's Attorney.

To O. R., Plaintiff's Attorney.

§ 926. Order on application for guardian ad litem.

Form No. 285.

[TITLE OF COURT AND CAUSE.]

On reading and filing the affidavit of A. B., the plaintiff [or, one of the defendants] in the above-entitled action, from which it satisfactorily appears that the above-entitled action has been commenced and is now pending in this court; that C. D. is a necessary or proper party thereto; that he is an infant over the age of fourteen years [or, under the age of fourteen years], and has no general or testamentary guardian in this state; that he resides at . . . , in the state of . . . , [if under the age of fourteen years, with E. F., his mother; or, if the infant's residence be unknown, that the residence of said infant is unknown and cannot with due diligence be ascertained]; and that no guardian has been appointed for him in this action: now, upon motion of G. H., attorney for the plaintiff, [or, of said defendant];

It is ordered, that said application be made before this court [or, before the undersigned circuit judge, county judge, or court commissioner] at . . . , in the county of . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon; that notice of this application be served upon the said infant by mailing a copy of the notice hereto attached and this order to said infant, directed to him at his said place of residence, with the postage thereon prepaid, and that such mailing be completed at least . . . days before the day herein appointed for the hearing of this application [if the infant be under fourteen years of age, the direction should be, that a copy be mailed to E. F., with whom the infant resides; if the residence be unknown, substitute: and that notice of this application be made by publication thereof in the X. Y. Z., a newspaper printed and published at the city of . . . , in the county of . . . , once in each week for four weeks successively prior to the hearing of said application, the said newspaper being designated as most likely to give notice to the said infant].

Dated, . . . , 19 . . .

I. K.,
Circuit Judge, [or, County Judge;
or, Court Commissioner].

§ 927. Notice of hearing or trial, by party.

Form No. 286.

[TITLE.]

Take notice, that this action will be brought to a hearing before R. F., referee herein, at his office, No. . . . street, in the city of . . . , on the . . . day of . . . next, at . . . o'clock in the . . . noon.

[DATE.]

A. B., Plaintiff's Attorney.

§ 928. Notice of bona fide purchaser.

Form No. 287.

I. That on the . . . day of . . . , 19 . . . , M. N. was, or pretended to be, the owner in fee-simple of the lands and premises described in the complaint, free from all incumbrances; and he then was in the actual possession thereon.

II. That the defendant, believing the said M. N. to be the owner of said premises, on that day agreed with him for the purchase thereof in fee-simple, for the price of . . . dollars; whereupon the said M. N. conveyed the said premises to this defendant, by his deed, dated on the . . . day of . . . , 19 . . . , which deed contained a covenant on the part of said M. N. that he was absolutely seized of said premises and that the same were free from all incumbrances.

III. That said sum of . . . dollars was actually paid by this defendant to said M. N. [at the time of the date of said deed].

IV. That this defendant had not, at or before the time of the said conveyance, or of the said payment of the purchase money, any notice whatsoever, either express or implied, of the said mortgage now claimed by the plaintiff, or of any other incumbrance whatsoever that affected the said premises.

V. That at the time of said conveyance and payment the said mortgage had not been recorded in the office of the . . . for the county of . . . [being the county wherein said lands are situated], nor was the same recorded until the . . . day of . . . , 19 . . . , [or, nor has the same ever been recorded in said office].

§ 929. Notice of ownership of attached property by third person.

Form No. 288.

[TITLE OF COURT AND CAUSE.]

To L. M., Sheriff of . . . County:

You are hereby notified that the black horse [or, otherwise, describe the property fully] which you did on the . . . day of . . . , 19 . . . , levy on as the property of C. D., by virtue of a writ of attachment issued out of the . . . court of . . . county, in the case of A. B., plaintiff, against C. D., defendant, belongs to me [or, if the affidavit is made by an agent or attorney, say: belongs to E. F.]; that my [or, his] interest is that of absolute owner [or, state nature of interest]; that I [or, he] acquired such interest by purchasing the said horse on the . . . day of . . . , 19 . . . , from Y. Z., and I [or, he] paid therefor . . . dollars [or, state facts showing how and from whom he acquired his interest in the property and the consideration paid], and I demand of you the immediate release and surrender of the said horse.

Dated, . . . , 19 . . .

E. F.

[Or, E. F., by G. H., his agent or attorney].

[VERIFICATION.]

§ 930. Notice of taxation of costs accompanying bill.

Form No. 289.

To G. H., Esq., Attorney for Defendant.

Please take notice that on the . . . day of . . . , 19 . . . , at . . . o'clock . . . M., the undersigned will apply to the clerk of the . . . court, for . . . county, at his office in the city of . . . , county of . . . , state of . . . , to have the within bill of costs and disbursements in the within-entitled action taxed, adjusted, and allowed, and the amount thereof inserted in the entry of judgment in the within-entitled action.

E. F., Attorney for Plaintiff.

§ 931. Notice of taxation accompanying bill.

Form No. 290.

[TITLE.]

To E. F., Esq., Attorney for said Respondent:

Take notice, that the within bill of costs and disbursements of the appellant in the above-entitled action will be presented

to Q. R., Esq., clerk of the supreme court of . . . , at his office in the capitol, at . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon of said day, and that the undersigned will apply to said clerk for taxation and allowance of the same, and that the amount thereof be inserted in the entry of judgment herein.

[DATE.]

G. H., Attorney for Appellant.

§ 932. Waiver of notice of subsequent proceedings.

Form No. 291.

[TITLE OF COURT AND CAUSE.]

To E. F., Plaintiff's Attorney:

Sir: Please take notice, that we are retained by and appear for the above-named defendant, C. D., in this action; and hereby waive notice of all subsequent proceedings herein, except [here specify exception, if any].

Dated, . . . , 19 . . .

G. H., Attorney for the Defendant C. D.

§ 933. Notice for special purpose only.

Form No. 292.

[TITLE OF COURT AND CAUSE.]

To E. F., Plaintiff's Attorney:

Sir: Please take notice, that we appear specially in this action for the defendant, C. D., as his counsel, for the purpose only of [state what], and that C. D., defendant, does not appear generally herein.

Dated, . . . , 19 . . .

G. H., Attorney for Defendant C. D.

§ 934. The same, with motion to set aside service of summons, etc., and vacate proceedings.

Form No. 293.

[TITLE OF COURT AND CAUSE.]

Sir: Please take notice that I appear specially for the defendant in this action, for the purpose of this motion only; and that upon the annexed affidavits of L. M. and O. P.; and upon the summons, return, and record herein, I, so specially appear-

ing, shall move, before the Hon. . . . judge, in the courtroom of Department No. . . . in the courthouse in the city of . . . , state of . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, that the service of the summons in this action be set aside and vacated, and the action be dismissed, with costs, for the reason that [here state reason, irregularities, etc.], with costs of motion.

Dated, . . . , 19 . . .

G. H., Attorney for C. D.,

for the purposes of this motion only.

To E. F., Plaintiff's Attorney.

§ 935. Notice of motion by plaintiff for judgment on the pleadings.

Form No. 294.

[TITLE.]

Sir: Please take notice, that upon the complaint and answer in this action, the undersigned will move the court at the next regular [or, special] term thereof, to be held at the courthouse in the . . . of . . . , county of . . . , on the . . . day of . . . , 19 . . . , at the opening of court on that day, or as soon thereafter as counsel can be heard, for the judgment demanded in the complaint, and such other order or relief as the court may grant.

[DATE.]

E. F., Plaintiff's Attorney.

§ 936. Notice of motion for dismissal.

Form No. 295.

[TITLE.]

Take notice, that on the affidavit of J. K., a copy of which is annexed, the undersigned will move the court, at the courtroom thereof on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, that the plaintiff's complaint in this action be dismissed [as against the defendant Y. Z.], with costs, in favor of the said defendant; and that judgment of dismissal of the action be entered accordingly, with costs; and that the plaintiff may be ordered to pay the costs of this motion, and for such other or further relief as may be just.

[DATE.]

J. K., Defendant's Attorney.

§ 937. Notice of motion to sue on judgment in the same court.

Form No. 296.

[TITLE OF COURT AND CAUSE.]

To C. D., the above-named defendant:

Take notice, that upon the affidavit of A. B., a copy of which is herewith served upon you, and upon the judgment-roll in this action, the plaintiff will move the above-named court at a regular term thereof, to be held in the courthouse in the city of . . . , in said county, on the . . . day of . . . , 19 . . . , at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order granting him leave to bring an action against you on such judgment and for such other relief as may be just.

Dated, . . . , 19 . . .

A. B.

§ 938. Notice of motion on petition for leave to sue a receiver.

Form No. 297.

[TITLE.]

To C. D., Receiver:

Take notice, that upon the petition of A. B., a copy of which is herewith served upon you, the said A. B. will move the court, at a regular term thereof, to be held in the courthouse in the city of . . . , in said county, on the . . . day of . . . , 19 . . . , at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order granting him leave to sue as demanded in said petition.

Dated, . . . , 19 . . .

L. M., Attorney for Petitioner.

§ 939. Order granting leave to receiver to sue.

Form No. 298.

[TITLE.]

On reading and filing the verified petition of the receiver in the above-entitled action, praying leave to bring an action as such receiver against E. F., no one appearing to oppose said motion, it appearing to the court now here that reasonable grounds exist for such action; upon motion of said receiver [or, L. M., Esq., counsel for said receiver];

It is ordered, that the said C. D., as such receiver, be and is hereby authorized to commence and prosecute an action in the

proper court against the said E. F. [here state any conditions which may be imposed by the court].

[DATE.]

By the court:

I. K., Judge.

§ 940. Order granting leave to bring action upon the bond of an executor, administrator, or testamentary trustee.

Form No. 299.

[TITLE.]

Upon reading and filing the petition of A. B. praying for permission to bring action in his own behalf upon the bond of O. P., executor of the last will and testament [or, administrator of the estate] of X. Y., deceased; it appearing from said petition that good ground exists for the commencement of such action;

It is ordered, that permission be and is hereby given to bring an action on said bond against the said executor [or, administrator] and the sureties upon such bond, in the name of the said petitioner as plaintiff, according to the prayer of said petition.

[DATE.]

By the court:

I. K., Judge.

§ 941. Notice of motion on affidavit to open default judgment and for leave to answer.

Form No. 300.

[TITLE.]

Please take notice that upon the affidavits of G. H. and J. K., and the proposed answer of the defendant G. H., of all of which copies are herewith served upon you, the defendant C. D., by his counsel G. H., will move the court at the next term thereof, to be held at the courthouse in the . . . of . . . , in . . . county, at the opening of court on that day, or as soon thereafter as counsel can be heard, to set aside the judgment entered in this action, and all subsequent proceedings thereon, and to allow this defendant to file and serve his said answer, and defend said action on such terms as may be just, and for such other order or relief as may be proper.

G. H., Defendant's Attorney.

To L. M., Attorney for Plaintiff.

§ 942. Order granting motion to open default judgment.

Form No. 301.

[TITLE.]

The motion of the defendant, C. D., to set aside the judgment herein and allow him to defend said action, coming on to be heard at said term on the affidavits of C. D., defendant, and J. K., and the proposed verified answer of said C. D., and it satisfactorily appearing therefrom that said judgment was rendered through the mistake [or, surprise or excusable neglect] of the said C. D., and it appearing by said proposed answer that said defendant has a valid and substantial defense to said action upon the merits, and is so advised by his counsel, to whom he has fully stated the case; after hearing G. H. for the motion, and L. M. in opposition thereto, and after reading the opposing affidavits of O. P. and J. K., on motion of G. H., defendant's attorney:

It is ordered, that said judgment entered in this action on the . . . day of . . . , 19 . . . , in favor of the plaintiff and against the defendant, for the sum of . . . dollars damages, and . . . dollars costs, be and the same is hereby vacated upon condition that said defendant pay forthwith to plaintiff's attorney the costs of entering said judgment, to-wit, the sum of . . . dollars, and that the issues in said action shall stand for trial at the present term and without other notice be placed upon and at the foot of the calendar.

Upon the payment of said costs, let the proposed answer already served with the motion papers herein stand as the answer herein without further service.

[If it be deemed advisable to let the judgment stand as security to the plaintiff, add:] Notwithstanding this order, let the said judgment [and the execution issued thereon] stand as security for the plaintiff's claim to abide the event of the action.

By the court:

R. S., Judge.

§ 943. Notice of motion to compel plaintiff to elect between several counts setting forth the same cause of action.

Form No. 302.

[TITLE.]

Please take notice, that upon the summons and complaint in this action [and on an affidavit, of which a copy is herewith served], the undersigned will move the court, at the courtroom

thereof at . . . on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, that the plaintiff be required to elect between the first-stated cause of action and the second-stated cause of action in the complaint, and state which he will rely on; and that on such election the other be stricken out; or in default of so electing, then that the second stated cause of action be stricken out as redundant; and for such other or further relief as may be just [and for the costs of this motion].

[DATE.]

[SIGNATURE.]

[ADDRESS.]

§ 944. Affidavit for same.

Form No. 303.

[TITLE OF CAUSE.]

[VENUE.]

C. D., being duly sworn, says:

I. That he is the defendant in the above-entitled action. [Or, if otherwise, show in some way deponent's knowledge of the circumstances involved.]

II. That the plaintiff's complaint herein purports to set forth two causes of action, but that only one transaction of the nature mentioned in either of the supposed causes of action set up in the complaint ever occurred between the defendant and the plaintiff, and that the transactions mentioned in both of the said supposed causes of action are in reality one and the same.

[JURAT.]

C. D.

§ 945. Order requiring election.

Form No. 304.

[TITLE.]

The motion of the defendant that the plaintiff be required to elect as to which cause of action alleged in his complaint he will rely upon on the trial, coming on to be heard on the . . . day of . . . , 19 . . . ; and on reading the complaint and the affidavit of C. D., now filed herein, and after hearing G. H. for the motion, and E. F. opposing, and being advised in the premises:

Ordered, that the plaintiff be required to elect, within . . . days after service of a copy of this order on his attorney, upon which of the several causes of action stated in his complaint he

will rely on the trial, and that he make such election by written notice, served upon the defendant's attorney.

That if plaintiff fails to so elect, the second and third causes of action be stricken out as redundant and irrelevant.

That defendant have . . . dollars, his costs of this motion.

By the court: J. K., Judge.

§ 946. Notice of motion to strike out answer.

Form No. 305.

[TITLE OF CAUSE.]

Take notice, that on the affidavit herewith served, and on the pleadings in this action, the undersigned will move the court, at the courtroom thereof at . . . on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, to strike out the answer herein as sham [or, the first defense in the answer herein as sham, and the second defense as irrelevant]; or for such other relief as may be just [with costs].

[DATE.]

E. F., Plaintiff's Attorney.

[ADDRESS.]

§ 947. Affidavit to falsity of answer.

Form No. 306.

[TITLE OF CAUSE.]

[VENUE.]

A. B., being duly sworn, says:

I. That he is the plaintiff in the above-entitled action.

II. That he has read the answer of the defendant, Y. Z., herein, and that the defense of payment therein set up is wholly and absolutely false; that the defendant has never paid, or in any way satisfied, the demand set up in the complaint, nor any part thereof; nor has he ever paid, by himself or his agents, to the plaintiff, or to any of his agents, any part of the sum alleged by the said answer to have been paid.

III. That the only person ever employed by deponent to ask or receive money from the defendant is one E. F., whose affidavit is hereto annexed; and that, to the best of deponent's knowledge and belief, no other person ever asked or received anything from the defendant for account of this deponent.

[Or, That the statements of said answer that [here give them] are utterly and absolutely false, and that said answer is a sham answer; and, on the contrary of said statements, the affiant alleges [here contradict the same matters set up.]

[JURAT.]

A. B.

§ 948. Corroborative affidavit.

Form No. 307.

[TITLE OF CAUSE.]

[VENUE.]

E. F., being duly sworn, says:

I. That he is a clerk in the employment of the plaintiff, and attends to the collection of the debts due to the latter.

II. That he has frequently asked the defendant for payment of the amount demanded by the complaint in this action, and the defendant has always refused to pay the same, and never has paid any part thereof to deponent, nor, so far as deponent is informed and believes, to any other person.

[JURAT.]

E. F.

§ 949. Order thereon.

Form No. 308.

[TITLE.]

On reading and filing [describe motion papers], and on motion of E. F. for the plaintiff, and after hearing G. H. in opposition thereto, [or, and on proof of due service of notice of the motion, and no one appearing in opposition thereto]:

Ordered, that the answer of the defendant, C. D., in this action be stricken out as a sham, with . . . dollars costs to plaintiff.

§ 950. Notice of motion to strike out irrelevant, redundant, or scandalous matter.

Form No. 309.

[TITLE.]

Take notice, that upon the pleadings in this action [and the affidavit of C. D. herewith served], the undersigned will move the court, at a special term, to be held at . . . on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, to strike out all of the third paragraph of the complaint [or, answer] herein, and so much of the fifth paragraph as is contained between the word " . . . "

and the word " . . . " [or, so much thereof as is contained between the word " . . . , " in folio . . . , and the word " . . . , " in folio . . . ,] both inclusive, as irrelevant and redundant [or, as scandalous], and for such other relief as may be just [with costs].

[DATE.]

[SIGNATURE.]

[ADDRESS.]

§ 951. Notice of motion to substitute officer's successor.

Form No. 310.

[TITLE.]

Please take notice, that on the affidavit of A. B., of which a copy is herewith served, the undersigned will move the court, at a special term thereof, to be held at . . . , on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, to substitute W. X., supervisor of the town of . . . [or, other official designation], in the place of Y. Z., as plaintiff [or, defendant] in this action; or for such other relief as may be just.

[DATE.]

[SIGNATURE.]

[ADDRESS.]

§ 952. Affidavit therefor.

Form No. 311.

[TITLE.]

[VENUE.]

M. N., being duly sworn, says that he is the attorney of the plaintiff [or, defendant] in this action; that on the . . . day of . . . last, W. X., of . . . , was duly elected [or, appointed] to the office of . . . of the [town of . . . , in the] county of . . . , in place of the [defendant, Y. Z.]; and that on the . . . day of . . . last, the said W. X. entered upon the duties of said office, and still holds the same.

[JURAT.]

[SIGNATURE.]

§ 953. Order thereon.

Form No. 312.

[TITLE.]

On reading and filing the affidavit of M. N. [and proof of due service of notice], and on motion of M. N., after hearing O. P. [or, no one appearing] in opposition:

Ordered, that W. X., of . . . , [designating official character], be substituted as the [defendant] herein, in place of Y. Z., [and he is hereby required to appear and answer within . . . days after service of a copy of this order.]

[DATE.]

[SIGNATURE.]

§ 954. Notice of motion by plaintiff to revive action against personal representatives of deceased defendant.

Form No. 313.

[TITLE.]

Take notice, that on the affidavit, of which a copy is herewith served, the undersigned will move the court, at a special term, to be held at . . . on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, for an order directing the above-entitled action to be continued against C. D. and E. F., as executors of the last will and testament [or, administrators of the estate of; or, heirs of] Y. Z., defendant above named, deceased, in the place of said deceased defendant; and granting leave to this plaintiff to amend the complaint herein as he shall be advised; and such other relief as may be just.

[DATE.]

[SIGNATURE.]

[ADDRESS.]

§ 955. Affidavit therefor.

Form No. 314.

[TITLE.]

[VENUE.]

A. B., being duly sworn, says:

I. That on or about the . . . day of . . . , 19 . . . , he commenced an action in this court against the defendant above named, for [state cause of action, and its condition].

II. That, as deponent is informed and believes, said defendant died on or about the . . . day of . . . last, having first duly made and published his last will and testament, by which, among other things, he appointed L. M. and N. O. his executors, who have proved said will; and that letters testamentary thereon have been duly issued to them by the . . . court of the county

of . . . , and they have duly qualified and undertaken the execution thereof.

III. That said action is still pending and undetermined, and no proceedings to continue it have been taken, to the knowledge of the deponent.

[JURAT.]

[SIGNATURE.]

§ 956. Order thereon.

Form No. 315.

[TITLE.]

On reading and filing the affidavit of M. N. [and proof of due service of notice], and on motion of M. N., after hearing O.P. [or, no one appearing] in opposition:

Ordered, that C. D. and E. F., executors of Y. Z., defendant above named, appear and answer the complaint herein within . . . days from the service of a copy of this order upon them; or that, in default thereof, the plaintiff may apply to the court for an order entering their appearance and directing the action to stand revived and continued against them as executors of said Y. Z.; and that the answer of said X. Y. be then deemed the answer of said executors [or, if no answer had been put in: and that he then have judgment for failure to answer].

AFFIDAVITS IN ACTIONS.

§ 957. Formal parts of affidavit.

Form No. 316.

[TITLE.]

STATE OF . . . }
COUNTY OF . . . } ss.

A. B., being duly sworn, says he is the plaintiff [or, defendant; or, the attorney or agent of the plaintiff or defendant] in the above-entitled action, and that [here state facts to be sworn to].

A. B.

Subscribed and sworn to before me, this . . . day of . . . ,
19 . . .

C. D., Notary Public, . . . County.

§ 958. The same by two or more affiants.

Form No. 317.

[TITLE OF COURT AND CAUSE.]

[VENUE.]

A. B. and C. D., being severally duly sworn, each for himself says: [Here state facts to be sworn to].

[JURAT.]

A. B.

C. D.

§ 959. Affidavit on which to move for security of costs.

Form No. 318.

[TITLE.]

[VENUE.]

C. D., being duly sworn, says that he is the defendant in the above-entitled action, which was commenced on the . . . day of . . . , 19 . . . ; that he has a good defense to the whole of said action [or, if only to a part, state specifically to what part]; that the plaintiff was at the time of the commencement of this action, and still is, a non-resident of this state [or, a private or foreign corporation], and has not given security for costs in said action. That defendant has not yet answered in said action, and that the time for answering has not yet expired.

[JURAT.]

C. D.

§ 960. Affidavit to obtain security for costs.

Form No. 319.

[TITLE.]

[VENUE.]

C. D., being duly sworn, says he is the defendant [or, one of the defendants] in this action, and that summons with a copy of the complaint was served on him on the . . . day of . . . , 19 . . . , and that the time for answering the complaint herein has not yet expired [or, state the stage of the action, according to the fact];

That the plaintiff is [or, all the plaintiffs are], and was at the time of the commencement of this action, a non-resident of this state.

[Or, if the plaintiff has become a non-resident:] That since the commencement of this action the plaintiff has become and is now a non-resident of this state.

That no security for costs has been filed in this action, and this affidavit is made for the purpose of compelling the filing of such security.

[JURAT.]

C. D.

§ 961. Affidavit for security when plaintiff or sureties become non-resident after action brought.

Form No. 320.

[TITLE.]

[VENUE.]

C. D., being duly sworn, says that he is the defendant above named, and that this action was commenced by said plaintiff in this court on the . . . day of . . . , 19 . . . ;

That since the commencement of this action, and on or about the . . . day of . . . , 19 . . . , the said plaintiff removed from this state, and became, and still is, a resident of the state of . . . , [or, allege the giving of security by the plaintiff, and that the surety or sureties have since removed from the state or become insolvent].

[JURAT.]

C. D.

§ 962. Affidavit to obtain stay of proceedings until another action is determined.

Form No. 321.

[TITLE.]

[VENUE.]

C. D., being duly sworn, says he is the defendant in the above-entitled action, which was commenced in this court on the . . . day of . . . , 19 . . . , for the purpose of [state object of action and present stage thereof].

That on the . . . day of . . . , 19 . . . , this defendant commenced an action in the . . . court of . . . county in said state against said plaintiff, for the purpose of [state object and present stage of action].

That the issues in the action last mentioned are the same as those involved in this action [or, that some of the issues are the same, naming them], and the decision of the last-named action will settle and determine all questions of fact or law involved in this action, for the following reasons: [State facts showing this to be true.]

That the issues in said action begun by this affiant are at law, and entitle the affiant to the benefit of a jury trial, to which he claims that he is entitled.

That this affidavit is made for the purpose of moving for a stay of proceedings in the above-entitled action until after the determination of the said action begun by this plaintiff.

[JURAT.]

C. D.

§ 963. Order staying proceedings on foregoing affidavit.

Form No. 322.

[TITLE.]

The defendant's motion for a stay of proceedings in this action coming on to be heard upon the affidavit of said defendant [and the affidavits of A. B. and N. O. in opposition thereto], after hearing G. F., Esq., for the motion, and E. F., Esq., in opposition; on motion of G. H., Esq., attorney for said defendant:

It is ordered, that this action and all proceedings herein on the part of the plaintiff be and the same are hereby stayed until the trial, final determination, and entry of judgment in the action wherein C. D. is plaintiff and A. B. is defendant, now pending in the . . . court of said . . . county, or until the further order of this court, and that the plaintiff pay . . . dollars, the costs of this motion.

By the court:

J. K., Judge.

§ 964. Order allowing amended pleading.

Form No. 323.

[TITLE.]

On reading and filing the affidavit of C. D. [and upon the proposed answer heretofore served, and upon the pleadings herein], and on motion of G. H. for plaintiff, after hearing E. F. [or, no one appearing] in opposition:

Ordered, that the defendant have leave to serve an answer in this action, amended by substituting, for the fifth paragraph of the original answer, the words " . . . ," within . . . days from the date of this order, on payment of . . . dollars costs to the plaintiff [and that plaintiff have leave to demur thereto within the usual time.]

[Or, in case proposed amended pleading has been served with the motion: Ordered, that the defendant have leave to amend his original answer by substituting therefor the proposed amended answer already served, and that the service of said amended answer already made stand as due service thereof, upon payment of . . . dollars, motion costs, and that the plaintiff have leave to demur or plead thereto on or before . . . , 19 . .

[SIGNATURE.]

§ 965. Order for inspection and copies.

Form No. 324.

[TITLE.]

Upon the petition of C. D., defendant in this action, of which a copy is hereto annexed, and upon the pleadings and proceedings in this action; on motion of G. H., Esq., attorney for the defendant:

Ordered, that the plaintiff be required to give to the defendant inspection and a sworn copy of [name and describe document or book], or permission to take such copies in the following mode, namely, that the plaintiff deposit [name document or book] with the clerk of this court in his office in the courthouse, on the . . . day of . . . , 19 . . . , on or before . . . o'clock noon, such deposit to continue until the . . . day of . . . , 19 . . . , at . . . o'clock . . . noon, on condition, nevertheless, that the plaintiff pay or tender to the attorney for the defendant before such time of delivery . . . dollars, to cover the expense of making such copies and their delivery. [Or, the condition may be:] That the plaintiff deposit with the clerk of this court the sum of . . . dollars, and notify defendant's attorney of such deposit, out of which the clerk shall tax the reasonable costs and expenses of making and delivering such copies [or, such other conditions as the court or judge deems proper].

Let a copy of this order and the petition on which it is founded be served on the attorneys for said plaintiff . . . days before the date last mentioned.

This order shall operate as a stay of proceedings to this extent only, namely, [here specify how far the proceedings shall be stayed, if it is desired not to make a full stay].

[DATE.]

By the court:

L. M., Circuit Judge.

§ 966. Order to furnish bill of particulars.

Form No. 325.

[TITLE.]

The defendant's motion for a bill of particulars of the plaintiff's claim coming on to be heard on the . . . day of . . . , 19 . . . , and on reading the complaint, the affidavit of the [defendant] and [here mention other papers used on hearing], G. H., attorney for defendant, appearing for the motion, and E. F., for the plaintiff, opposing, and after hearing and being advised in the premises:

Ordered, that within . . . days after the service of this order on his attorney, the plaintiff deliver to the defendant's attorney a bill of particulars [duly verified] of the demand for which this action is brought, stating fully [here specify what the bill shall specially state]; and

That all proceedings herein, on the part of the plaintiff, be stayed, and that the defendant have . . . days, after the service of such bill, in which to answer the complaint, and that he recover ten dollars, the costs of this motion.

[DATE.]

J. K., Judge.

§ 967. Order for further bill of particulars.

Form No. 326.

[TITLE.]

Upon the affidavit of C. D., and upon the complaint herein, and upon [name other papers, if any, on which order is based], and upon motion of G. H., Esq., defendant's attorney, E. F., Esq., plaintiff's attorney, having appeared in opposition thereto:

Ordered, that the plaintiff's attorney deliver to the defendant's attorney, within . . . days after service of this order, a further account in writing, of the particulars of the plaintiff's further demand herein, specifying [here point out particularly the defects to be supplied].

Ordered, further, [continue with order for stay, etc., as in last preceding order].

[DATE.]

[SIGNATURE.]

CHAPTER XXXV.

JURISDICTION.

§ 968. **Jurisdiction defined.**—The jurisdiction of a court is its power to hear and determine a cause—to hear and determine the subject-matter in controversy between the parties to a suit; to adjudicate or exercise judicial power.¹ A matter is “*coram judice*” whenever a case is presented which brings this power into action.² The jurisdiction of a court has reference—1. To the court’s power over the parties; 2. Over the subject-matter,—i. e. the nature of the cause of action; 3. Over the property in controversy; and 4. To its authority to render the judgment.³ Jurisdiction must always be exercised in one of two modes—*in rem*, or *in personam*.⁴ When it ceases to exist, the only function remaining in the court is that of announcing the fact and dismissing the cause, even though it had been submitted for decision.⁵

There is a marked distinction between jurisdiction and the exercise of jurisdiction. When jurisdiction has attached, all that follows is but the exercise of jurisdiction; but jurisdiction does not attach until the conditions upon which it depends are fulfilled.⁶

Jurisdiction carries with it the power to render correct as well as erroneous judgments.⁷ It is the power not only to hear and determine, but also the power to render the particular judgment in the particular case,⁸ and want of jurisdiction cannot be predicated upon mere error in its exercise.⁹

¹ United States v. Arredondo, 6 Pet. 709, 8 L. Ed. 554; Rhode Island v. Massachusetts, 12 Pet. 718, 9 L. Ed. 1233; Grignon v. Astor, 2 How. 328, 11 L. Ed. 283; Central Pacific R. R. Co. v. Placer County, 43 Cal. 365; Sherer v. Superior Court, 96 Cal. 653, 31 Pac. 565; Bassick Min. Co. v. Schoolfield, 10 Colo. 46, 14 Pac. 65.

² United States v. Arredondo, 6 Pet. 709, 8 L. Ed. 554.

³ Cooper v. Reynolds, 10 Wall. 316, 19 L. Ed. 932.

⁴ Overby v. Gordon, 177 U. S. 220, 44 L. Ed. 741, 20 Sup. Ct. 603.

⁵ Ex parte McCardle, 7 Wall. 514, 19 L. Ed. 265.

⁶ Nelson v. Lemmon, 10 Cal. 50; Johnson v. Sepulbeda, 5 Cal. 149; Carpentier v. City of Oakland, 30 Cal. 439; Smith v. Montoya, 3 N. Mex. 39, 1 Pac. 175; White v. Espey, 21 Or. 331, 28 Pac. 71; Estate of Eichhoff, 101 Cal. 600, 36 Pac. 11; Furgeson v. Jones, 17 Or. 204, 11 Am. St. Rep. 808, 20 Pac. 842, 3 L. R. A. 620.

⁷ Nicklin v. Hobin, 13 Or. 406, 10 Pac. 835.

⁸ Russell v. Shurtleff, 23 Colo. 414, 89 Am. St. Rep. 216, 65 Pac. 27.

⁹ In re McKenzie, 180 U. S. 551, 45 L. Ed. 657, 21 Sup. Ct. 468.

§ 969. **General versus limited jurisdiction.**—It may be said, as a general rule, that the presumption is in favor of the jurisdiction of a court of general jurisdiction, both as to persons and property, where the want of jurisdiction does not affirmatively appear on the record.¹⁰ There are two very important limitations on this general rule, however. In the first place, the presumption in support of the jurisdiction of such courts arises only with respect to jurisdictional facts concerning which the record is silent. Secondly, the presumption is limited to jurisdiction of persons within the limits of the court's jurisdiction, and over proceedings in accordance with the course of common law.¹¹ Thus, where a defendant is a non-resident, the burden is on the plaintiff to show the jurisdictional facts;¹² and a judgment *in personam* against a non-resident cannot hold property within the court's jurisdiction unless attached.¹³

This presumption cannot be indulged in the case of courts of limited jurisdiction; in proceedings in such courts the jurisdictional facts must appear on the face of the record.¹⁴ When, however, these jurisdictional facts are made to appear of record, the same presumption as to the action of a court of limited jurisdiction will be indulged as in case of a court of general jurisdiction.¹⁵

To constitute a court of general jurisdiction as to any class of actions, its jurisdiction of such actions must be unconditional, so that the only thing essential to enable it to take cognizance of them is the acquisition of jurisdiction of the persons of the parties.¹⁶ A court that has power to hear, try, and determine all transitory actions, wherever the cause may arise, and is also a court of record proceeding according to the course of the common law, is a court of general jurisdiction.¹⁷

¹⁰ Galpin v. Page, 18 Wall. 365, 366, 21 L. Ed. 959; Nelson v. Lemon, 10 Cal. 50; Grewell v. Henderson, 7 Cal. 290; Clark v. Sawyer, 48 Cal. 133; Hughes v. Cummings, 7 Colo. 141, 203, 2 Pac. 289, 928; Amy v. Amy, 12 Utah, 309, 42 Pac. 1121; In re Cuddy, 131 U. S. 285, 33 L. Ed. 154, 9 Sup. Ct. 703.

¹¹ Galpin v. Page, 18 Wall. 366, 367, 21 L. Ed. 957; Settlemeier v. Sullivan, 97 U. S. 449, 24 L. Ed. 1110.

¹² Belcher v. Chambers, 53 Cal. 635; Furgeson v. Jones, 17 Or. 211,

11 Am. St. Rep. 213, 20 Pac. 842, 3 L. R. A. 620.

¹³ Northcut v. Lemery, 8 Or. 316.

¹⁴ Den ex dem. Walker v. Turner, 9 Wheat. 548, 6 L. Ed. 157; Hornthall v. The Collector, 9 Wall. 565, 19 L. Ed. 562; McClaughery v. Deming, 186 U. S. 69, 46 L. Ed. 1049, 22 Supt. Ct. 786.

¹⁵ Miller v. United States, 11 Wall. 299, 20 L. Ed. 142.

¹⁶ Simons v. DeBare, 4 Bosw. 553.

¹⁷ Foot v. Stevens, 17 Wend. 483; DeVaughn v. DeVaughn, 19 Gratt. 556; Kempe v. Kennedy, 5 Cranch, 185, 3 L. Ed. 74.

§ 970. **Limited jurisdiction—Probate.**—The county court, in exercising jurisdiction in probate, is a superior court of general jurisdiction.¹⁸ Though proceedings in the county court in probate are analogous to the practice in courts of chancery, the rule governing appeals from decrees of circuit courts does not apply to final decisions of county courts.¹⁹ The superior court, sitting in probate, has jurisdiction to determine matters raised by answer to a contest of the right to letters of administration.²⁰

§ 971. **Limited jurisdiction.**—A court which has no jurisdiction over the subject-matter of a suit, over the action itself, unless a party resides in a particular locality, or is served with process in a particular place, is a court of limited jurisdiction, within the meaning of the rule we are considering.²¹

Where jurisdiction is limited by the constitution or by statute, the consent of the parties cannot confer it upon the court, except when the limitation is in regard to certain persons; in the latter case, a person may, if competent, waive his exemption and confer jurisdiction.²² So, also, the agreement of the parties cannot operate to divest a court of its jurisdiction.²³ Where a court of general jurisdiction has summary powers conferred upon it which are wholly derived from statute, and not exercised according to the course of the common law, or are no part of its general jurisdiction, its decisions must be treated and regarded like those of courts of limited jurisdiction.²⁴

§ 972. **Powers of courts at chambers.**—As a general rule, all judicial business must be transacted in court, and there must be some warrant of statute to authorize any of it to be transacted at chambers.²⁵

Under the California statute,²⁶ a justice of the supreme court may, at chambers, grant all orders and writs which are usually

¹⁸ *Nolan v. Hughes* (Or.), 93 Pac. 362.

¹⁹ *In re Roach's Estate*, 50 Or. 179, 92 Pac. 118.

²⁰ *In re Warner's Estate*, 6 Cal. App. 361, 92 Pac. 191; Cal. Code Civ. Proc., § 1365.

²¹ *In re Cuddy*, 131 U. S. 284, 33 L. Ed. 154, 9 Sup. Ct. 703; *Simons v. DeBare*, 4 Bosw. 553.

²² *Gray v. Hawes*, 8 Cal. 562; *Norwood v. Kenfield*, 34 Cal. 329; *Bates*

v. Gage, 40 Cal. 183; *Black v. Clendenin*, 3 Mont. 49; *Hobbs v. German-American Doctors*, 14 Okla. 236, 78 Pac. 356.

²³ *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313.

²⁴ *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 20 Pac. 842, 3 L. R. A. 620.

²⁵ *Larco v. Casaneuava*, 30 Cal. 560; *Norwood v. Kenfield*, 34 Cal. 332.

²⁶ Code Civ. Proc., §§ 165, 166.

granted in the first instance on *ex parte* application, except writs of *mandamus*, *certiorari*, and prohibition, and may, in his discretion, hear applications to discharge such orders and writs. The superior court judges may, in addition, appoint appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the court of all writs and papers necessary in the exercise of their powers in matters of probate.

A judge at chambers has no power to make an order directing the clerk to enter in the minutes of the court, *nunc pro tunc*, an order alleged to have been made in open court;²⁷ nor to make an order setting aside an execution and perpetually enjoining the enforcement of the same;²⁸ nor to entertain motions to strike out pleadings or parts of pleadings.²⁹ Nor can a judge at chambers discharge a defendant in a criminal case, or dismiss an information against him.³⁰ In Washington, a judge may render judgment in his chambers, in a case where the defendant has defaulted.³¹ Under the statutes of Idaho,³² a district court cannot at chambers hear a proceeding for the condemnation of lands, or enter a judgment or decree therein.³³ The provision of the Oregon constitution providing for the trial of contested election cases in chambers has been upheld.³⁴

A judge's chambers are not confined to the usual place for the transaction of business not required to be done in open court, but chamber business may be done wherever the judge may be found, within the proper jurisdiction of the court.³⁵

§ 973. Concurrent jurisdiction.—It frequently happens that two or more courts are competent to take jurisdiction over the same parties and the same subject-matter, or that process may issue from two or more courts authorizing the seizure of the same property, and that the action of either court, if it is allowed to

²⁷ Hegeler v. Henckell, 27 Cal. 491.

²⁸ Bond v. Pacheco, 30 Cal. 530; Norwood v. Kenfield, 34 Cal. 332.

²⁹ Larco v. Casaneuava, 30 Cal. 560.

³⁰ Carpenter v. Nutter, 127 Cal. 64, 59 Pac. 301.

³¹ Murne v. Schwabacher Bros., 2 Wash. T. 130, 3 Pac. 899.

³² Idaho Rev. Codes, §§ 3890-3910.

³³ Washington etc. R. R. Co. v. Cœur d'Alene Ry. etc. Co., 3 Idaho, 263, 28 Pac. 394.

³⁴ Cresap v. Gray, 10 Or. 348.

³⁵ Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109; In re Lux, 100 Cal. 593, 35 Pac. 341.

proceed, may impair the jurisdiction of the other by taking property subject to its process, or determining some question of right which the other was, at least, equally competent to determine. In order to avoid conflict between tribunals of coequal authority the rule has been formulated, and is now of universal application, that the court first acquiring jurisdiction shall be allowed to pursue it to the end, to the exclusion of any other court.

There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. Jurisdiction is not a right or privilege belonging to a judge, but an authority or power to do justice in a given case when it is brought before him; and the mere grant of jurisdiction to a particular court, without any words of exclusion, does not oust any other court of similar authority or power.³⁶

The legislature cannot confer on one court the functions and powers which the constitution has conferred upon another, where that jurisdiction is exclusive.³⁷ But if exclusive jurisdiction be not conferred upon a court by the constitution, the legislature may confer on other courts the powers and functions which the constitution has conferred on that court.³⁸

State courts do not have jurisdiction to enjoin one from obtaining title to public lands, or to cause him to file a relinquishment of his claim.³⁹ The determination by a state court of a federal question must be made in the light of the decisions of the federal supreme court, in so far as they apply.⁴⁰

§ 974. Appellate jurisdiction.—The supreme court may have appellate jurisdiction of a suit of equitable cognizance, though the amount in controversy is less than that prescribed by statute.⁴¹ But where the proceeding is in *mandamus*, to compel the issuance of a warrant for a certain amount, that amount must be equal to that prescribed by statute.⁴² The authority of the supreme court

³⁶ *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742; *Delafield v. Illinois*, 2 Hill, 159; *Courtwright v. Bear River etc. Co.*, 30 Cal. 573.

³⁷ *Courtwright v. Bear River etc. Co.*, 30 Cal. 580.

³⁸ *Perry v. Ames*, 26 Cal. 372.

³⁹ *Columbia Canal Co. v. Benham*, 47 Wash. 249, 125 Am. St. Rep. 901, 91 Pac. 961.

⁴⁰ *Spokane & B. C. Ry. Co. v. Washington etc. Ry. Co.*, 49 Wash. 280, 95 Pac. 64.

⁴¹ *Agnew v. Barto & Sons' Bank*, 48 Wash. 66, 92 Pac. 885; *Edward Malley Co. v. Londoner*, 41 Colo. 436, 93 Pac. 488.

⁴² *State v. Meads*, 49 Wash. 468, 95 Pac. 1022.

to issue the writ of *habeas corpus* is derived from the constitution, as a general rule, and not from the statutes, and the practice in such cases is governed by the rules of that court, and not by the statutes.⁴³ The supreme court may entertain an appeal upon an injunction suit, whether it involves the merits of the case or not.⁴⁴

§ 975. **Jurisdiction of state courts.**—It is not proposed under this heading to discuss the relations between state and federal courts, but merely to note instances in which the state courts have jurisdiction over cases in which the authority of the United States courts would ordinarily seem to appear. State courts have jurisdiction in the following cases, over subject-matter apparently within the exclusive control of the United States government, or over parties, subjects of foreign governments resident within the state, as in an action for assault and battery in a United States navy yard, although the state ceded exclusive jurisdiction of that place to the United States.⁴⁵ So, also, state courts have jurisdiction of crimes committed on the United States military reservation.⁴⁶ An act of the New York legislature, ceding the navy yard at Brooklyn to the United States, which act provides that cession “shall not prevent the operation of the laws of the state” within the same, had the effect of preserving the jurisdiction of the state over offenses committed on board the government ship in the navy yard and over the person of the offender.⁴⁷

Foreign citizenship does not exempt a person from liability from a breach of the criminal laws.⁴⁸ And a foreign consul, in civil and criminal matters, is subject to the local law in the same way as other foreign residents within the country.⁴⁹ In cases of tort committed in a foreign state, state courts have jurisdiction where the defendant is served with process within the state.⁵⁰ So, also, of a fraudulent conspiracy formed in another state.⁵¹ State courts have also jurisdiction in actions against foreign

⁴³ *Ex parte Moyer* (Colo.), 91 Pac. 738.

⁴⁴ *Rickey Land etc. Co. v. Glader*, 6 Cal. App. 113, 91 Pac. 414.

⁴⁵ *Armstrong v. Foote*, 11 Abb. Pr. 384.

⁴⁶ *Clay v. State*, 4 Kan. 49.

⁴⁷ *People v. Lane*, 1 Edm. (N. Y.) 116.

⁴⁸ *In re Jugiro*, 140 U. S. 297, 35 L. Ed. 510, 11 Sup. Ct. 770.

⁴⁹ *Coppell v. Hall*, 7 Wall. 553, 19 L. Ed. 244.

⁵⁰ *Hull v. Vreeland*, 18 Abb. Pr. 182; *Latourette v. Clarke*, 45 Barb. 327.

⁵¹ *Mussina v. Belden*, 6 Abb. Pr. 165.

executors or administrators who are residents of the state.⁵² So of actions on contracts made in a foreign country.⁵³ Foreign governments may sue and be sued in state courts in their federative names.⁵⁴

State courts having general jurisdiction in actions of trover, may entertain suit for a conversion which would also be cognizable under federal law, in the absence of express prohibition. On this theory the postmaster may be held liable for wrongful detention of mail.⁵⁵ And state courts have jurisdiction concurrently with federal courts in suits for the infringement of trade-marks,⁵⁶ and in suits to recover royalties for the privilege of selling or using a patented article.⁵⁷

A state judicial officer has no jurisdiction to issue *habeas corpus* for the discharge of a person held under the authority of the United States and by United States officers. When the return of the writ shows that the prisoner is in custody of a federal officer under the authority of the United States, a state court can proceed no further.⁵⁸ But a state court may determine the legality of the restraint of all persons held within their limits, although depending upon the federal constitution and laws, subject to the exclusive authority of the federal courts to determine the legality of the detention of persons held under federal authority.

Property levied upon under a state writ of execution cannot be levied upon by process issuing from a federal court.⁵⁹ The United States government or a state government may consent to be sued in a state court.⁶⁰ And actions may be maintained in state courts against officers of the United States government in certain cases.⁶¹

⁵² *Gulick v. Gulick*, 33 Barb. 92; *Montalvan v. Clover*, 32 Barb. 190; *Sere v. Coit*, 5 Abb. Pr. 482.

⁵³ *Skinner v. Tinker*, 34 Barb. 333.

⁵⁴ *Republic of Mexico v. Arrangois*, 11 How. Pr. 1; *Mills v. Thursday*, 2 Abb. Pr. 437; *Manning v. State of Nicaragua*, 14 How. Pr. 517.

⁵⁵ *Teal v. Felton*, 12 How. 292, 13 L. Ed. 991.

⁵⁶ *In re Keasbey etc. Co.*, 160 U. S. 231, 40 L. Ed. 402, 16 Sup. Ct. 273.

⁵⁷ *Felix v. Scharnweber*, 125 U. S. 58, 31 L. Ed. 687, 8 Sup. Ct. 759; *Pratt v. Paris Gas Light Co.*, 168 U.

S. 259, 42 L. Ed. 458, 18 Sup. Ct. 62.

⁵⁸ *Ableman v. Booth*, 21 How. 523, 16 L. Ed. 169; *Tarble's case*, 13 Wall. 402, 20 L. Ed. 597.

⁵⁹ *Hagan v. Lucas*, 10 Pet. 404, 9 L. Ed. 470; *Prince v. Bartlett*, 8 Cranch, 434, 3 L. Ed. 614.

⁶⁰ *People of Michigan v. Phoenix Bank*, 4 Bosw. 363.

⁶¹ *Ripley v. Gelston*, 9 Johns. 201, 6 Am. Dec. 271; *In re Stacy*, 10 Johns. 328; *Hoyt v. Gelston*, 13 Johns. 141; *Wilson v. MacKenzie*, 7 Hill, 95, 42 Am. Dec. 51; *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352; *McButt v. Murray*, 10 Abb. Pr. 196.

§ 976. **Extraterritorial jurisdiction of state courts.**—It may be stated as an absolute rule that process from a state court cannot, by publication or otherwise, run into another state and summon a person domiciled there to answer in proceedings purely *in personam*. Suits based upon a money demand or a purely personal contract are *in personam*, and within the rule above stated, and a defendant in such suit cannot be summoned by constructive service.⁶² The rule protects foreign corporations as well as non-resident individuals.⁶³ Service of a foreign corporation doing business within the state may be made upon the secretary of state, if such corporation does not have a designated party to receive service.⁶⁴ But service of an officer of such a corporation temporarily in the state cannot bind the corporation to appear.⁶⁵ And the mere fact that the corporation has property in the state will not give a court jurisdiction *in personam*.⁶⁶ A judgment against a domestic corporation or against a non-resident stockholder cannot fix the latter's individual liability if he did not appear in the suit.⁶⁷ Judgment against a firm cannot bind a non-resident partner;⁶⁸ nor can service of the agent of a non-resident firm bind the firm.⁶⁹

Legislatures have power to prescribe the conditions upon which foreign corporations may do business within the state and invoke the jurisdiction of its courts;⁷⁰ but for defendant to avail himself of the bar, it must be pleaded and proven that plaintiff has not complied with the conditions.⁷¹ However, the California statute seems to impose upon the plaintiff foreign corporation the burden of pleading and proving that it has complied with the statutory provision.⁷²

⁶² *Pennoyer v. Neff*, 95 U. S. 727, 24 L. Ed. 565; *Davis v. Wakelee*, 156 U. S. 685, 39 L. Ed. 578, 15 Sup. Ct. 555; *Brown v. Campbell*, 100 Cal. 641, 38 Am. St. Rep. 317, 35 Pac. 434.

⁶³ *St. Clair v. Cox*, 106 U. S. 653, 27 L. Ed. 222, 1 Sup. Ct. 354.

⁶⁴ Cal. Civ. Code, § 405.

⁶⁵ *Goldey v. Morning News*, 156 U. S. 521, 39 L. Ed. 517, 15 Sup. Ct. 559; *Dillard v. Central Virginia etc. Co.*, 82 Va. 741, 1 S. E. 128.

⁶⁶ *United States v. American Bell Tel. Co.*, 29 Fed. 32.

⁶⁷ *Wilson v. Seligman*, 144 U. S.

44, 36 L. Ed. 338, 12 Sup. Ct. 541; *Wilson v. St. Louis etc. R. R.*, 103 Mo. 597, 32 Am. St. Rep. 629, 18 S. W. 286. But see *Hale v. Hardon*, 95 Fed. 762, 37 C. C. A. 240.

⁶⁸ *Lackett v. Rumbaugh*, 45 Fed. 30; *Beck v. Thompson*, 22 Nev. 127, 36 Pac. 568.

⁶⁹ *Brooks v. Dun*, 51 Fed. 145.

⁷⁰ *International Trust Co. v. Leschen & Sons Rope Co.*, 41 Colo. 299, 92 Pac. 727.

⁷¹ *Standard Stock Food Co. v. Jasper*, 76 Kan. 926, 92 Pac. 1094.

⁷² Cal. Civ. Code, §§ 405, 410.

Attachment, although a proceeding *in rem*, will not support a personal judgment against a non-resident.⁷³ Accordingly, if attachment does not entirely satisfy the judgment, the plaintiff has no redress for the unsatisfied part.⁷⁴ Upon the same principle, while a court may decree the foreclosure of a mortgage on a non-resident's property, it cannot render a deficiency judgment, unless the defendant appeared.⁷⁵ The Colorado courts have held that a suit to foreclose a mechanic's lien is a proceeding *in personam*, and there can therefore be no service by publication against a non-resident.⁷⁶ In no event can the mere rendition of a personal judgment against a non-resident create a lien on his property.⁷⁷

Of course, where a non-resident has appeared and answered to the merits, he is deemed to have waived his extraterritorial immunity.⁷⁸ So, also, where a non-resident individual is served in a state, jurisdiction is acquired in a suit *in personam*.⁷⁹ In California, constructive service is allowed in a suit against a guardian for an accounting, on the ground of implied consent to such service, in case of removal from the state.⁸⁰

An equally well-settled rule is, that service by publication against a non-resident will give jurisdiction in a proceeding substantially *in rem*, property within the state being subject to attachment, and the object of such a suit being to reach and dispose of such property.⁸¹ A proceeding for the foreclosure of a mortgage on property within the jurisdiction of the court is of such a nature.⁸² And proceedings to enforce liens generally are within the meaning of the rule.⁸³ A suit to recover possession of

⁷³ Exchange Bank v. Clement, 109 Ala. 280, 19 So. 817; Cudabae v. Strong, 67 Miss. 709, 7 So. 544.

⁷⁴ Eastman v. Dearborn, 63 N. H. 366.

⁷⁵ Blumberg v. Birch, 99 Cal. 417, 37 Am. St. Rep. 68, 34 Pac. 102; Williams v. Follett, 17 Colo. 54, 28 Pac. 331.

⁷⁶ Davis v. John Mouat etc. Co., 2 Colo. App. 388, 31 Pac. 189; Estey v. Hallack etc. Co., 4 Colo. App. 166, 34 Pac. 1114; Sayre-Newton Co. v. Park, 4 Colo. App. 485, 36 Pac. 447.

⁷⁷ Denny v. Ashley, 12 Colo. 167, 20 Pac. 332.

⁷⁸ Vermilya v. Brown, 65 Fed. 150;

Epps v. Buckmaster, 104 Ga. 702, 30 S. E. 961.

⁷⁹ Sipe v. Copwell, 59 Fed. 971, 8 C. C. A. 419.

⁸⁰ Spencer v. Houghton, 68 Cal. 87, 8 Pac. 682.

⁸¹ Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

⁸² Blumberg v. Birch, 99 Cal. 417, 37 Am. St. Rep. 68, 34 Pac. 102; La Fetra v. Gleason, 101 Cal. 248, 35 Pac. 766.

⁸³ Oswald v. Kampmann, 28 Fed. 37; McCarter v. Neil, 50 Ark. 191, 6 S. W. 731; Roller v. Holley, 13 Tex. Civ. App. 636, 35 S. W. 1074; Goodale v. Coffee, 24 Or. 353, 33 Pac. 991.

land sold for taxes is also a proceeding *in rem*,⁸⁴ as also is a suit to set aside a fraudulent conveyance.⁸⁵

While the attachment of property within the state is insufficient in itself as a basis for a judgment *in personam* against a non-resident served by publication, the proceedings are so far proceedings *in rem* as to hold the property actually attached.⁸⁶

A state may authorize proceedings to determine the *status* of one of its citizens toward a non-resident without the jurisdiction of its courts.⁸⁷ It is upon this principle that divorce decrees rendered against non-residents have been upheld.⁸⁸

§ 977. **Jurisdiction determined by amount in controversy.**—The constitutions or statutes of the several states usually provide that the jurisdiction of certain courts shall extend only to cases where the amount in controversy shall exceed or not exceed a certain sum. In such cases it is generally the amount of the plaintiff's claim, as shown by his complaint, or by the summons, which determines the court's jurisdiction. That the *ad damnum* clause of the plaintiff's complaint determines the question, is a rule of almost universal application. It is the claim as made, and not the claim as decided or allowed, which determines the jurisdiction; hence the term "the amount in controversy."⁸⁹ And this is the rule when a suit is for unliquidated damages, irrespective of the nature of the action, whether in contract or in tort.⁹⁰

Thus, in replevin, jurisdiction attaches according to the claim made in the affidavit.⁹¹ Where the plaintiff in his complaint claims one hundred dollars, the mere fact that the copy of a note attached to the complaint, and the note itself, was for more than that amount, is no ground for arresting the judgment of a court whose jurisdiction is limited to cases in which the amount in contro-

⁸⁴ *Shepherd v. Ware*, 46 Minn. 176, 24 Am. St. Rep. 214, 48 N. W. 773.

⁸⁵ *Robinson v. Kind*, 23 Nev. 340, 47 Pac. 1, 977; *Loaiza v. Superior Court*, 85 Cal. 28, 20 Am. St. Rep. 197, 24 Pac. 710, 9 L. R. A. 376.

⁸⁶ *Anderson v. Goff*, 72 Cal. 69, 1 Am. St. Rep. 37, 13 Pac. 75; *Brown v. Tucker*, 7 Colo. 34, 1 Pac. 224; *State v. Eddy*, 10 Mont. 318, 25 Pac. 1034.

⁸⁷ *Pennoyer v. Neff*, 95 U. S. 734, 24 L. Ed. 565.

⁸⁸ *In re James*, 99 Cal. 376, 37 Am. St. Rep. 62, 33 Pac. 1123; *Amy v.*

Amy, 12 Utah, 286, 42 Pac. 1128.

⁸⁹ *Jackson v. Whartenby*, 5 Cal. 94; *Maxfield v. Johnson*, 30 Cal. 545; *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 870; *Plunket v. Evans*, 2 S. Dak. 434, 50 N. W. 961; *Ebey v. Engle*, 1 Wash. T. 72.

⁹⁰ *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349; *Perkins v. Ralls*, 71 Cal. 87, 11 Pac. 860; *Kleni v. Allenbach*, 6 Nev. 159; *Corbell v. Childers*, 17 Or. 528, 21 Pac. 670.

⁹¹ *Shealor v. Amador County Sup. Court*, 70 Cal. 564, 11 Pac. 653.

versy does not exceed one hundred dollars;⁹³ and it has been held that a court whose jurisdiction is limited to cases where the debt or damages demanded does not exceed a certain sum has jurisdiction of a case in which the *ad damnum* is for that sum, although a larger one is alleged in the complaint.⁹⁴

In a suit for damages to personal property it is the amount of damages claimed in the complaint that fixes the jurisdiction, and not the verdict or amount of damages proved.⁹⁵ So in determining the jurisdiction in an action for trespass to real estate, it is the amount claimed in the summons, and not the damage shown, which must govern.⁹⁶ In an action for the wrongful conversion of personal property, the amount demanded determines the jurisdiction, although the value of the property converted and the money expended in the pursuit of it, separately considered, do not either of them equal the jurisdictional amount.

In actions on bonds, it is the amount of damages claimed, and not the penalty named in the bond, which determines the jurisdiction, the penalty being considered in the nature of a mere collateral security.⁹⁷ Where a plaintiff's demand consists of several distinct items, it is the aggregate of the items which constitutes the sum demanded and confers jurisdiction;⁹⁸ and it is immaterial that such sum is made up of several demands acquired by assignment.⁹⁹ It does not follow, however, that distinct and different demands against several defendants, although based upon promises contained in the same instrument, may be aggregated in order to confer jurisdiction.¹⁰⁰ Thus in a suit to foreclose several mechanics' liens, where the demand of each claimant is less than three hundred dollars, and the equity jurisdiction to enforce them fails, the superior court has no jurisdiction to render a personal judgment against the owners of the land. Such judgment must be several, and not joint; and the several demands cannot be cumulated for the purpose of jurisdiction.¹⁰¹ In the case of an action to enforce the statutory liability of the stockholders of a corporation, a court has no jurisdiction of an action

⁹³ *Wilhelms v. Noble Bros.*, 36 Ga. 599.

⁹⁴ *Hapgood v. Doherty*, 8 Gray, 373.

⁹⁵ *Velvin v. Hall*, 78 Ga. 136.

⁹⁶ *Stewart v. Baltimore etc. R. R. Co.*, 33 W. Va. 88, 10 S. E. 26.

⁹⁷ *Fowler v. McDaniel*, 6 Heisk. 529.

⁹⁸ *Moore v. Nowell*, 94 N. C. 266.

⁹⁹ *Stanley v. Albany County*, 15 Fed. 483, 21 Blatchf. 249; *Martin v. Goode*, 111 N. C. 288, 32 Am. St. Rep. 799, 16 S. E. 232.

¹⁰⁰ *Thomas v. Anderson*, 58 Cal. 99.

¹⁰¹ *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785.

to recover such liability where the several amounts sued for are less than the jurisdictional amount, notwithstanding the aggregate indebtedness of the corporation sued upon exceeds that sum.¹⁰²

As a general rule, it may be stated that, in the absence of express statutory provision, interest accruing after the commencement of suit may be calculated in determining the amount in controversy.¹⁰³ But where the amount necessary to give a particular court jurisdiction is fixed by statute or constitutional provision, "exclusive of interest," interest forms no part of the amount in controversy; and it is therefore immaterial that the amount of the claim including interest may exceed the amount fixed by statute.¹⁰⁴ And a constitutional provision limiting the jurisdiction of a superior court to "cases in which the demand exclusive of interest amounts to three hundred dollars," excludes all compound as well as simple interest from the demand.¹⁰⁵

The only limitation or exception to the rule that the *ad damnum* clause determines the jurisdiction of the court is that the demand made must be made in good faith. Thus the prayer of a complaint is not conclusive of the jurisdiction of a particular court, if the record shows on its face that the dispute concerning an amount within the jurisdiction of that court is feigned and not real.¹⁰⁶ If items are fraudulently included in a complaint for the purpose of giving a court jurisdiction to which it is not entitled, the question can only be raised by proper averments presenting that issue.¹⁰⁷ But where the case admits of reasonable doubt as to whether the amount in controversy is within the jurisdiction, and where the plaintiff might have had reasonable grounds to believe that he could recover a sum within the jurisdiction, the suit will not be dismissed, as all presumptions in a doubtful case should be in favor of the jurisdiction.¹⁰⁸ So where the claim made in a complaint is sufficient to give jurisdiction to

¹⁰² *Derby v. Stevens*, 64 Cal. 237, 30 Pac. 820; *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Myers v. Sierra Val. etc. Assoc.*, 122 Cal. 672, 55 Pac. 689.

¹⁰³ *Malson v. Vaughn*, 23 Cal. 61; *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96; *Denver Brick Mfg. Co. v. McAllister*, 6 Colo. 326.

¹⁰⁴ Cal. Const., art. vi. § 5; *Christian v. Superior Court*, 122 Cal. 117,

54 Pac. 518; *Gallagher v. McGraw*, 132 Cal. 601, 64 Pac. 1080; *Nelson v. Ladd*, 4 S. Dak. 1, 54 N. W. 809.

¹⁰⁵ *Christian v. Superior Court*, 122 Cal. 117, 54 Pac. 518.

¹⁰⁶ *Lehnhardt v. Jennings*, 119 Cal. 92, 48 Pac. 56, 51 Pac. 195.

¹⁰⁷ *Tiball v. Eichoff*, 66 Tex. 58, 17 S. W. 263.

¹⁰⁸ *Dwyer v. Bassett*, 63 Tex. 274.

the superior court, and deduction is made by plaintiff's counsel when the case is called for trial, on account of discovered errors in the account, reducing the plaintiff's demand below the jurisdictional amount, although such admission is binding upon the plaintiff, it cannot affect the jurisdiction of the court to try the case.¹⁰⁹

As a corollary to the rule just stated, it is well settled that although the jurisdiction of a court may be limited to a certain sum, and the original indebtedness sued upon exceeds that amount, still the jurisdiction of the court is not ousted if the original sum has been reduced below the jurisdictional limit by *bona fide* credits.¹¹⁰ So, also, a plaintiff may remit a portion of the amount really claimed to be due in order to confer jurisdiction, provided this is not done with a fraudulent intent.¹¹¹

Of course, it follows that a defendant's counterclaim to an action must be within the jurisdiction of the court in which the plaintiff's action is brought; in other words, it must be for an amount for which he, as plaintiff, could have sued in the same court.¹¹²

§ 978. In justices' courts.—The burden is upon one relying upon a judgment of a justice of the peace to show affirmatively that the justice had jurisdiction.¹¹³ If the summons was served outside the county, the plaintiff is bound to show that there was a certificate of the county clerk attached to it, to the effect that the person issuing it was an acting justice of the peace in that county; that is, the one relying upon such judgment must show that the summons was properly issued and served.¹¹⁴

If the justice has not jurisdiction to part of the action, on account of its being equitable in nature, he may still proceed with that part which is legal.¹¹⁵ A justice of the peace has no jurisdiction to sit for another justice without the written request of such justice.¹¹⁶ Though a defendant may have the case trans-

¹⁰⁹ *Rodley v. Curry*, 120 Cal. 541, 52 Pac. 999.

¹¹⁰ *Dillard v. Noel*, 2 Ark. 449.

¹¹¹ *Hempler v. Schneider*, 17 Mo. 258; *Burden v. Hornsby*, 50 Mo. 238; *Hill v. Wilkinson*, 25 Neb. 103, 41 N. W. 134; *Litchfield v. Daniels*, 1 Colo. 268.

¹¹² *Griswold v. Pieratt*, 110 Cal. 259, 42 Pac. 820; *Malson v. Vaughn*, 23 Cal. 61.

¹¹³ *Ferguson v. Basin Cons. Mines*, 152 Cal. 712, 93 Pac. 867; *Harlan v. Gladding*, 7 Cal. App. 49, 93 Pac. 400.

¹¹⁴ *Ferguson v. Basin Cons. Mines*, 152 Cal. 712, 93 Pac. 867.

¹¹⁵ *Anderson v. Red Metal Min. Co.*, 36 Mont. 312, 93 Pac. 44.

¹¹⁶ *Harlan v. Gladding etc. Co.*, 7 Cal. App. 49, 93 Pac. 400.

ferred to the next nearest justice, by consenting to its being sent to a distant justice, jurisdiction is conferred upon such justice.¹¹⁷

Justices' courts have only such powers as are conferred upon them by statute, which statute must be liberally construed, but a justice of the peace may lose his jurisdiction by taking a case under advisement, without specifying time or place for rendering judgment, and rendering judgment more than a month thereafter.¹¹⁸ But he does not lose jurisdiction of the person, once it is obtained, until the case is finally disposed of.¹¹⁹ Nor does he lose jurisdiction by being absent on the day set for trial, if the attorneys stipulate for trial at a later date.¹²⁰

A justice of the peace must have jurisdiction of both the person and the subject-matter; the one is conferred by law, and the other by service of summons or general appearance.¹²¹ Justices of the peace constitute, as a rule, one distinct class of judicial officers under the constitution.¹²²

§ 979. Justice court—Presumption of jurisdiction.—Courts of justices of the peace are courts of special jurisdiction, and no presumption lies in favor of their jurisdiction, until jurisdiction has once attached, when it is presumed as to all subsequent proceedings.¹²³

§ 980. Justice court—Actions affecting real property.—The parties cannot give evidence in, and the justice court cannot try, an action which involves the title or right of possession of real property;¹²⁴ and if such an issue is raised by the pleadings, the fact that the answer is not verified does not change the rule.¹²⁵ The California code provides that justices' courts shall have concurrent jurisdiction with the superior courts, within their respective townships, in actions of forcible entry and detainer, where the rental value is not in excess of twenty-five dollars, and the whole amount of damages claimed not more than two hundred

¹¹⁷ *Squires v. Curtain*, 42 Colo. 51, 93 Pac. 1106.

¹¹⁸ *State v. Houston*, 36 Mont. 178, 92 Pac. 476; Mont. Rev. Codes, §§ 6286, 7084.

¹¹⁹ *Presley v. Dean*, 10 Idaho, 375, 79 Pac. 71.

¹²⁰ *Hobbs v. German-American Doctors*, 14 Okla. 236, 78 Pac. 356.

¹²¹ *Hobbs v. German-American Doctors*, 14 Okla. 236, 78 Pac. 356.

¹²² *Love v. Liddle*, 26 Utah, 62, 72 Pac. 185, 62 L. R. A. 482.

¹²³ *Rhyne v. Manchester Assur. Co.*, 14 Okla. 555, 78 Pac. 558.

¹²⁴ Cal. Code Civ. Proc., § 838.

¹²⁵ *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10.

dollars;¹²⁶ and this is to be construed to include both actions of forcible entry and unlawful detainer, though such actions are separately defined.¹²⁷ An unnecessary allegation of ownership, not denied in the answer, does not oust the justice of jurisdiction.¹²⁸

§ 981. **Justice court — Amount in controversy.** — Under some statutes the justice cannot allow interest upon the amount due, prior to judgment, if the amount will exceed the statutory limitation;¹²⁹ and if the claim is for money, or for certain property which is valued at more than the statutory limit, a remission of the excess of the money claimed over the statutory amount allowable in such courts will not validate the jurisdiction after judgment is made for the return of the property.¹³⁰ Nor can plaintiff remit a portion of his demand, after suit is instituted, to bring it within the jurisdictional limit.¹³¹ A judgment of a justice of the peace for replevin of property of value in excess of three hundred dollars is invalid.¹³²

Where a sheriff makes a wrongful levy on the property of a person not named in the execution, and takes several articles at different places on the same day, and as part of the same levy, including all in one return, it constitutes but one cause of action and cannot be split up in order to bring several suits in the justice court, instead of one suit in the higher court.¹³³

¹²⁶ Cal. Code Civ. Proc., § 113.

¹²⁷ Cal. Code Civ. Proc., §§ 1160, 1161; *Ivory v. Brown*, 137 Cal. 603, 70 Pac. 657.

¹²⁸ *Heiney v. Heiney*, 43 Or. 577, 73 Pac. 1038.

¹²⁹ Or. B. & C. Codes, § 926.

¹³⁰ *Ferguson v. Byers*, 40 Or. 468, 67 Pac. 1115, 69 Pac. 32.

¹³¹ *Brown v. Braun*, 9 Ariz. 254, 80 Pac. 323.

¹³² *Robinson v. Bonjour*, 16 Colo. App. 458, 66 Pac. 451; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695.

¹³³ *Hesser v. Johnson*, 13 Okla. 747, 76 Pac. 181.

CHAPTER XXXVI.

VENUE.

§ 982. **Definitions of terms.**—There are several terms which are synonymous with the word “venue,”—e. g. “the place of trial,” “the proper county,” “the county where the action must be tried,” “the district or county in which the action is triable.” An action is triable only in the county of the venue. It may be in the county selected by the plaintiff when preparing his complaint, or the county to which the venue has subsequently been removed by order of the court.¹

In the code states, generally, the distinction between local and transitory actions, so far as any consequence attends it, depends entirely upon statutory law, and does not coincide with or depend upon the distinction between actions *in rem* and actions *in personam*. The nature of an action, as concerns its venue, is to be determined from the character of the complaint and of the judgment which may be rendered on a default.² The California code³ provides that actions must be tried in a particular county, the district having reference—1. To the place where the subject-matter in controversy is situated; 2. To the place where the cause of action arose; 3. To the place where the parties to the action reside according to the nature of the questions involved. In this respect, the distinction between local and transitory actions is in a measure preserved. Thus real actions or actions affecting real property have a tendency to a fixed and local jurisdiction; while personal actions are transitory in their character.

§ 983. **Venue dependent upon location of subject-matter.**—Under the codes, generally, the actions which are to be tried where the subject-matter, or some part thereof, is situated, subject to the right to change the place of trial in certain cases, are as follows: Actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such

¹ *Bangs v. Selden*, 13 How. Pr. 374. v. Superior Court, 83 Cal. 491, 24 Pac.

² *McFarland v. Martin*, 144 Cal. 157.

771, 78 Pac. 239; *Fresno Nat. Bank* ³ Code Civ. Proc., §§ 392-396.

right or interest, and for injuries to real property; actions for the partition of land; actions for the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.⁴ The California constitutional provision,⁵ that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate or any part thereof is situated, applies only to the commencement of the action.⁶ Under the laws of Oregon,⁷ an action of replevin is local, and must be prosecuted in the county where the property is contained.⁸ On the other hand, a suit for the specific performance of a contract for the purchase of land proceeds *in personam*, and may be maintained in any court of equity which has jurisdiction of the parties, even if the land lies in another county; and this is true also in Washington.⁹ In Washington, all actions for the causes mentioned in section 48 of the laws of 1877, must be commenced in the county or district in which the subject of the action lies; the court of no other county or district has jurisdiction thereof.¹⁰ The laws of Arizona include mining claims, but make no provision as to property lying in contiguous counties.¹¹ In California, also, mining claims are included in this rule.¹² The Oklahoma statute¹³ requiring certain civil actions to be brought in the county in which the subject of the action is situated, was held, so far as it related to resident defendants, to be in conflict with the act of Congress requiring all civil actions to be brought in the county in which the defendants reside.¹⁴

These statutes, of course, do not apply to actions for land lying out of the state.¹⁵

⁴ Cal. Code Civ. Proc., § 392, as amended 1907; Mont. Rev. Codes, § 6501; Colo. Civ. Code, § 25; Idaho Rev. Codes, § 2120; Ariz. Civ. Code, par. 18.

⁵ Const., art. vi, § 5.

⁶ Hancock v. Burton, 61 Cal. 70.

⁷ Or. B. & C. Codes, § 42.

⁸ Moorhouse v. Donaca, 14 Or. 433, 13 Pac. 112.

⁹ Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; Johnston

v. Wadsworth, 24 Or. 498, 34 Pac. 13.

¹⁰ Wood v. Mastic, 2 Wash. T. 64, 3 Pac. 612. See, also, State v. Superior Court, 5 Wash. 639, 32 Pac. 553.

¹¹ Ariz. Civ. Code, par. 18.

¹² Watts v. White, 13 Cal. 321.

¹³ Code Civ. Proc., § 48.

¹⁴ Burke v. Malaby, 14 Okla. 650, 78 Pac. 105.

¹⁵ Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Mussina v. Bel-den, 6 Abb. Pr. 165.

§ 984. **Transitory actions.**—Actions against an agent for money had and received, or against a depository of stock in a mining corporation who is pledged to deliver the same to plaintiff, are transitory, and may be brought wherever the defendant can be served with process.¹⁶ Transitory actions against non-residents may be commenced in any county that plaintiff may select, and personal service any place in the state will give the court jurisdiction.¹⁷

§ 985. **Actions affecting lands.**—In determining whether an action is, in effect, an action relating to lands, which must be brought in the county where the land is situated, the court will consider not only the pleadings of the parties, but also the terms of the decree proper to be rendered.¹⁸ Instances of actions held to be local by reason of the fact that they affect real property are the following: Actions to recover damages for injuries done to land;¹⁹ an action on contract for the removal of standing timber;²⁰ actions in ejectment;²¹ actions to condemn lands for the use of a railroad;²² an action to have a deed absolute on its face declared to be a mortgage;²³ an action for the reformation of a contract for the sale of land;²⁴ an action to foreclose a vendor's lien;²⁵ an action to set aside a fraudulent conveyance;²⁶ an action to dissolve a mining copartnership, where the determination of the respective interests of the parties in the mining claim is involved in the action;²⁷ an action the object of which is to have the plaintiff adjudged to be the owner of an interest in mining property;²⁸ an action to quiet title to real estate;²⁹ an action to restrain a

¹⁶ *Sandoval v. Randolph* (Ariz.), 95 Pac. 119; *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397.

¹⁷ *Brown v. Lewis*, 50 Or. 358, 92 Pac. 1058; Or. B. & C. Codes, § 44.

¹⁸ *Staacke v. Bell*, 125 Cal. 309, 57 Pac. 1012; *McFarland v. Martin*, 144 Cal. 771, 78 Pac. 239.

¹⁹ *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356; *McCleod v. Ellis*, 2 Wash. 177, 26 Pac. 76; *Golden Cross Min. Co. v. Spiers*, 115 Cal. 247, 47 Pac. 108.

²⁰ *Seymour v. La Furgey*, 47 Wash. 450, 92 Pac. 267.

²¹ *Jacks v. Moore*, 33 Ark. 31.

²² *California etc. R. R. Co. v. South-*

ern Pacific R. R. Co., 65 Cal. 409, 4 Pac. 388; *Pool v. Simmons*, 134 Cal. 621, 66 Pac. 872.

²³ *Baker v. Fireman's Fund. Ins. Co.*, 73 Cal. 182, 14 Pac. 686; *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356.

²⁴ *Franklin v. Dutton*, 79 Cal. 605, 21 Pac. 964.

²⁵ *Urton v. Woolsey*, 87 Cal. 38, 25 Pac. 154.

²⁶ *Sloss v. De Toro*, 77 Cal. 129, 19 Pac. 233.

²⁷ *Clark v. Brown*, 83 Cal. 181, 23 Pac. 289.

²⁸ *McFarland v. Martin*, 144 Cal. 771, 78 Pac. 239.

²⁹ *Fritts v. Camp*, 94 Cal. 393, 29

threatened injury to land;³⁰ an action to abate a nuisance to land.³¹ But an action for personal judgment for costs of a party-wall may be changed to the county of the defendant's residence.³²

The action may be brought in any county in which any part of the land lies.³³ An action for the diversion of water from the plaintiff's ditch may be brought in either of the counties in which such ditch is situated, although the defendant's place of business is in the other county, where the act complained of was committed.³⁴ The right of an owner of a ditch situated in two counties to have water flow therein is coextensive with his right to the ditch; and a diversion of water therefrom in one of the counties is an injury to the real property of the owner in another county.³⁵

It has been held that an action to enforce a logger's lien is properly brought in the county where the logs were cut, and the lien recorded, regardless of the fact that at the time of the action the logs are in another county.³⁶

A complaint which describes the location of the land involved by government subdivisions, and upon a plat which is made part of the complaint, and which thus shows the land to be located, in fact, in another county, warrants the court in taking judicial notice of that fact, notwithstanding there is no averment in the complaint that the lands are situated in the county of the venue.³⁷

The mere fact that questions relating to real property may be involved in the action does not of itself make the action local. Thus an action for the enforcement of a trust, and for an accounting thereunder, is transitory, irrespective of the fact that the action will affect real property.³⁸ In Oklahoma, the residence of defendant governs even in cases affecting interests in real

Pac. 867; *Pacific Yacht Club v. Sausalito Bay Water Co.*, 98 Cal. 487, 33 Pac. 322.

³⁰ *Drinkhouse v. Spring Valley Water Co.*, 80 Cal. 308, 22 Pac. 252; *Last Chance Water Ditch Co. v. Emigrant Ditch Co.*, 129 Cal. 277, 61 Pac. 960.

³¹ *Marysville v. North Bloomfield Gravel Min. Co.*, 66 Cal. 343, 5 Pac. 507.

³² *Anaheim Odd Fellows Hall Co. v. Mitchell*, 6 Cal. App. 431, 92 Pac. 331.

³³ *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428.

³⁴ *Lower Kings River etc. Co. v. Kings River etc. Co.*, 60 Cal. 408.

³⁵ *Last Chance Water Ditch Co. v. Emigrant Ditch Co.*, 129 Cal. 277, 61 Pac. 960.

³⁶ *Overbeck v. Calligan*, 6 Wash. 342, 33 Pac. 825.

³⁷ *Waters v. Pool*, 130 Cal. 136, 62 Pac. 385.

³⁸ *State v. Superior Court*, 7 Wash. 306, 34 Pac. 1103; *Reese v. Murnan*, 5 Wash. 373, 31 Pac. 1027;

estate.³⁹ An action in the nature of a creditor's bill, brought to set aside a conveyance made by an execution debtor on the ground of fraud, is also a transitory action;⁴⁰ as, also, is a creditor's bill to remove a fraudulent mortgage recorded in another county as an obstruction to execution against the property of the defendant in such other county.⁴¹ An action to cancel a contract for the sale of land on the ground of fraud, and for the recovery of the purchase price paid before the discovery of the fraud, is transitory, where it does not appear that the vendee had title to the land.⁴² An action to recover an unpaid balance of the purchase price of land is transitory, and not local.⁴³

§ 986. **Actions against counties.**—An action against a county or city and county may be commenced and tried in such county or city and county, unless the action is brought by a county or city and county, in which case it may be commenced and tried in any county or city and county not a party thereto.⁴⁴ In the absence of special statutory provisions, such suits are governed by the usual rules of civil practice; and where a county was sued in a judicial district of which it did not form a part, but appeared and answered without objection to the jurisdiction, it thereby waived the right to a change of venue to its own jurisdiction.⁴⁵ Where the ultimate object of a bill in equity is to restrain a county from tearing down a public building in order to erect a new one, such action can only be brought in the county where the land is situated.⁴⁶

§ 987. **Place where cause of action arose.**—Under the codes, actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial: 1. For the recovery of a penalty or forfeiture imposed by statute, except that where it is imposed for an offense committed on a lake, river, or stream

Le Breton v. Superior Court, 66 Cal. 27, 4 Pac. 777.

³⁹ Burke v. Malaby, 14 Okla. 650, 78 Pac. 105; Mouldin v. Rice, 19 Okla. 589, 91 Pac. 1032.

⁴⁰ Beach v. Hodgdon, 66 Cal. 187, 5 Pac. 77.

⁴¹ Woodbury v. Nevada Southern Railway Co., 120 Cal. 463, 52 Pac. 730.

⁴² State v. District Court, 94 Minn. 370, 102 N. W. 869.

⁴³ Smith v. Allen, 18 Wash. 1, 63 Am. St. Rep. 864, 50 Pac. 783, 39 L. R. A. 82.

⁴⁴ Cal Code Civ. Proc., § 394.

⁴⁵ Clarke v. Lyon County, 8 Nev. 181.

⁴⁶ Munger v. Crowe, 219 Ill. 12, 76 N. E. 50, 115 Ill. App. 189.

situated in two or more counties, the action may be brought in another county bordering on such lake, river, or stream, and opposite to the place where the offense was committed; 2. Against a public officer or person especially appointed to execute his duties for the act done by him in virtue of his office, or against a person who by his conduct or aid does anything touching the duties of such officer.⁴⁷ These provisions do not apply to official neglect or omission, such as letting a state contract to another than the lowest bidder,⁴⁸ but merely to affirmative acts of officers.⁴⁹ Nor do they apply to officers of the United States.⁵⁰ An executor is not a public officer within the meaning of this rule, and has no official residence; and executors sued upon a claim against the estate of a decedent in the county in which the estate is being administered, but who reside in another county, are entitled to a change of venue to the county of their residence.⁵¹

§ 988. Residence of defendants as determining venue.—In all cases except those mentioned in the foregoing sections, the action must be tried in the county in which the defendants or some of them reside at the commencement of the action. If none of the defendants reside in the state, or, if residing in the state, and the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint, and if the defendant is about to depart from the state, such action may be tried in any county where either of the parties reside, or service is had; subject, however, to the power of the court to change the place of trial,⁵² as provided in this code. If any person is improperly joined or made a defendant solely for the purpose of having trial in the county of his residence, his residence must not be considered.

In the statutes under which the residence of a defendant or one of several defendants controls, as to the venue of the action, the word "defendant" is usually construed to mean defendants who

⁴⁷ Cal. Code Civ. Proc., § 393; Or. B. & C. Codes, § 43; Wash. Bal. Codes, § 38; Idaho Rev. Codes, § 2121; Ariz. Civ. Code, par. 19.

⁴⁸ Bonestell etc. Co. v. Curry, 153 Cal. 418, 95 Pac. 887.

⁴⁹ Elliot v. Cronk's Admr., 13 Wend. 35; Hopkins v. Haywood, 13 Wend. 265; McMillan v. Richards, 9 Cal. 420, 70 Am. Dec. 655.

⁵⁰ Freeman v. Robertson, 7 Ind. 321.

⁵¹ Thompson v. Wood, 115 Cal. 301, 47 Pac. 50.

⁵² Cal. Code Civ. Proc., § 395, as amended 1907; Or. B. & C. Codes, § 44; Idaho Rev. Codes, § 2123; Ariz. Civ. Code, par. 20; Bonestell etc. Co. v. Curry, 153 Cal. 418, 95 Pac. 887.

have a real and substantial interest adverse to the plaintiff and against whom substantial relief is sought, as distinguished from merely nominal defendants.⁵³

An action for divorce by a wife living apart from her husband may be brought in the county where she resides;⁵⁴ but a defendant in an action for divorce has the right to a change of venue to the county in which he resides, upon a proper demand therefor.⁵⁵ Actions to recover damages for injuries to the person should be brought under this section,⁵⁶ and also actions for abating a private nuisance, the same being an action for the injury to a person.⁵⁷

Where a defendant lived with his family at a certain place, where he kept his personal property, had business interests, and paid taxes, but maintained an office for the transaction of business at another place, where he kept an apartment which he used while at the latter place transacting business, the former place was held to be his residence for the purpose of determining the venue of an action.⁵⁸

In Oregon, private copartners may be sued, except in those cases in which the statute is impressed with the character purely local, either where they reside or where the cause of action arose.⁵⁹

As a general rule, in actions against corporations, the principal place of business of the corporation is its residence.⁶⁰ And in Oregon, this rule as to venue applies to corporations, except in so far as it is modified by subdivision 1 of section 55 of the code of that state.⁶¹ A corporation organized under the laws of Oregon must be sued in the county where it has its principal office or

⁵³ *Dunn v. Haines*, 17 Neb. 560, 23 N. W. 501; *Pool v. Pickett*, 8 Tex. 122; *First Nat. Bank v. Hesser*, 14 Okla. 115, 77 Pac. 36.

⁵⁴ *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372; *Jenney v. Jenney*, 14 Mass. 231; *Vence v. Vence*, 15 How. Pr. 497. See Cal. Civ. Code, § 128.

⁵⁵ *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523.

⁵⁶ *McIvor v. McCabe*, 16 Abb. Pr. 319; *Schmit v. Day*, 27 Or. 110, 39 Pac. 870.

⁵⁷ *Ray v. Sellers*, 1 Duv. 254.

⁵⁸ *Washington v. Thomas*, 92 N.

Y. Supp. 994, 103 App. Div. 423.

⁵⁹ *Bailey v. Malheur Irr. Co.*, 36 Or. 58, 57 Pac. 910.

⁶⁰ *Jenkins v. California Steam Nav. Co.*, 22 Cal. 537; *Cohn v. Central Pacific R. R. Co.*, 71 Cal. 488, 12 Pac. 498.

⁶¹ *Holgate v. Oregon Pacific R. R. Co.*, 16 Or. 123, 17 Pac. 859. As to venue of action against a corporation under the statutes of Colorado, see *Denver etc. Construction Co. v. Stout*, 8 Colo. 61, 5 Pac. 627; In Washington, Bal. Codes, § 4854. See, also, *McMaster v. Advance Thresher*, 10 Wash. 147, 38 Pac. 760

place of business or in the county where the cause of action arose.⁶²

In California and Oregon, however, under a constitutional provision,⁶³ a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of such corporation is situated.⁶⁴ The scope of this constitutional provision has been materially limited, if indeed it has not been nullified, by late decisions of the California courts. In a case in the supreme court,⁶⁵ the court asserted the right of a corporation defendant to have an action to determine a right or interest in land tried in the county wherein the land is situated. In that case Mr. Justice Henshaw said: "That the discrimination is arbitrary and rests upon no logical or rational distinction seems too plain to permit of debate or to call for elaborate consideration. No conceivable ground can be suggested why a natural person should have the right of trial in the county where the land is situated and the same right should be denied to a corporation." This ruling was reaffirmed in a later case in the district court of appeal,⁶⁶ where in a transitory action it was held that the provision of the state constitution above referred to was repugnant to the fourteenth amendment to the federal constitution.

An action against a railroad company to recover damages for injuries sustained may be tried in the county where the injury was inflicted, and the defendant has no right to have the place of trial changed to the county where it has its principal place of business.⁶⁷ And the creditor of a bank has a right to bring and maintain an action against its stockholders in the county where the cause of action arose and where some of the defendants reside, and non-resident defendants cannot, with the unanimous consent of all the defendants to change the place of trial to the place of their residence, take away the plaintiff's right.⁶⁸

⁶² *Holgate v. Oregon Pacific R. R. Co.*, 16 Or. 123, 17 Pac. 859.

⁶³ Const., art. xii, § 16.

⁶⁴ *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209; *Griffin & Skelley v. Magnolia etc. Cannery Co.*, 107 Cal. 378, 40 Pac. 495; *Winter v.*

Union Packing Co., (Or.), 93 Pac. 930.

⁶⁵ *Grocers' etc. Union v. Kern etc. County*, 150 Cal. 166, 89 Pac. 120.

⁶⁶ *Krogh v. Pacific Gateway etc. Co.*, (Cal. App.) 104 Pac. 698.

⁶⁷ *Lewis v. South Pacific Coast R. Co.*, 66 Cal. 209, 5 Pac. 79.

⁶⁸ *Greenleaf v. Jack*, 135 Cal. 154, 67 Pac. 17.

A plaintiff suing a corporation upon a contract has a right to commence the action in the county where the contract was made or where it was to be performed. The contract is deemed to have been made in the county where the offer of one party was accepted by the other; and the place of performance, where none is expressly named, of a contract of a corporation to repay money advanced to it by the plaintiff bank, is at the bank where it can be found.⁶⁹

A foreign corporation doing business in California has no residence within that state, and an action against it may be tried in any county designated by the plaintiff in his complaint.⁷⁰ Also, an action brought by such a corporation must show in the complaint that it has complied with the statutory provisions relating to foreign corporations, or the complaint is demurrable.⁷¹

An action brought by a sheriff upon an indemnity bond, where there is no provision that the contract of indemnity shall be performed in a particular county, and the defendants are not served in the county of the plaintiff's residence, must be tried in the county of the defendants' residence, under the statute providing that an action shall be tried in the county where the defendants reside.⁷² A constitutional provision that "all civil and criminal business arising in any county must be tried in such county, unless a change of venue is taken in such cases as may be provided by law," applies only to causes of actions arising within the jurisdiction of the state.⁷³

If real and personal actions are joined in the same complaint, the case falls within section 395 of the California Code of Civil Procedure, and must be tried in the county of the defendant's residence.⁷⁴

§ 989. Waiver of objections.—If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the de-

⁶⁹ *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90.

⁷⁰ *Thomas v. Placerville etc. Min. Co.*, 65 Cal. 600, 4 Pac. 641.

⁷¹ *Valley Lumber Co. v. Driessel*, 13 Idaho, 662, 93 Pac. 765, 15 L. R. A. (N. S.) 299.

⁷² *Colo. Ann. Code*, § 27; *Brewer v. Gordon*, 27 Colo. 111, 83 Am. St. Rep. 45, 59 Pac. 404.

⁷³ *Steed v. Harvey*, 18 Utah, 367, 72 Am. St. Rep. 789, 54 Pac. 1011; *Utah Const.*, art. viii, § 5.

⁷⁴ *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356; *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523.

fendant, at the time he answers or demurs, files an affidavit of merits, and demands in writing that the trial be had in the proper county,⁷⁵ if he has done no prior act constituting a waiver.⁷⁶ The defendant does not, however, waive his right to move for a change of venue by obtaining an extension of time in which to plead, where the stipulation is silent as to the time in which to make a motion.⁷⁷ The right of some of the defendants cannot be defeated by the consent of the others,⁷⁸ nor by the failure of the husband to join with the wife in such motion.⁷⁹ Application for change on prejudice of the inhabitants is waived, if not made before trial.⁸⁰

⁷⁵ Cal. Code Civ. Proc., § 396, as amended 1907.

⁷⁶ Smith v. Post etc. Co., 17 Colo. App. 238, 68 Pac. 119.

⁷⁷ Grant v. Bannister, 145 Cal. 219, 78 Pac. 653.

⁷⁸ Wood v. Herman, 139 Cal. 713, 73 Pac. 588.

⁷⁹ Anaheim Odd Fellows Hall Assoc. v. Mitchell, 6 Cal. App. 431, 92 Pac. 331.

⁸⁰ Anderson v. Monmouth Min. Co., 26 Utah, 357, 73 Pac. 412.

CHAPTER XXXVII.

CHANGE OF VENUE.

§ 990. **Power of court.**—The codes generally provide that the court may, on motion, change the place of trial in the following cases: 1. When the county designated in the complaint is not the proper county; 2. When there is reason to believe that an impartial trial cannot be had therein; 3. When the convenience of witnesses and the ends of justice would be promoted by the change; 4. When, from any cause, there is no judge of the court qualified to act.¹

In any case, before it is incumbent upon the court to make the change, good cause must be shown by the party applying therefor; and this remedy is a privilege which may be waived, as by failing to appear.² The statute becomes mandatory only where the party applying for the change has brought himself within these provisions.³

A motion for change of venue on the ground of convenience of witnesses, and because a fair and impartial trial cannot be had in the county in which the action is commenced, is held to be addressed to the sound discretion of the court, and its action thereon will not be disturbed on appeal, unless it appears that this discretion has been abused or injustice has been done;⁴ but where the ground for the motion to change the venue is that the action is brought in the wrong county, there is no discretion in the court, and the change is a matter of right, although it may be waived.⁵ The Utah statute authorizes the court to change the place of trial to the nearest court when the parties do not agree on the court to which the change shall be made.⁶

¹ Cal. Code Civ. Proc., § 397, as amended 1907; Or. B. & C. Codes, § 45; Idaho Rev. Codes, § 4125; Ariz. Civ. Code, par. 21.

² Fletcher v. Stowell, 17 Colo. 94, 28 Pac. 326.

³ Roberts v. People, 9 Colo. 458, 13 Pac. 630.

⁴ Avila v. Meherin, 68 Cal. 478, 9 Pac. 428; Dewein v. Osborn, 12 Colo. 407, 21 Pac. 189; State v. Superior Court, 9 Wash. 673, 38 Pac. 206;

Kennon v. Gilmer, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 847; Louisiana etc. R. R. Co. v. Smith, 74 Ark. 172, 85 S. W. 242.

⁵ Smith v. People, 2 Colo. App. 99, 29 Pac. 924; Bond v. Hurd, 31 Mont. 314, 78 Pac. 579; Hennessy v. Nicol, 105 Cal. 139, 38 Pac. 649.

⁶ Ex parte Whitmore, 9 Utah, 441, 35 Pac. 524; Elliot v. Whitmore, 10 Utah, 246, 37 Pac. 461.

The filing of a motion to strike out parts of the complaint contemporaneously with the filing of a demurrer, whether under a rule of court or otherwise, does not waive the rights of the defendants to a change of the place of trial upon a proper showing.⁷

The right to a change of venue is to be determined by the conditions existing at the time the parties claiming it appeared in the action.⁸ A defendant against whom no cause of action is stated is not entitled to a change.⁹

§ 991. **Grounds for change.**—The only ground for the change of the place of trial of an action which has relation to the judge of a court of record, is the disqualification of the judge from acting, for some one of the reasons specified in section 170 of the California Code of Civil Procedure and section 180 of the Montana code; bias or prejudice on the part of the judge is not a ground for a change of venue.¹⁰

In order to disqualify a judge from sitting or acting in an action or proceeding pending in his court, by reason of his relationship to a person appearing as an attorney for the party thereto, it is not necessary that such person should be an attorney of record, nor does his relation as attorney depend upon the obligation of his client to compensate him for his services, or upon the continuance of a partnership between him and the attorney of record.¹¹ Under the Montana statute,¹² authorizing the change, "when from any cause the judge is disqualified from acting," the ground for change must be one of the facts enumerated in the code as disqualifying a judge to sit in an action.¹³

The granting or denial of a motion for the change of the place of trial on account of the convenience of witnesses is in the discretion of the court, and is subject to review only in case of a clear abuse of discretion.¹⁴ The mere preponderance of witnesses

⁷ Wood v. Herman Min. Co., 139 Cal. 713, 73 Pac. 588.

⁸ Ah Fong v. Sternes, 79 Cal. 33, 21 Pac. 381; Hennessy v. Nicol, 105 Cal. 138, 38 Pac. 649; Wallace v. Owsley, 11 Mont. 221, 27 Pac. 790.

⁹ Eddy v. Houghton, 6 Cal. App. 85, 91 Pac. 397.

¹⁰ Matter of Jones, 103 Cal. 397, 37 Pac. 385; Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918.

¹¹ Johnson v. Brown, 115 Cal. 694, 47 Pac. 686.

¹² Code Civ. Proc., § 615.

¹³ Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918.

¹⁴ Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836; Territory v. Kinney, 3 N. Mex. 97, 2 Pac. 357; Territory v. Lopas, 1 West Coast Rep. 821; Schilling v. Buhne, 139 Cal. 611, 73 Pac. 431.

on one side is not necessarily decisive of the motion.¹⁵ The saving of expense to the plaintiff in the certification of numerous papers to the county of the defendant's residence is not a ground for the change of venue to the county of the plaintiff's residence, where the expense of certification is not stated, and where the defendant offers to stipulate copies to save such expense.¹⁶ Witnesses who may testify to the value of property from personal knowledge, as distinguished from those who give their opinions on an assumed state of facts, are not within the rule that expert witnesses will not be considered on a motion for a change of venue on this ground.¹⁷

It is the duty of a court to see that a party has a fair trial by an impartial jury, and where a party charged with a criminal offense applies to the court to change the place of trial, and the facts and circumstances of the case show that the party is not liable to obtain an impartial jury in such county, it is the duty of the court to change the place of trial to another county.¹⁸

§ 992. Application for change.—An application for a change of venue should be made at the earliest possible moment, and it comes too late where presented after asking for a postponement of the matter pending before the court.¹⁹ Where the time for the defendant to answer has been repeatedly extended, and he finally appears and moves for a change of venue, but fails to file his demurrer or answer, whereupon his default is entered, and thereafter the court, upon motion of the defendant, sets aside the default, and allows him ten days to "answer upon the merits," and such allowance imposes a condition against further delay or dilatory plea, a second motion for change of venue is properly denied.²⁰ An application made after trial is clearly too late.²¹ In California, the notice to be given as to time is five days before the day appointed for the hearing, when the court is held in the same district with both parties; otherwise, ten days, unless the notice is served by mail.²² Under the Colorado statute, notice of

¹⁵ Hanchett v. Finch, 47 Cal. 192;
Cook v. Pendergast, 61 Cal. 72.

¹⁶ Schilling v. Buhne, 139 Cal. 611,
73 Pac. 431.

¹⁷ Groff v. Rome etc. Co., 98 App.
Div. 152, 90 N. Y. Supp. 691.

¹⁸ State v. Olds, 19 Or. 397, 24
Pac. 394.

¹⁹ Thompson v. American etc.
Assoc., 114 Ill. App. 131.

²⁰ Dennison v. Chapman, 102 Cal.
618, 36 Pac. 943.

²¹ Smith v. King etc. Min. Co., 9
Ariz. 228, 80 Pac. 357.

²² Cal. Code Civ. Proc., § 1005.

the application for change of venue is indispensable.²³ It is only in cases where the change is asked because the county designated in the complaint is not the proper county that the motion for the change must precede or accompany the answer or demurrer. The motion may be made by the defendant on any other statutory ground, without the affidavit and demand, within a reasonable time after his appearance. Such motions, however, being dilatory, must be prosecuted with diligence.²⁴

§ 993. Demand for change.—In New York, to procure a change of the place of trial, in case the county named is not the proper county, a demand is first necessary, the service of which is an essential prerequisite to the motion;²⁵ and if the plaintiff fails to consent to the demand, application must be made to the court.²⁶ The fact that after the service of the demand that the place of trial be changed, defendant's demurrer to the complaint is overruled is of no importance, where leave to answer is afterward given to the defendant.²⁷ A demand is now also necessary in California, where the ground of removal is that the action is not brought in the proper county.²⁸ It has been held that service of notice of the motion to change the place of trial is a sufficient demand; but it is now well settled that a notice of motion is not a demand. A demand in writing for a change is essential to the validity of an order changing the place of trial.²⁹

In the demand the name of the proper county to which a removal is sought must be inserted,³⁰ and service will not be made on the opposite counsel before the time for answering expires.³¹ It may, however, be made simultaneously with the service of the answer,³² but not after, although the defendant answered before his time had expired.³³ Under the present New York practice,

²³ *Fitzhugh v. Nicholas*, 20 Colo. App. 234, 77 Pac. 1092.

²⁴ *Cook v. Pendergast*, 61 Cal. 72; *Roberts v. People*, 9 Colo. 458, 13 Pac. 630.

²⁵ N. Y. Code Civ. Proc., § 986.

²⁶ *Clark v. Campbell*, 54 How. Pr. 166; *Houck v. Lasher*, 17 How. Pr. 520; *March v. Lowry*, 16 How. Pr. 41.

²⁷ *Washington v. Thomas*, 103 App. Div. 423, 92 N. Y. Supp. 994.

²⁸ Cal. Code Civ. Proc., § 396.

²⁹ *Byrne v. Byrne*, 57 Cal. 348; *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523; *Pennie v. Visher*, 94 Cal. 326, 29 Pac. 711; *Elam v. Griffin*, 19 Nev. 442, 14 Pac. 582.

³⁰ *Beardsley v. Dickerson*, 4 How. Pr. 81.

³¹ *Milligan v. Brophy*, 2 N. Y. Code Rep. 118.

³² *Mairs v. Remsen*, 3 N. Y. Code Rep. 138.

³³ *Milligan v. Brophy*, 2 N. Y. Code Rep. 118.

the demand must specify the county where the defendant requires the action to be tried,³⁴ and a demand specifying an improper county is irregular. A demand for change of venue is not insufficient because the attorneys of the defendant, describing themselves as such, say that they demand, instead of saying that the defendants demand, the change.³⁵ The demand for change may be signed by an attorney simultaneously with his appearance.

§ 994. Joinder of defendants.—It is well settled that all of the defendants must join in the application for a change of venue, or a good reason be shown why they do not; otherwise, it will be denied.³⁶ The motion may be made by one of several defendants,³⁷ on notice to the other defendants, unless they be in default; or a defendant subsequently served, after a similar motion by another defendant has been denied, may move for a change of venue.³⁸ This would seem, however, not to be the rule in California, if the motion is made on the ground that the action is not brought where the defendants reside, and part of the defendants live in the county where the action is brought.³⁹

A judge, if properly passing upon a motion to transfer the cause to some other court than the nearest or most accessible court, on account of the convenience of witnesses, does not abuse his discretion in denying the application, where the affidavits are conflicting as to what is the most convenient court for witnesses, and only forty-five out of two hundred and fifty defendants join in the motion.⁴⁰

In an action to determine rights to real estate, of course, a defendant is entitled, as a matter of right, to have the action tried in the county where the land is situated, and all the defendants need not join in claiming such rights;⁴¹ and an application for the change of venue to the proper county, made by all the defendants who had been served at the time, cannot be adversely affected by

³⁴ N. Y. Code Civ. Proc., § 986.

³⁵ *Buck v. City of Eureka*, 97 Cal. 135, 31 Pac. 845.

³⁶ *Sailly v. Hutton*, 6 Wend. 508; *Legg v. Dorsheim*, 19 Wend. 700; *Pieper v. Centinela Land Co.*, 56 Cal. 173; *McKenzie v. Barling*, 101 Cal. 459, 36 Pac. 8.

³⁷ *McSherry v. Pennsylvania etc. Land Co.*, 97 Cal. 637, 32 Pac. 711;

Bachman v. Cathry, 113 Cal. 498, 45 Pac. 814.

³⁸ *New Jersey Zinc Co. v. Blood*, 8 Abb. Pr. 147.

³⁹ Cal. Code Civ. Proc., § 395.

⁴⁰ *Anaheim Water Co. v. Jurupa Land etc. Co.*, 128 Cal. 568, 61 Pac. 80.

⁴¹ *O'Neil v. O'Neil*, 54 Cal. 187; *Warner v. Warner*, 100 Cal. 16, 34 Pac. 523.

the fact that before its determination another defendant has been served who has failed to join in the application.⁴² The right of the defendant to have the venue changed to the county of his residence is not affected by the joinder of another defendant who is not a necessary party and against whom no cause of action is stated.⁴³

The venue of an action for damages commenced in a county in which none of the defendants reside will be changed to the proper county on the application of the defendants who have been served with process;⁴⁴ but if one of the defendants resides in the county in which the action is commenced, it may properly be tried there, and an order refusing to change the venue to the county in which other of the defendants reside will not be disturbed.⁴⁵ At least, a motion to change the venue to the county in which other of the defendants reside will not be granted, unless all of the defendants have joined in the motion, or unless good reason is shown why they have not so joined.⁴⁶ One who is involuntarily substituted as the sole defendant in an action, is entitled to a change of venue to the county in which he resides, notwithstanding the failure of the original defendant to demand such change.⁴⁷

§ 995. **Affidavit of merits.**—An affidavit of merits, which declares “that the defendant has fully and fairly stated the case to his counsel; that he has a good and substantial defense on the merits to the whole of the plaintiff’s demand, as he is advised by his counsel, and verily believes to be true,” is sufficient.⁴⁸ The affiant should aver that he has fully and fairly stated “the case” (not “his case”) to his attorney.⁴⁹ There is no essential difference, however, between an affidavit of merits which states that the defendant “has fully and fairly stated the case in this action” and one which states “that he has fully and fairly stated the facts of the said case.”⁵⁰

⁴² *State v. Superior Court*, 9 Wash. 668, 38 Pac. 206.

⁴³ *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120.

⁴⁴ *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. 987.

⁴⁵ *Hirshfeld v. Sevier*, 77 Cal. 448, 19 Pac. 819.

⁴⁶ *McKenzie v. Barling*, 101 Cal. 459, 36 Pac. 8.

⁴⁷ *Howell v. Stetefeldt Furnace Co.*, 69 Cal. 153, 10 Pac. 390.

⁴⁸ *Watkins v. Degener*, 63 Cal. 500; *Buell v. Dodge*, 63 Cal. 553; *Rowland v. Coyne*, 55 Cal. 1; *Butler v. Mitchell*, 17 Wis. 52.

⁴⁹ *People v. Larue*, 66 Cal. 235, 5 Pac. 157.

⁵⁰ *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. 987; *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397.

An affidavit of merits, otherwise good, is not defective because of failure to allege that the affiant believes the advice of his counsel.⁵¹ Nor is it insufficient because of the omission of the names of the defendants from the title of the action, where the notice of the motion states that the motion will be made "upon the affidavit and demand of defendant to change the place of trial annexed and served with the said notice, and upon said notice and all the pleadings on file in said action," and both the notice and demand were duly entitled in the action and the affidavit was filed with the notice.⁵² But an affidavit of merits averring merely that the affiant had fully and fairly stated to the attorney all the facts constituting the defense of the defendants, instead of the facts of the case, is insufficient.⁵³ It has been held that where it appears from the affidavit of merits that the defendant is entitled to file an answer which will raise issues for trial, which he desires to have tried in the proper county, the affidavit is sufficient.⁵⁴

The affidavit of merits must be made and served with the notice of the motion.⁵⁵ It is a common and convenient practice to combine the affidavit of merits with the affidavit of the ground on which the motion is made, where the latter does not appear upon the face of the complaint, and has to be established by affidavit.⁵⁶ The affidavit may be made by the attorney of the party applying for the change of venue, if it shows sufficient reason for not being made by the party himself.⁵⁷

Where the affidavits issued upon a motion to change the place of trial go mostly to the merits of the action, and all the statements therein are controverted by conflicting affidavits, the ruling of the court will not be reversed upon appeal.⁵⁸

§ 996. Contents of affidavit stating grounds.—In an affidavit for change on the ground that an impartial trial cannot be had, it is necessary to state the facts and circumstances which induce the belief that such trial cannot be had, in order that the court may

⁵¹ *Watt v. Bradley*, 95 Cal. 415, 30 Pac. 557.

⁵² *Id.*

⁵³ *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226.

⁵⁴ *State v. Superior Court*, 9 Wash. 668, 38 Pac. 206.

⁵⁵ *Lynch v. Mosher*, 4 How. Pr. 86.

⁵⁶ *State v. Superior Court*, 9 Wash. 668, 38 Pac. 206.

⁵⁷ *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882; *Scott v. Gibbs*, 2 Johns. Cas. 116.

⁵⁸ *McKenzie v. Barling*, 101 Cal. 459, 36 Pac. 8.

determine whether the belief is well founded; the affidavits of individuals as to their belief that an impartial trial cannot be had are insufficient.⁵⁹ An application for a change of venue based on the ground of prejudice of the people of the county will be denied where it is shown that an equal number of citizens of the county testify that in their opinion an impartial trial can be had.⁶⁰

Under a statute providing that the judge shall grant a change of the venue when either party to a civil action shall file an affidavit that the opposite party has an undue influence over the citizens of the county, or that an odium attaches to the applicant or to his cause of defense, if an affidavit is filed setting up the existence of such facts in the words of the statute, a court has no discretion to refuse the change.⁶¹ Under the New Mexico statute,⁶² an application will not be granted on the ground that a fair trial cannot be had within the county, if the affidavit does not set out the facts.⁶³ Where two counties are united for judicial purposes, an affidavit for a change from either is insufficient, unless it shows that the prejudice alleged extends to the inhabitants of both.⁶⁴

Where the motion is made on account of the convenience of witnesses, an affidavit should set out the facts to be proved, and their materiality must be shown.⁶⁵ The affidavit should state the witnesses' names and residences; the mere statement that they are residents of the county is not sufficient.⁶⁶ It must also appear that each and every one is a necessary witness, and that without the testimony of each the affiant could not safely proceed.⁶⁷ It is not necessary, however, to state that the affiant expects to be able to procure the attendance of the witnesses at the trial.⁶⁸ Where the motion is made on the ground of the disqualification of the

⁵⁹ *Bowman v. Ely*, 2 Wend. 250; *People v. Bodine*, 7 Hill, 147; *People v. Vermilyea*, 7 Cow. 108; *Scott v. Gibbs*, 2 Johns. Cas. 116; *Sloan v. Smith*, 3 Cal. 410; *State v. Millain*, 3 Nev. 409; *Williams v. United States*, 6 Indian T. 1, 88 S. W. 334.

⁶⁰ *State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

⁶¹ *Perkins v. McDowell*, 3 Wyo. 203, 19 Pac. 440.

⁶² N. Mex. Comp. Laws, § 1833.

⁶³ *Lady Franklin Min. Co. v. DeManey*, 4 N. Mex. 39, 51, 12 Pac. 628.

⁶⁴ *Black v. Bent*, 20 Colo. 342, 38 Pac. 387.

⁶⁵ *Price v. Fort Edward Water Works*, 16 How. Pr. 51.

⁶⁶ *Westbrook v. Merritt*, 1 How. Pr. 195; *Pierce v. Gunn*, 3 Hill, 445; *Hull v. Hull*, 1 Hill, 671; *People v. Wright*, 5 How. Pr. 23.

⁶⁷ *Onondaga County Bank v. Shepherd*, 19 Wend. 10; *Satterlee v. Groot*, 6 Cow. 33; *Constantine v. Dunham*, 9 Wend. 431.

⁶⁸ *Reavis v. Cowell*, 56 Cal. 588.

judge, an affidavit which states "that the judge, as the affiant is informed and verily believes, has frequently stated that he believes the affiant guilty of the crime charged in the indictment, and has frequently expressed himself against and adversely to the affiant in connection with said charge," will not be considered, as it contains a mere charge upon information and belief, and does not show how the information was obtained or upon what the belief was based.⁶⁹ An affidavit for change setting forth bias or prejudice on the part of the judge can form no excuse or justification for language and statements used in the affidavit constituting disorderly, contemptuous, and insolent behavior toward the judge of the court; and such behavior may be punished as contempt.⁷⁰ In an affidavit made in the support of a motion for a change of venue on the ground of non-residence, the naked declaration that a party was a resident of the certain county at the commencement of the suit is a mere conclusion.⁷¹

§ 997. Affidavit on ground of disqualification of judge.—This affidavit is rarely if ever made; the bare suggestion to the judge of one of the statutory grounds for disqualification being sufficient. A disqualified judge is, without discretion, absolutely required to transfer the cause.⁷² In a suit to protect decreed water priorities, a change of venue is not required because the judge was an attorney in the former suit when the priorities were adjudicated.⁷³ Change may be had to some court agreed upon by the parties in writing or in open court and entered in the minutes, or if they do not agree, then to the nearest or most accessible court where a like objection does not exist. If in a superior court, the cause should be transferred to another superior court; if in a justice's court, to another justice's court in the same county.⁷⁴

§ 998. Affidavit resisting motion for change.—Counter-affidavits opposing a motion made on the ground of convenience of witnesses should be in form and substance similar to the moving

⁶⁹ *People v. Williams*, 24 Cal. 31.

⁷⁰ *Matter of Jones*, 103 Cal. 397, 37 Pac. 385.

⁷¹ *Boyle v. Standard Oil Co.*, 102 App. Div. 623, 92 N. Y. Supp. 677.

⁷² Cal. Code Civ. Proc., § 398; *Parish v. Riverside Trust Co.*, 7 Cal. App. 95, 93 Pac. 685.

⁷³ *Kerr v. Burns*, 42 Colo. 285, 93 Pac. 1120.

⁷⁴ Cal. Code Civ. Proc., § 398; Ariz. Civ. Code, pars. 1701-1704; Idaho Rev. Codes, § 4126; Mont. Lev. Codes, § 6507; Nev. Comp. Laws, § 3116; N. Mex. Comp. Laws, § 2879; Or. B. & C. Codes, § 45; Utah Rev. Stats., § 102; Wash. Bal. Codes, § 4857; Wyo. Rev. Stats., § 4282; Colo. (Mills') Stats., § 4631.

affidavits of the defendant, and should state what is expected to be proved by the witnesses,⁷⁵ and the names of the witnesses should also be stated.⁷⁶ Where the plaintiff files affidavits showing that the convenience of witnesses requires a change of the place of trial, if the defendant files a stipulation admitting that all the facts alleged and to be proved by such witnesses are true, and thus obviates the necessity of proving them, no counter-affidavits are necessary.⁷⁷

In New York, a motion made on the ground of the convenience of witnesses cannot be resisted by the plaintiff prior to issue joined.⁷⁸ In California, the practice is the same, although formerly a different opinion prevailed.⁷⁹ Nor can the hearing of defendant's motion, made at the time of his appearance and demurrer, be postponed until his answer is filed, and leave granted to the plaintiff to make a cross-motion to retain the case on the ground of convenience of witnesses.⁸⁰

If the plaintiff desires to re-change to the county in which the action is brought, he should make a cross-motion to that effect.⁸¹ If the state of the case is such that the plaintiff has the right to resist the motion for a change of venue, time to file counter-affidavits may be allowed him, in the discretion of the court.⁸²

§ 999. Hearing of motion.—The trial court may properly consider the allegations of the complaint in determining the motion for the change of the place of trial, where the defendant's notice of motion stated that it would be based upon certain affidavits, "and upon all the papers, files, records, and proceedings" in the action.⁸³ Affidavits on the motion must be limited to the issues made, and if issue is not joined upon an amended pleading which had been served long prior to the hearing of a motion, affidavits to the contrary are not material.⁸⁴ The ruling upon a motion to

⁷⁵ American Exchange Bank v. Hill, 22 How. Pr. 29; Onondaga County Bank v. Shepherd, 19 Wend. 10.

⁷⁶ Loeher v. Latham, 15 Cal. 418.

⁷⁷ Stockton Combined Harvester etc. Works v. Houser, 103 Cal. 377, 37 Pac. 179.

⁷⁸ International etc. Co. v. Sweetland, 14 Abb. Pr. 240.

⁷⁹ Cook v. Pendergast, 61 Cal. 72; Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349.

⁸⁰ Heald v. Hendy, 65 Cal. 321, 4 Pac. 27. But see Allis v. White, 70 Minn. 189, 72 N. W. 1070, where rule is held to be different under local statute.

⁸¹ Cook v. Pendergast, 61 Cal. 72.

⁸² Pierson v. McCahill, 22 Cal. 127; Hyde v. Harkness, 1 Idaho, 602.

⁸³ Lakeshore Cattle Co. v. Modoc Land etc. Co., 108 Cal. 261, 41 Pac. 472.

⁸⁴ Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

change the place of trial on the ground of the disqualification of the judge, which was taken under advisement by the disqualified judge and never passed upon, and was again called up for hearing before his successor, who was qualified to try the case, is to be tested by the conditions existing when the motion is passed upon, and the qualified judge may properly deny the motion.⁸⁵

Under the Missouri statute,⁸⁶ where the change of venue is sought on the ground of local prejudice, and the adverse party has filed counter-affidavits, the court must hear evidence on the issue and determine the matter on the merits.⁸⁷

The motion will be denied where it is clear that the object of the motion is merely delay;⁸⁸ e. g. where nearly six months had elapsed before the motion was made and long after the defendant had answered.⁸⁹ The motion will also be denied where, by stipulation, evidence is confined to facts occurring in the county where the action is brought.⁹⁰

An application by the defendants for a change of venue to another county on the ground that they are residents of such county, that the action is founded on the contract to be performed therein, and that the summons was there served on them, but which does not say that the plaintiff was not a resident of the county where the action is brought when the suit was commenced, is properly refused.⁹¹ But it has been held that where a motion for a change of venue to the proper county of trial has been made, upon a sufficient affidavit of merits, the failure of the applicant for transfer to appear at the time set for the hearing of his motion affords no ground for denying the application;⁹² and the averment by the plaintiff that he was ignorant of the place or residence of the defendant when the action was commenced, without showing that he used all proper diligence to ascertain his residence before suit and failed, does not entitle the plaintiff to have a trial of the action in a county designated by him other than that of the defendant's residence.⁹³

⁸⁵ *Santa Cruz Bank of Savings v. Taylor*, 125 Cal. 249, 57 Pac. 987.

⁸⁶ Rev. Stats. 1899, § 822.

⁸⁷ *Eudaley v. Kansas City etc. R. Co.*, 186 Mo. 399, 85 S. W. 366.

⁸⁸ *Dennison v. Chapman*, 102 Cal. 618, 36 Pac. 943; *Killbourne v. Fairchild*, 12 Wend. 293; *Garlock v. Dunke*, 22 Cal. 615.

⁸⁹ *Tooms v. Randall*, 3 Cal. 438.

⁹⁰ *Smith v. Averill*, 1 Barb. 28; *Stockton Combined Harvester etc. Works v. Houser*, 103 Cal. 377, 37 Pac. 179.

⁹¹ *DeWein v. Osborn*, 12 Colo. 407, 21 Pac. 189.

⁹² *State v. Superior Court*, 9 Wash. 668, 38 Pac. 206.

⁹³ *Thurber v. Thurber*, 113 Cal. 607, 45 Pac. 852; *Bachman v. Cathry*,

§ 1000. **Effect of motion on court's power.**—A motion for the change of the place of trial intercepts all judicial action in the case, and suspends the power of the court to act upon any other question until the motion has been determined.⁹⁴ Pending the hearing of the motion, and until it is passed upon, the court has no jurisdiction to hear and determine any demurrer to the complaint, and its order made in passing upon the same is a nullity. If the motion should be granted, the defendant is entitled to have the demurrer passed upon in the county to which the change is to be made.⁹⁵ The judge of the second court may direct the correction of a clerical error made in the court from which the case was transferred.⁹⁶

§ 1001. **Mandamus to compel hearing.**—A writ of mandate will issue from the supreme court to compel a superior judge to hear and determine a motion made in an action pending in his court for a change of the place of trial of the action to the place of the defendant's residence.⁹⁷

When a motion for the change of venue is denied without delay, and appeal from the order affords a complete remedy, *mandamus* will not lie to compel the court to change the place of trial. *Mandamus* is only proper when the court unreasonably delays to decide the motion.⁹⁸

§ 1002. **Appeal from order.**—An appeal from an order refusing to change the venue of an action does not operate to stay proceedings in a court below until such appeal is determined.⁹⁹ Under the Nevada practice, an order changing the place of trial is not appealable, but is properly brought before the court on an appeal from the judgment, as an intermediate order involving the merits and necessarily affecting the judgment.¹⁰⁰ The refusal of a justice of the peace to allow a change of venue upon an affidavit showing the interest, prejudice, and bias of the justice, although erroneous

113 Cal. 498, 45 Pac. 814; *Mahler v. Drummer Boy Gold Min. Co.*, 7 Cal. App. 190, 93 Pac. 1064; Cal. Code Civ. Proc., § 395.

⁹⁴ *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209.

⁹⁵ *Nolan v. McDuffie*, 125 Cal. 334, 58 Pac. 4.

⁹⁶ *United Zinc Co. v. Morrison*, 76 Kan. 799; 92 Pac. 1114.

⁹⁷ *Hennessy v. Nicol*, 105 Cal. 138, 38 Pac. 649.

⁹⁸ *San Joaquin County v. Superior Court*, 98 Cal. 602, 33 Pac. 482; *In re Davis Estate*, 11 Mont. 1, 27 Pac. 342.

⁹⁹ *Howell v. Thompson*, 70 Cal. 635, 11 Pac. 789.

¹⁰⁰ *State v. Shaw*, 21 Nev. 222, 29 Pac. 321.

and subject to reversal upon appeal, does not render subsequent proceeding before such justice void for want of jurisdiction.¹⁰¹

Upon an appeal from an order changing the place of trial, where the bill of exceptions, settled without notice, has been stricken from the files of the superior court, and by the supreme court from the transcript on appeal, leaving nothing but the notice of appeal and clerk's certificate as to the undertaking, it is the duty of the supreme court to dismiss the appeal of its own motion, without considering a motion to dismiss it for failure by the applicant to serve and file points and authorities.¹⁰²

An order changing the place of trial will be presumed to have been properly made when the record on appeal from the order does not contain any papers identified as having been used in the lower court on the hearing of the motion to change.¹⁰³

FORMS FOR CHANGE OF VENUE.

§ 1003. Demand for change.

Form No. 327.

[TITLE.]

I hereby demand that the place of trial of this cause be changed to the proper county, viz. the county of . . .

[DATE.]

[SIGNATURE.]

[ADDRESS.]

§ 1004. Consent to change.

Form No. 328.

[TITLE.]

Take notice, that the above-named plaintiff consents that the place of trial of this action be changed to . . . county.

[DATE.]

E. F., Plaintiff's Attorney.

[ADDRESS.]

¹⁰¹ Ritzman v. Burnham, 114 Cal. 522, 46 Pac. 379.

¹⁰³ McAulay v. Truckee Ice Co., 79 Cal. 50, 21 Pac. 434.

¹⁰² Tingley v. Otis, 141 Cal. 71, 74 Pac. 448.

§ 1005. Demand for change by defendant's attorney, combined with notice of retainer.

Form No. 329.

[TITLE.]

Take notice, that the undersigned is retained by, and hereby appears for, the defendant in the above-entitled action; and that the defendant demands that the trial of this action be had within the county of . . . , for the reason that the said defendant, at the time of the commencement of this action, resided, and still resides, in the city of . . . , in said county of . . .

[DATE.]

G. H., Defendant's Attorney.

§ 1006. Notice of motion for change.

Form No. 330.

[TITLE.]

To . . . Attorney for Plaintiff:

You will please take notice that the defendant will move this court, at the courtroom thereof, . . . , on the . . . day of . . . , 19.., at ten o'clock A. M., of said day, or as soon thereafter as counsel can be heard, for an order changing the place of trial of this action to the superior court in and for the county of . . . Said motion will be made upon affidavits, copies of which are herewith served upon you, and upon the demand to change the place of trial, and the papers on file in the case, upon the following grounds:

I. That the property in controversy is situated in said . . . county.

II. That the defendants are both residents of said . . . county.

III. That this is an action against said defendant, . . . , for an act done by him in virtue of his office, said defendant being sheriff of . . . county.

[DATE.]

A. B., Defendant's Attorney.

§ 1007. Affidavit for change on failure to consent.

Form No. 331.

[TITLE.]

[VENUE.]

C. D., being duly sworn, on oath says that he is the defendant [or, one of the attorneys of the defendant] in the above-entitled action.

The said action was commenced on the . . . day of . . . , 19. . . ; that at the time of the commencement of this action the said defendant resided, and still resides, in the city of . . . , in the county of . . . ; and that he has a good and sufficient defense to the alleged cause of action set out in plaintiff's complaint.

That on the . . . day of . . . , 19. . . , the defendant's attorneys served on the attorneys for the plaintiff a demand in writing that the place of trial of this action be changed to . . . county, of which demand a copy is hereto annexed.

That no written consent to said change has been served by the plaintiff's attorneys on the defendant's attorneys, or received by them in this action.

C. D.

§ 1008. Statement of ground—Not the proper county from situation of subject-matter.

Form No. 332.

That this is an action for the recovery of real property [or, of an estate, or interest therein; or, for the determination in some form of such right or interest; or, for injuries to real property], and that the said real property is wholly situate in the said last-named county.¹⁰⁴

[Or, that this is an action for the partition of real property, which said property is wholly situate in the said county to which the desired change is asked.]¹⁰⁵

[Or, that this is an action for the foreclosure of a mortgage of [or, lien upon] real property, and that the land in said mortgage [or, lien] described is wholly situate in said last-named county.]¹⁰⁶

§ 1009. The same—Not the county where cause of action arose.

Form No. 333.

That this is an action for the recovery of a penalty or forfeiture imposed by statute, except, etc.,¹⁰⁷ and that it arose in the said last-named county.

[Or, that this is an action against defendant, being the . . . of said last-named county, and a resident thereof,¹⁰⁸ or, when the act

¹⁰⁴ Cal. Code Civ. Proc., § 392, subd. 1.

¹⁰⁵ Id., subd. 2.

¹⁰⁶ Id., subd. 3.

¹⁰⁷ See Cal. Code Civ. Proc., § 939, subd. 1.

¹⁰⁸ Cal. Code Civ. Proc., § 393, subd. 2.

complained of was done by, and suit was brought against a person who by command of such officer, or in his aid, performed the act which is the subject of the action, add:] and that such person is a resident of the last-named county, etc.

§ 1010. Affidavit on the ground of non-residence.

Form No. 334.

[TITLE.]

[VENUE.]

A. B., the defendant in the above-entitled action, being duly sworn, deposes and says as follows:

I. The summons and complaint in this action were served on me on the . . . day of . . . , 19..

II. I further say, that I have fully and fairly stated the case in this cause to G. H., my counsel, who resides at No. . . . in . . . street, in the city of . . . , and after such statement I am by him advised and verily believe that I have a good and substantial defense on the merits to the action.

III. All the parties defendant to this action reside in the county of . . . , in this state.

[JURAT.]

[SIGNATURE.]

§ 1011. Affidavit on ground of partiality and prejudice.

Form No. 335.

[Same as in form No. 334, down to paragraph III.]

III. I have reason to believe, and do believe, that I cannot have a fair and impartial trial in said court, in which this action is brought, by reason of the interest, prejudice, and bias of the people of said county. [Give the facts.]

[JURAT.]

A. B.

§ 1012. Affidavit on account of convenience of witnesses.

Form No. 336.

[Same as form No. 334, down to paragraph III.]

III. I have fully and fairly stated to my counsel the facts which I expect to prove by each and every one of the following witnesses, viz. J. K., L. M., and O. P.; and each and every one of them is a material and necessary witness for my defense on the trial of this cause, as I am advised by my said counsel, and verily

believe, and that without the testimony of each and every one of the said witnesses I cannot safely proceed to the trial of this cause, as I am also advised by my said counsel, and verily believe.

IV. That each and every one of said witnesses reside in the county of . . . , viz.: [State the residence of each.]

V. The facts which I expect to prove by said witnesses are as follows: By J. K., the fact that, etc.; by L. M., that, etc.

[JURAT.]

[SIGNATURE.]

§ 1013. Affidavit on the ground of disqualification of the judge.

Form No. 337.

[Same as in form No. 334, down to paragraph III.]

III. That the Hon. X. Y., judge of the court in which the complaint in this action is filed, is disqualified from presiding in the same [he being related to the plaintiff within three degrees of consanguinity, to-wit, a brother of the plaintiff; or, he having heretofore acted as counsel in this action on the part of plaintiff].

[JURAT.]

[SIGNATURE.]

§ 1014. Affidavit resisting motion for change.

Form No. 338.

[TITLE.]

[VENUE.]

A. B., plaintiff above named, being duly sworn, says as follows:

I. I have fully and fairly stated to E. F., my counsel in this cause, who resides at . . . , in the county of . . . , the facts which I expect to prove by each and every one of the following witnesses, viz. G. H., of the town of . . . ; J. K., of the town of . . . ; L. M., of the town of . . . ; all of whom reside in said county of . . . , and that they are, each and every one of them, material and necessary witnesses for me on the trial of this cause, as I am advised by said counsel, and as I verily believe; and that without the testimony of each and every one of said witnesses I cannot safely proceed to the trial of this cause, as I am also advised by my said counsel, and verily believe.

II. That the facts which I expect to prove by said witnesses are as follows: [State in detail the facts and circumstances expected to be proved by each witness, naming him, and the materiality of those facts.]

[JURAT.]

[SIGNATURE.]

§ 1015. Order to show cause with stay of proceedings.

Form No. 339.

[TITLE.]

On the affidavit of C. D., served herewith, and the demand therein mentioned, and on the pleadings, let the plaintiff show cause at the courtroom of this court on the . . . day of . . . , 19 . . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, why the place of trial of this action should not be changed from the county of . . . to the county of . . . ; and why the defendant should not have the costs of this motion, and such other relief as may be just. And until the determination of this motion, let all the proceedings on the part of the plaintiff be stayed.

Let this order and said affidavit be served on the plaintiff's attorney on or before the . . . day of . . . , 19..

By the Court:

L. M., Superior Judge.

§ 1016. Order changing venue, on judge's own motion.

Form No. 340.

[TITLE.]

This cause being now pending in this court at issue, and it appearing to the judge thereof that he has been of counsel for one of the parties thereto [or, that he is interested in the subject-matter thereof; or, that he is related to one of the parties], therefore:

Ordered, that the place of trial of this action be changed from . . . county to . . . county.

[DATE.]

By the Court:

L. M., Superior Judge.

§ 1017. Order denying motion.

Form No. 341.

[TITLE.]

At a regular term of the superior court of the county of . . . , state of California, held at . . .

Present, the Honorable . . . , Judge.

The motion to change the place of trial in this action coming on regularly to be heard this day, A. B., Esq., appearing in favor of said motion, and C. D., Esq., appearing in opposition thereto, and the court being duly advised:

It is ordered, that the motion to change the place of trial in this action be and the same is hereby denied (with . . . dollars costs).

§ 1018. Order granting change of place of trial.

Form No. 342.

[Commencement as in form No. 341.]

It is ordered, that the place of trial of this action be and is hereby changed from the county of . . . to the county . . .

§ 1019. Order to transfer cause to another court, on account of disability of judge.

Form No. 343.

[TITLE.]

It being shown to the court by G. H., of counsel for the defendant, that the judge of this court was heretofore of counsel in a cause involving the same title which is in issue in this cause:

It is ordered, that this cause be transferred to the superior court of the county of . . . for trial.

CHAPTER XXXVIII.

REMOVAL OF CAUSES TO FEDERAL COURTS.

§ 1020. While the subject of removal of causes from state to federal courts is not, strictly speaking, within the scope of a work on code pleading and practice, it is deemed advisable to treat the subject briefly in connection with the subject of change of venue from one state court to another.

§ 1021. **Statutes.**—The principal statutes of the United States authorizing and regulating the transfer of causes from state courts to courts of the United States have been the acts of 1789, 1866, 1867, and 1875. The twelfth section of the Judiciary Act of 1789, and that of July 27, 1866, and March 2, 1867, although technically repealed, are substantially embodied in section 639 of the Revised Statutes. There are other provisions of the statute covering the transfer of a limited number of special cases, but section 639 of the act of March 3, 1875,¹ as amended by the act of March 3, 1887,² as re-enacted by the act of August 13, 1888,³ provides for nearly all the cases met with in ordinary practice. The act of 1888 expressly repeals all laws and parts of laws in conflict with its provisions.⁴

Special cases not within section 639 of the act of 1875, or that of 1887, are—1. Cases, civil and criminal, in any state court, against persons denied civil rights;⁵ 2. Suits, civil and criminal, against revenue officers of the United States, and against officers and other persons acting under the registration laws;⁶ 3. Suits by aliens against civil officers of the United States, under certain circumstances.⁷

The act of March 3, 1887, as re-enacted by the act of August 13, 1888, and amendatory of the act of 1875, may be regarded as embodying all the general laws on the subject of the removal of causes. The intention of the act is to restrict removals from

¹ 18 U. S. Stats., § 470.

² 24 U. S. Stats., § 552.

³ 25 U. S. Stats., § 433.

⁴ Desty's Removal of Causes, § 561;
Desty's Fed. Proc., § 96.

⁵ U. S. Rev. Stats., §§ 641, 642.

⁶ U. S. Rev. Stats., § 643.

⁷ U. S. Rev. Stats., § 644.

state or federal courts, and its provisions should be strictly construed against any one seeking to evade the additional requirements which it puts upon the right of removal.⁸

It is not the purpose of the statutes authorizing removal of causes from state to federal courts to deprive either party of any substantial right, but to secure to the parties all such rights which could be claimed in the state courts when capable of enforcement under the settled federal practice.⁹

§ 1022. **Right of removal.**—The right of removal is restricted as to the parties who can exercise it, as to the classes of actions in which it may be exercised, and as to the time in which an election to exercise the privilege must be made. The right is given only to a defendant who has not submitted himself to state jurisdiction, and who promptly avails himself of the right at the time of his appearance by declining to plead, and filing his petition for removal.¹⁰ So a party cannot, after experiment and defeat in a state court, ask for the removal of the case to a federal court.¹¹ It follows, also, that real parties only can claim the right to remove, and that the right cannot be defeated by joining mere nominal parties.¹²

The right of a citizen to remove a cause into a federal court is not a vested right of property. The rules of statutory construction when vested rights are concerned do not apply when the jurisdiction of a federal court to entertain a removal case has been cut off by an act of Congress.¹³

§ 1023. **Party entitled to removal.**—A party defendant to an action, within the meaning of the statute, is one who is named as such, and appears in the record as a defendant at the time the right of removal exists.¹⁴ So in an action for death caused by the alleged negligence of a resident owner and a non-resident contractor, where both were joined in good faith as defendants, and not for the fraudulent purpose of preventing a removal of the cause to the circuit court of the United States, and the cause had

⁸ *Dwyer v. Peshall*, 32 Fed. 497; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768.

⁹ *Smale v. Mitchell*, 143 U. S. 106, 12 Sup. Ct. 353, 36 L. Ed. 90.

¹⁰ *West v. Aurora City*, 6 Wall. 142, 18 L. Ed. 819.

¹¹ *Rosenthal v. Coates*, 148 U. S. 147, 13 Sup. Ct. 576, 37 L. Ed. 399.

¹² *Case of Sewing Machine Cos.*, 13 Wall. 586, 21 L. Ed. 914.

¹³ *Manley v. Olney*, 32 Fed. 708.

¹⁴ *Walker v. Richards*, 55 Fed. 129.

been removed to that court upon an insufficient petition and remanded, the contractor is not subsequently entitled to a removal of the cause, merely because the resident owner obtains a nonsuit.¹⁵

Under section 2 of the act of 1875, providing that where the controversy is between citizens of one or more states on one side and citizens of other states on the other side, either party may remove the suit to a federal court without regard to the position occupied by him in the pleadings as plaintiff or defendant.¹⁶

All of the defendants must join in the petition for removal, unless there is a separable controversy between citizens of different states which can be fully determined in the federal court.¹⁷ Separate causes of action disclosed by the bill or complaint in a single suit, on either of which a separate suit could be maintained, and the determination of neither of which is essential to the determination of the other, constitute separable controversies, and if either controversy, when the parties have been properly arranged on opposite sides, is wholly between citizens of different states, the suit is removable.¹⁸ On the other hand, in a suit for an undivided half-interest in a single tract of land alleged to be wrongfully withheld by two defendants, there is no separable controversy so as to allow removal to a federal court, though the citizenship of the plaintiffs and of only one of the defendants is diverse.¹⁹

Where aliens are on both sides of a case, or when sued with a citizen, the alien cannot have the cause removed to a federal court.²⁰

Formal parties, or nominal parties, or parties without interest, united with real parties to the litigation, cannot defeat the right of removal, if the citizenship or character of the real parties be such as to confer it.²¹ Hence, merely nominal or formal defendants need not join in the petition where they have not appeared, and where there is no issue between them and the plaintiff upon

¹⁵ *Knott v. McGilvray*, 124 Cal. 128, 56 Pac. 789.

¹⁶ *Removal Cases*, 100 U. S. 468, 25 L. Ed. 593.

¹⁷ *Fraser v. Jennison*, 106 U. S. 194, 1 Sup. Ct. 171, 27 L. Ed. 131; *Thompson v. Chicago etc. R. R. Co.*, 60 Fed. 773; *Western Union Tel. Co. v. Brown*, 32 Fed. 337; *Plymouth etc. Mining Co. v. Amador etc. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232.

¹⁸ *Boatmen's Bank v. Fritzen*, 135 Fed. 650, 68 C. C. A. 288.

¹⁹ *Knight v. Luteher etc. Co.*, 136 Fed. 404, 69 C. C. A. 248; *Forsyth Mfg. Co. v. Putnam etc. Co.*, 139 Fed. 1007, 71 C. C. A. 684.

²⁰ *Merchants' Cotton Press etc. Co. v. Insurance Co.*, 151 U. S. 368, 336, 14 Sup. Ct. 367, 38 L. Ed. 195.

²¹ *Wood v. Davis*, 18 How. 469, 15 L. Ed. 460.

which a verdict could be rendered.²² An executor, made defendant to a suit merely to reach the interest of an heir in the estate, being a nominal party, does not prevent removal, although of the same state with the plaintiff.²³

In no case, however, is the removal of a cause allowable when one of the plaintiffs and one of the defendants, who are necessary parties, are citizens of the same state. Under the act of 1887, removal for diverse citizenship can be had only by a non-resident defendant, and a defendant sued in a court of his own state by citizens of another state has no right of removal.²⁴

Municipal as well as private corporations are deemed to be citizens of the state under whose laws they are organized or created, for the purpose of removal of causes.²⁵ The citizenship of a corporation, within the meaning of the statute, is fixed in the state granting its charter, although it may be organized for the purpose of doing business chiefly in other states.²⁶ A suit by non-resident plaintiffs against a corporation not chartered by the state in which the suit is brought is removable by the defendant.²⁷ A foreign railroad corporation does not become domestic, so as to lose its right of removal, by taking a lease of a railroad within the state;²⁸ but a corporation of one state which is created a corporation by a statute in another state becomes a domestic corporation, and cannot remove when sued in the latter state.²⁹ Where both the plaintiff and the defendant, in a suit in a state court, are foreign corporations, doing business within the state and amenable to its laws, but neither are residents of the judicial district to which the defendant seeks to remove the cause, the federal court will not assume jurisdiction without the consent of both parties.

The citizenship of parties, which determines the right to remove a cause, is that of the parties as persons, and not an official citizen.

²² *Shattuck v. North British etc. Ins. Co.*, 58 Fed. 609, 7 C. C. A. 386.

²³ *Bacon v. Rives*, 106 U. S. 104, 1 Sup. Ct. 3, 27 L. Ed. 69.

²⁴ *Martin v. Snyder*, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602.

²⁵ *City of Ysleta v. Canda*, 67 Fed. 6; *Zambrino v. Galveston etc. Ry. Co.*, 38 Fed. 451; *Martin v. Baltimore etc. R. R. Co.*, 151 U. S. 677, 14 Sup. Ct. 533, 38 L. Ed. 671.

²⁶ *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Goodlett v. Louis-*

ville R. R. Co., 122 U. S. 410, 7 Sup. Ct. 1254, 30 L. Ed. 1230; *Baughman v. National Water Works Co.*, 46 Fed. 4.

²⁷ *Sherwood v. Newport News etc. Co.*, 55 Fed. 1.

²⁸ *Railroad Co. v. Koontz*, 104 U. S. 13, 26 L. Ed. 643.

²⁹ *Memphis etc. R. R. Co. v. Alabama*, 107 U. S. 585, 2 Sup. Ct. 432, 27 L. Ed. 518; *Martin v. Baltimore etc. R. R. Co.*, 151 U. S. 677, 14 Sup. Ct. 533, 38 L. Ed. 671.

ship acquired in a representative capacity.³⁰ A state is not a citizen within the meaning of the removal acts.³¹

§ 1024. What causes are removable.—The right of removal is restricted by the removal acts of 1887 and 1888 to suits of a civil nature at “common law” or “in equity.”³² It must be a suit regularly commenced by a citizen of the state from which it is sought to remove it, by process served on a citizen of another state, if the ground for removal be diverse citizenship.³³ *Quo warranto* is a suit of a civil nature within the meaning of the statutes,³⁴ as, also, is a proceeding for the allowance of a claim against the estate of a deceased person;³⁵ but it has been held that a proceeding to establish and probate a will is not such a suit, and therefore not removable.³⁶ A special statutory proceeding for the establishment of a drain, under the laws of Indiana, is, after the filing of the commissioners’ report in the state circuit court, and the filing of remonstrances thereto, a controversy of a “civil nature,” which may be removed.³⁷ A controversy between citizens of different states, within the meaning of the statute, is involved in a suit whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation, and is presented by the pleadings.³⁸

A proceeding before a mayor and jury to ascertain the value of land condemned for widening a street, under the Missouri statute, is not a suit within the meaning of the removal acts;³⁹ nor is an appeal from an assessment to a county court acting administratively.⁴⁰

The filing of an affirmative answer demanding relief against the plaintiff, as a citizen of another state, does not constitute a new suit within the meaning of the removal acts;⁴¹ nor does the

³⁰ *Wilson v. Smith*, 66 Fed. 81; *Amory v. Amory*, 95 U. S. 187, 24 L. Ed. 428.

³¹ *Missouri etc. R. R. v. Missouri etc. Commrs.*, 183 U. S. 58, 22 Sup. Ct. 18, 46 L. Ed. 78; *Arkansas v. Kansas etc. Co.*, 183 U. S. 188, 22 Sup. Ct. 47, 46 L. Ed. 144.

³² *In re Cilley*, 58 Fed. 977; *In re Foley*, 76 Fed. 390.

³³ *West v. Aurora City*, 6 Wall. 142, 18 L. Ed. 819.

³⁴ *Ames v. Kansas*, 111 U. S. 461, 4 Sup. Ct. 437, 28 L. Ed. 482.

³⁵ *Clark v. Bever*, 139 U. S. 102, 11 Sup. Ct. 468, 35 L. Ed. 88.

³⁶ *In re Cilley*, 58 Fed. 977; *In re Foley*, 76 Fed. 390.

³⁷ *In re Jarnecke Ditch*, 69 Fed. 161.

³⁸ *Gaines v. Fuentes*, 92 U. S. 20, 23 L. Ed. 524.

³⁹ *Pacific Ry. Removal Cases*, 115 U. S. 18, 5 Sup. Ct. 1113, 29 L. Ed. 319.

⁴⁰ *Upshur v. Rich*, 135 U. S. 470, 10 Sup. Ct. 651, 34 L. Ed. 196.

⁴¹ *West v. Aurora City*, 6 Wall. 141, 18 L. Ed. 819.

substitution of a "sold-out" corporation as defendant, under a Texas statute.⁴²

§ 1025. **Local prejudice or denial of civil rights as ground for removal.**—Subdivision 3 of section 639 of the Revised Statutes, providing for the removal of causes on the ground of local prejudice, by either plaintiff or defendant, was repealed by the act of 1887, because the same subject-matter is covered by the latter act, the difference in the two acts showing that it was the intention of Congress to limit the right of removal on this ground to the defendant only.⁴³ In order to entitle a non-resident defendant to remove a cause on this ground, it is not necessary that his co-defendants be also non-residents;⁴⁴ but one of the several defendants, being a citizen of the same state as the plaintiff, cannot remove a cause upon the ground of local prejudice as between himself and the other defendants.⁴⁵ Under section 639, a cause could be removed on this ground only, where all the parties to the suit on one side were citizens of a different state from those on the other side.⁴⁶ But this is not the holding under the act of 1887, where the expression "any defendant" is used.⁴⁷

The object of allowing a defendant to remove a controversy into the circuit court is to prevent the plaintiff from obtaining any advantage against him by reason of local influence, and, unless such prejudice or influence in favor of the plaintiff is alleged and proved, he cannot be prevented from prosecuting his suit against all the defendants in the court in which he originally brought it.⁴⁸ A petition for removal on this ground should state the facts relied on as showing prejudice, and should be sworn to by at least one of the petitioners, or by some authorized agent or attorney.⁴⁹

It is not sufficient merely to allege that the petitioner "has reason to believe, and does believe," that from prejudice and local

⁴² *Houston etc. Ry. v. Shirley*, 111 U. S. 360, 4 Sup. Ct. 472, 28 L. Ed. 455.

⁴³ *Fisk v. Henarie*, 142 U. S. 467, 12 Sup. Ct. 207, 35 L. Ed. 1080; *Tullock v. Webster Co.*, 40 Fed. 706; *Campbell v. Collins*, 62 Fed. 849.

⁴⁴ *Bonner v. Meikle*, 77 Fed. 489.

⁴⁵ *Hanrick v. Hanrick*, 153 U. S. 143, 14 Sup. Ct. 835, 38 L. Ed. 685; *Thurber v. Miller*, 67 Fed. 375, 14 C. C. A. 432.

⁴⁶ *Young v. Parker*, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. Ed. 352; *Rosenthal v. Coates*, 148 U. S. 143, 13 Sup. Ct. 576, 37 L. Ed. 399.

⁴⁷ *Parker v. Vanderbilt*, 136 Fed. 246; *Boatmen's Bank v. Fritzen*, 135 Fed. 650, 68 C. C. A. 288.

⁴⁸ *Hanrick v. Hanrick*, 152 U. S. 193, 14 Sup. Ct. 835, 38 L. Ed. 685.

⁴⁹ *Hall v. Chattanooga Agricultural Works*, 48 Fed. 599; *Schwenk v. Strang*, 59 Fed. 209, 8 C. C. A. 92.

influence he will be unable to obtain justice in the state courts; the existence of prejudice and local influence must be alleged as a matter of fact.⁵⁰ And where the petition is based upon the ground that the petitioner is denied civil rights, it must affirm that he is actually denied such rights, and not merely apprehensive of a subsequent denial.⁵¹

The right of removal extends not only to cases where prejudice would affect the jury, but also to cases in which the decisions of the judge as to questions of law or fact may be affected thereby.⁵²

In order that a cause may be removed because of an alleged violation of the fourteenth amendment to the federal constitution, such violation must be the result of the constitution or laws of the state, and not of their administration.⁵³ When the constitution and laws of a state, as interpreted by its highest judicial tribunals, do not stand in the way of enforcing rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the state court may not protect and enforce the right to equal protection of the laws constitutes no ground for removal.⁵⁴ Thus the act of administrative officers in excluding colored persons from juries is not a ground of removal, unless it is shown that such exclusion was under the authority of the state constitution or laws.⁵⁵

§ 1026. Removal where federal question involved.—When a question over which the federal courts have jurisdiction forms an ingredient of the original cause, those courts have jurisdiction, although other questions of fact or law may be involved.⁵⁶ Cases arising under the laws of the United States are such as arise out of federal legislation, whether they constitute the right or privilege, claim, protection, or defense of the party, in whole or in part, by whom they are asserted.⁵⁷ The right of removal

⁵⁰ *Short v. Chicago etc. Ry. Co.*, 33 Fed. 114; *Collins v. Campbell*, 62 Fed. 850.

⁵¹ *Virginia v. Rives*, 100 U. S. 320, 25 L. Ed. 667.

⁵² *City of Detroit v. Detroit City Ry. Co.*, 54 Fed. 1.

⁵³ *Williams v. Mississippi*, 170 U. S. 219, 18 Sup. Ct. 583, 42 L. Ed. 1012.

⁵⁴ *Gibson v. Mississippi*, 162 U. S. 582, 16 Sup. Ct. 904, 40 L. Ed. 1075;

Neal v. Delaware, 103 U. S. 392, 26 L. Ed. 567; *Murray v. Louisiana*, 163 U. S. 106, 16 Sup. Ct. 990, 41 L. Ed. 87.

⁵⁵ *Gibson v. Mississippi*, 162 U. S. 585, 16 Sup. Ct. 904, 40 L. Ed. 1075; *Virginia v. Rives*, 100 U. S. 321, 25 L. Ed. 667.

⁵⁶ *Railroad Co. v. Mississippi*, 102 U. S. 141, 26 L. Ed. 96.

⁵⁷ *Id.*

depends not upon the validity, but upon the presentation of a claim involving a substantial controversy under the federal constitution or laws.⁵⁸ The question whether a case is one for removal is itself a federal question.⁵⁹

Whenever it is sought to remove a suit on this ground, it must appear from the petition for removal and the pleadings that there is a question actually involved in the suit, depending for its determination upon a correct construction of a law of the United States, and the facts averred in the pleadings or in the petition must show what the question is and how it will arise.⁶⁰ The fact must appear by the party's own statement;⁶¹ and a deficiency in his statement, in this respect, cannot be supplied by allegations in the petition for removal or in subsequent pleadings in the case.⁶² A statement in a complaint merely anticipating a defense will not of itself entitle the defendant to remove the cause.⁶³

As illustrations of cases involving federal questions, the following may be noted: A case in which the existence of some title, right, or privilege depends upon the construction of the federal constitution or laws;⁶⁴ a case where it is alleged that the courts of one state refuse full faith and credit to the judgments of the courts of another state;⁶⁵ a suit in ejectment against a United States officer holding lands in his official capacity;⁶⁶ prosecutions against official officers for acts done under color of office;⁶⁷ cases arising under the internal revenue laws;⁶⁸ an action against a federal marshal for alleged illegal seizure of goods;^{68a} an ejectment suit in which the authority of the government to grant a patent is questioned.

⁵⁸ *Southern Pacific R. R. Co. v. California*, 118 U. S. 112, 6 Sup. Ct. 993, 30 L. Ed. 103.

⁵⁹ *Railroad Co. v. Koontz*, 104 U. S. 15, 26 L. Ed. 643; *Mitchell v. Clark*, 110 U. S. 645, 4 Sup. Ct. 170, 28 L. Ed. 279.

⁶⁰ *Walker v. Richards*, 55 Fed. 129; *State v. Southern Pacific Co.*, 23 Or. 424, 31 Pac. 960; *Carson v. Dunham*, 121 U. S. 426, 7 Sup. Ct. 1030, 30 L. Ed. 992.

⁶¹ *Caples v. Texas etc. R. R. Co.*, 67 Fed. 9; *Haggin v. Lewis*, 66 Fed. 199.

⁶² *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 487, 15 Sup. Ct. 192, 39 L. Ed. 231; *Wichita Nat. Bank v. Smith*, 72 Fed. 570, 19 C. C. A. 42;

California Oil Co. v. Miller, 96 Fed. 18.

⁶³ *Kansas v. Atchison etc. R. R. Co.*, 77 Fed. 341.

⁶⁴ *Southern Pacific R. R. Co. v. California*, 118 U. S. 112, 6 Sup. Ct. 993, 30 L. Ed. 103.

⁶⁵ *Dupasseeur v. Rochereau*, 21 Wall. 134, 22 L. Ed. 588.

⁶⁶ *Brown v. Huger*, 21 How. 308, 16 L. Ed. 125.

⁶⁷ *Texas v. Davis*, 100 U. S. 271, 25 L. Ed. 648; *Cleveland etc. Ry. Co. v. McClung*, 119 U. S. 461, 7 Sup. Ct. 262, 30 L. Ed. 465.

⁶⁸ *Philadelphia v. Collector*, 5 Wall. 730, 18 L. Ed. 614.

^{68a} *Feibelman v. Packard*, 109 U. S. 424, 3 Sup. Ct. 289, 27 L. Ed. 984.

Corporations of the United States organized under acts of Congress are entitled to remove to the federal courts suits against them commenced in the state courts, as arising under the laws of the United States;⁶⁹ and a federal corporation defendant is entitled to removal, notwithstanding it is described in the complaint as a state corporation.⁷⁰ But this rule does not apply to corporations organized under the laws of a territory, and upon which, after their organization, certain rights and privileges are conferred by an act of Congress;⁷¹ nor is a suit by or against a national bank necessarily removable to a federal court since the act of 1885.⁷²

§ 1027. Right of removal—How determined.—The right to remove a cause depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed.⁷³ Whether there is a separable controversy warranting a removal, is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of allegations in the petition or in the affidavits, unless the petitioner both alleges and proves that defendants were wrongfully united for the purpose of preventing removal.⁷⁴ And the right must be shown by the statement of the facts in legal and logical form, such as is required by good pleading.⁷⁵ The want of a showing sufficient to justify removal cannot be supplied by the petition for removal or the subsequent pleadings;⁷⁶ and whether a party claims a right under the federal constitution or laws, is

⁶⁹ *Pacific R. R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; *Butler v. National Home for Soldiers*, 144 U. S. 64, 12 Sup. Ct. 581, 36 L. Ed. 346; *Texas etc. Ry. v. Cox*, 145 U. S. 601, 12 Sup. Ct. 905, 36 L. Ed. 829; *Supreme Lodge v. Hill*, 76 Fed. 471, 22 C. C. A. 280; *United States etc. Co. v. Gallegos*, 89 Fed. 771, 32 C. C. A. 470.

⁷⁰ *Texas etc. Ry. v. Cody*, 166 U. S. 608, 17 Sup. Ct. 703, 41 L. Ed. 1132.

⁷¹ *Conlon v. Oregon etc. Ry. Co.*, 21 Or. 462, 28 Pac. 501, 23 Or. 500, 32 Pac. 397.

⁷² *Leather etc. Bank v. Cooper*, 120 U. S. 780, 7 Sup. Ct. 777, 30 L. Ed. 816; *Ex parte Jones*, 164 U. S. 692, 17 Sup. Ct. 222, 41 L. Ed. 601.

⁷³ *Barney v. Latham*, 103 U. S. 216, 26 L. Ed. 514; *Graves v. Corbin*, 132 U. S. 585, 10 Sup. Ct. 196, 33 L. Ed. 462; *Merchants' Cotton Press etc. Co. v. Insurance Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195.

⁷⁴ *Louisville etc. R. R. v. Wangelin*, 132 U. S. 601, 10 Sup. Ct. 203, 33 L. Ed. 474; *Wilson v. Oswego Township*, 151 U. S. 66, 14 Sup. Ct. 56, 38 L. Ed. 70; *Loving v. Arnold*, 84 Fed. 218.

⁷⁵ *Gibbs v. Crandall*, 120 U. S. 108, 7 Sup. Ct. 497, 30 L. Ed. 490.

⁷⁶ *Chappell v. Waterworth*, 155 U. S. 107, 15 Sup. Ct. 34, 39 L. Ed. 85; *Neel v. Pennsylvania Co.*, 157 U. S. 154, 15 Sup. Ct. 589, 39 L. Ed. 654;

to be ascertained by legal construction of his own allegations, and not by the effect attributed to them by the adverse party.⁷⁷

§ 1028. **Waiver of right to remove.**—A party may waive his right to have a cause removed to a federal court.⁷⁸ The right of removal is inconsistent with the voluntary submission to a state court's jurisdiction;⁷⁹ and one making himself a party to the "same suit" voluntarily submits himself to the obstacles in his way of removing the suit.⁸⁰ But a party who, after having failed in his effort to obtain a removal, is forced to trial and defends in a state court under protest, loses none of his rights by so defending.⁸¹ Nor does a general appearance of a defendant in a state court operate as a waiver of his right to remove the cause.⁸² And where a petition for removal is filed before the time fixed by the statute or the rules of court for the filing of an answer, the petitioner's appearance and hearing of a preliminary motion regarding an injunction does not constitute a waiver.⁸³

Parties not petitioning for removal cannot assign error for a denial of the right to others.⁸⁴

§ 1029. **Petition for removal.**—A petition for removal is a pleading, and should state facts, not legal conclusions; hence a petition setting forth that rights under an act of Congress are involved, without pleading facts to enable the court to determine whether the construction of an act of Congress is involved, is insufficient.⁸⁵ Such a petition is a matter of record proper.⁸⁶ The necessary facts for removal appearing in the pleadings need not be restated in the petition, but facts not so appearing must be supplied.⁸⁷ The court will not judicially notice facts which might

Oregon etc. Ry. v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048.

⁷⁷ Central R. R. Co. v. Mills, 113 U. S. 257, 5 Sup. Ct. 456, 28 L. Ed. 948.

⁷⁸ Insurance Co. v. Morse, 20 Wall. 451, 22 L. Ed. 365.

⁷⁹ Manning v. Amy, 140 U. S. 141, 11 Sup. Ct. 757, 35 L. Ed. 386.

⁸⁰ Brooks v. Clark, 119 U. S. 513, 7 Sup. Ct. 301, 30 L. Ed. 482.

⁸¹ Insurance Co. v. Dunn, 19 Wall. 224, 22 L. Ed. 68; Railroad Co. v. Mississippi, 102 U. S. 141, 26 L. Ed. 96; Powers v. Chesapeake R. R. Co.,

169 U. S. 102, 18 Sup. Ct. 264, 42 L. Ed. 673.

⁸² Groton Bridge Co. v. American Bridge Co., 137 Fed. 284.

⁸³ Cella v. Brown, 136 Fed. 439; Atlanta etc. Ry. Co. v. Southern Ry. Co., 131 Fed. 657, 66 C. C. A. 601.

⁸⁴ Merchants' Cotton Press etc. Co. v. Insurance Co., 151 U. S. 387, 38 L. Ed. 195, 14 Sup. Ct. 367.

⁸⁵ Gold Washing etc. Co. v. Keyes, 96 U. S. 202, 24 L. Ed. 656.

⁸⁶ McDonnell v. Jordon, 178 U. S. 234, 20 Sup. Ct. 886, 44 L. Ed. 1048.

⁸⁷ Gold Washing etc. Co. v. Keyes, 96 U. S. 204, 24 L. Ed. 656.

give jurisdiction on removal, if the plaintiff has not relied upon them in his pleading.⁸⁸

The filing of a petition for removal of a cause does not amount to a general appearance, but to a special appearance only.⁸⁹

The allowance of an amendment to a petition for removal is a matter of defense.⁹⁰

§ 1030. Record to show jurisdiction.—Where the record from a state court contains only a fragment of the cause, unintelligible, except by reference to other matters or verbal explanation, this is fatal to the right to removal.⁹¹ But whether the petition for removal avers the jurisdictional facts or not is immaterial, providing such facts are shown to exist by any part of the record.⁹²

“Citizenship” and “residence” are not synonymous terms, and an allegation that the petitioners are residents in another state is not sufficient.⁹³ The citizenship of parties which determines the right of removal is personal citizenship, and this must be shown by the petition.⁹⁴ So averments in the removal petition that a firm is doing business in, or that the party is a corporation of, another state are insufficient.⁹⁵ Where the petition for removal shows that the defendant is a corporation created in another state, it need not allege that it is a non-resident of the state in which the suit is brought, and of which the plaintiff is a citizen.⁹⁶ So, also, the allegation that the defendant is a company duly chartered and incorporated under the laws of Great Britain is a sufficient statement of the citizenship of such corporation, without a negative allegation that it is not a citizen of the state in which the suit is brought.⁹⁷

Diversity of citizenship must be alleged to be existing at the commencement of the action and also at the time of removal;

⁸⁸ *Mountain View etc. Co. v. McFadden*, 180 U. S. 535, 21 Sup. Ct. 488, 45 L. Ed. 656; *Arkansas v. Kansas etc. Co.*, 183 U. S. 189, 22 Sup. Ct. 47, 46 L. Ed. 144.

⁸⁹ *Wabash etc. Co. v. Brow*, 164 U. S. 279, 17 Sup. Ct. 126, 41 L. Ed. 431; *National Accident Soc. v. Spiro*, 164 U. S. 281, 17 Sup. Ct. 996, 41 L. Ed. 435.

⁹⁰ *Ayers v. Watson*, 137 U. S. 585, 11 Sup. Ct. 201, 34 L. Ed. 803.

⁹¹ *West v. Aurora City*, 6 Wall. 142, 18 L. Ed. 819.

⁹² *Bondurant v. Watson*, 103 U. S. 285, 26 L. Ed. 447.

⁹³ *Parker v. Overman*, 18 How. 141, 15 L. Ed. 318; *Pennsylvania Co. v. Bender*, 148 U. S. 257, 13 Sup. Ct. 591, 37 L. Ed. 441.

⁹⁴ *Amory v. Amory*, 95 U. S. 187, 24 L. Ed. 428.

⁹⁵ *Grace v. American etc. Ins. Co.*, 109 U. S. 285, 3 Sup. Ct. 207, 27 L. Ed. 932.

⁹⁶ *Shattuck v. North British etc. Ins. Co.*, 58 Fed. 609, 7 C. C. A. 386; *Wilcox etc. Co. v. Phoenix Ins. Co.*, 60 Fed. 929.

⁹⁷ *Robertson v. Scottish etc. Ins. Co.*, 68 Fed. 173.

hence, where a party dies, the substitution of an administrator having the requisite citizenship does not make the case removable.⁹⁸

The mere filing of a petition for removal is not enough, unless, when taken in connection with the rest of the record, it shows on its face that the petitioner has, under the statute, the right to remove the suit.⁹⁹

§ 1031. **Petition—When to be made.**—A party must move that the cause be transferred to the United States courts within the time prescribed, or his right to do so will be lost.¹⁰⁰ The time within which removal must be applied for, however, is not jurisdictional, but modal and formal; and if the conduct of a party is merely a device to prevent a removal, the objection as to time cannot be raised by him.^{100a} Where, from the facts in the record, great doubt appears as to whether the petition for removal was too late, the court will not so presume.¹⁰¹ The removal acts contemplate the filing of the petition before the trial or final hearing of the suit.¹⁰²

In those states where statutes provide for terms of court, the petition must be filed at or before the term at which the suit could be first tried.¹⁰³ So where the original defendants have answered without counterclaim or suit, if the issues are complete and the cause is ready for trial, a petition for removal must be filed at that term.¹⁰⁴ A case is "triable" within the removal acts after the answers are all in and the term cannot be extended by order of the court or agreement of the parties.¹⁰⁵

Where a statute allows a defeated party a second trial as of right, the first trial is not a "final hearing or trial."¹⁰⁶ The report

⁹⁸ *Grand Trunk Ry. Co. v. Twitchell*, 59 Fed. 727, 8 C. C. A. 237. See *Day v. Oatis*, 85 Miss. 123, 37 South. 559.

⁹⁹ *Knott v. McGilvray*, 124 Cal. 123, 56 Pac. 789.

¹⁰⁰ *Baltimore etc. R. R. Co. v. Burns*, 124 U. S. 166, 8 Sup. Ct. 421, 31 L. Ed. 333

^{100a} *Powers v. Chesapeake etc. Ry. Co.*, 169 U. S. 99, 18 Sup. Ct. 264, 42 L. Ed. 673.

¹⁰¹ *Carson v. Hyatt*, 118 U. S. 283, 6 Sup. Ct. 1050, 30 L. Ed. 167.

¹⁰² *Insurance Co. v. Dunn*, 19 Wall. 225, 22 L. Ed. 68; *Virginia v. Rives*,

100 U. S. 319, 25 L. Ed. 667; *Hess v. Reynolds*, 113 U. S. 80, 5 Sup. Ct. 377, 28 L. Ed. 927; *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080.

¹⁰³ *Babbitt v. Clark*, 103 U. S. 612, 26 L. Ed. 507; *Gibson v. Bruce*, 103 U. S. 563, 2 Sup. Ct. 873, 27 L. Ed. 825.

¹⁰⁴ *Edrington v. Jefferson*, 111 U. S. 774, 4 Sup. Ct. 683, 28 L. Ed. 594.

¹⁰⁵ *Pullman Palace Car Co. v. Speck*, 113 U. S. 83, 5 Sup. Ct. 374, 23 L. Ed. 925.

¹⁰⁶ *Insurance Co. v. Dunn*, 19 Wall. 225, 22 L. Ed. 68.

of commissioners to whom a claim has been referred by a probate court is not a final hearing;¹⁰⁷ nor is the taking of testimony before a master under a stipulation between the parties.¹⁰⁸

The objection that a petition for removal was not filed in time may be waived.¹⁰⁹

§ 1032. **Notice of application.**—Parties to be affected by the removal should have reasonable notice of the application for removal and an opportunity to contest it. And when notice to the party interested is practicable, the court should not in any case rest its judgment upon a mere *ex parte* showing.¹¹⁰ It has been held, however, that under the act of 1887, where the ground for removal is prejudice and local influence, notice to the adverse party is not jurisdictional, and that such motion may be made upon *ex parte* hearing. But the better, as well as the safer, practice would ordinarily be for the court to decline to hear the application until proper notice of the hearing had been given.¹¹¹

§ 1033. **Bond and order.**—The mere filing of a petition is not a removal.¹¹² Removal can be effected in a proper case only by the filing of a petition and bond.¹¹³ Where the cause is removable, it is, in law, removed upon the filing of petition and bond, notwithstanding an order of removal has been refused by a state court.¹¹⁴ The service of appropriate process on the clerk of the state court is sufficient, without any further order of the circuit court.¹¹⁵

The requirements for a bond, with good and sufficient surety, is suited by the presence of one surety able to respond to the condition of the bond; and a state court has no discretion to refuse the acceptance of a removal bond with such surety.¹¹⁶

¹⁰⁷ *Hess v. Reynolds*, 113 U. S. 80, 5 Sup. Ct. 377, 28 L. Ed. 927.

¹⁰⁸ *Carson v. Hyatt*, 118 U. S. 289, 6 Sup. Ct. 1050, 30 L. Ed. 167.

¹⁰⁹ *French v. Hay*, 22 Wall. 244, 22 L. Ed. 799; *Pacific Ry. Removal Cases*, 115 U. S. 17, 5 Sup. Ct. 1113, 29 L. Ed. 319; *Martin v. Baltimore etc. R. R. Co.*, 151 U. S. 688, 14 Sup. Ct. 533, 38 L. Ed. 311; *Connell v. Smiley*, 156 U. S. 338, 15 Sup. Ct. 353, 39 L. Ed. 443.

¹¹⁰ *Schwenk v. Strang*, 59 Fed. 209, 8 C. C. A. 92.

¹¹¹ *Reeves v. Corning*, 51 Fed. 774.

¹¹² *Gregory v. Hartley*, 113 U. S. 745, 5 Sup. Ct. 743, 28 L. Ed. 1150; *Crehore v. Ohio etc. Ry. Co.*, 131 U. S. 244, 9 Sup. Ct. 692, 33 L. Ed. 144.

¹¹³ *Manning v. Amy*, 140 U. S. 140, 11 Sup. Ct. 757, 35 L. Ed. 386.

¹¹⁴ *Marshall v. Holmes*, 141 U. S. 595, 12 Sup. Ct. 62, 35 L. Ed. 870.

¹¹⁵ *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386.

¹¹⁶ *Removal Cases*, 100 U. S. 472, 25 L. Ed. 593.

FORMS FOR CHANGE TO FEDERAL COURT.

§ 1034. Entry of appearance.

Form No. 344.

[TITLE OF STATE COURT AND CAUSE.]

The said defendant, A. B., now comes, and by C. D., his attorney, enters his appearance in said action, and herewith also files his petition for the removal of said cause into the circuit court of the United States, in and for the . . . district, of the state of . . .

C. D., Attorney for Defendant.

§ 1035. Petition for transfer from state court to a circuit court of the United States.

Form No. 345.

[TITLE OF STATE COURT AND CAUSE.]

To said Superior Court:

Your petitioner, C. D., respectfully shows that he is the defendant in the above-entitled suit; that said suit was brought by said plaintiff, A. B., on or about the . . . day of . . . , 19.., in this court; that the said plaintiff at the time of the commencement of said suit was, and still is, a citizen of this state, and your petitioner then was, and still is, a citizen of the state of . . .

Your petitioner further represents that said action above entitled was brought by the said plaintiff for the purpose of [here briefly state the nature of and subject-matter of the suit, and the relief asked], and that the matter in dispute in said action exceeds the sum and value of two thousand dollars, exclusive of interests and costs.

Your petitioner further shows that he has herewith filed his appearance in said action, and offers herewith his bond, with good and sufficient surety, as required by section 3 of the act of Congress of March 3, 1887, and that your petitioner desires to remove said cause above entitled into the circuit court of the United States for the district of . . . , pursuant to said statute.

Your petitioner, therefore, prays that said bond may be accepted as good and sufficient, according to said statute, and that the said suit may be removed into the next circuit court of the United States in and for said district of . . . , pursuant to said statute in

such case made and provided, and that no further proceeding be had therein in this court.

And your petitioner will ever pray.

. . . , Attorney for Defendant.

STATE OF . . . }
COUNTY OF . . . } ss.

C. D., being first duly sworn, says that he is the petitioner above named, that he has read the foregoing petition, and knows the contents thereof, and that each and every of the matters and things therein stated are true.

[JURAT.]

[SIGNATURE.]

§ 1036. The same—On ground of prejudice or local influence, under act of 1887.

Form No. 346.

In the Circuit Court of the United States for the District of . . .
[TITLE OF CAUSE.]

To the Honorable the Judges of the Circuit Court of the United States for the District of . . . :

Your petitioner, A. B., respectfully shows that the above-entitled suit is now pending for trial in the . . . court of . . . county, state of . . . , and has not yet been tried, and that your petitioner desires to remove said suit into the circuit court of the United States for the district of . . .

That your petitioner is the defendant [or, one of the defendants] in said suit, and that the matter in dispute therein exceeds the sum of two thousand dollars, exclusive of interest and costs.

Your petitioner further shows that there is, and was at the time said suit was brought, a controversy therein between your petitioner, who avers that he was, at the time said suit was brought, and still is, a citizen of the state of . . . , and the said plaintiff, who was then, and still is, a citizen of the state of . . . , in which last-named state said suit was brought; and that both your petitioner and the said plaintiff are actually interested in said controversy.

That said suit was brought for the purpose of [briefly stating the nature of the suit and the relief asked].

Your petitioner further states that he has filed herewith an affidavit, that it may be made to appear to the said circuit court that, by reason of the existence of prejudice and local influence against

your petitioner, he will not be able to obtain justice in the said state court, or in any other state court to which your petitioner may, under the laws of the state of . . . , have the right, on account of such prejudice and local influence, to remove said cause.

Your petitioner, therefore, prays that the said affidavit may be accepted as good and sufficient, and that the said suit may be removed into the said circuit court of the United States for the district of . . . , aforesaid.

. . . , Attorney for Petitioner.

§ 1037. Affidavit of prejudice or local influence to accompany the foregoing petition.

Form No. 347.

In the Circuit Court of the United States for the District of . . .
[TITLE OF CAUSE.]

UNITED STATES OF AMERICA, }
. . . DISTRICT OF . . . } ss.

I, A. B., being duly sworn, say that I am the defendant [or, one of the defendants] in the above-entitled cause, and that the existence of prejudice and local influence as alleged in the foregoing petition will sufficiently appear to the court from the following statement of facts: [State facts relied on as showing prejudice and local influence.] That, by reason of the existence of said prejudice and local influence, I shall not be able to obtain justice in said state court or in any other state court to which the said defendant may, under the laws of said state of . . . , have the right, on account of such prejudice and local influence, to remove said cause.

[JURAT.]

[SIGNATURE.]

§ 1038. Bond on removal under act of 1887.

Form No. 348.

Know all men by these presents, that I, . . . , as principal, and . . . , as surety, are held and firmly bound unto . . . in the penal sum of . . . dollars, for the payment whereof well and truly to be made unto the said . . . , his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Nevertheless, upon these conditions: The said . . . , having petitioned the . . . court of . . . county, state of . . . , for the removal of a certain cause therein pending, wherein . . . is plaintiff and . . . is defendant, to the circuit court of the United States in and for the district of . . . :

Now, if the said . . . , your petitioner, shall enter in the said court of the United States, on the first day of its next sesison, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if such court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and virtue.

Witness our hands and seals, etc.

. . . [L. S.]
[L. S.]

STATE OF . . .
COUNTY OF . . .

} ss.

I, . . . , of said county, the surety named in the foregoing bond, being duly sworn, depose and say: I am a resident of the state of . . . , and am a property-holder therein; that I am worth the sum of two thousand dollars over and above all my debts and liabilities, and exclusive of property by law exempt from sale on execution.

[JURAT.]

[SIGNATURE.]

§ 1039. Petition for removal on ground of citizenship under act of 1887.

Form No. 349.

[TITLE OF STATE COURT AND CAUSE.]

To said court:

Your petitioner respectfully shows to this honorable court that he is the defendant in the above-entitled suit; that he is a non-resident of the state in which said suit was brought, and was at the time of the commencement of this suit, and still is, a citizen of the state of . . .

That the said suit is of a civil nature [briefly stating its nature and the relief asked] ; and that the matter and amount in dispute in the said suit exceeds the sum or value of two thousand dollars, exclusive of interests and costs.

That the controversy in said suit is wholly between citizens of different states, to-wit: Between your petitioner, who, as aforesaid,

was at the time of the commencement of this suit, and still is, a citizen of the state of . . . , and the said plaintiff, who was then, and still is, a citizen of the state of . . . *

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for the payment of all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further in said cause, except to make the order of removal now prayed for and required by law, and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States in and for the district of . . . , and your petitioner will ever pray.

[VERIFICATION.]

. . . , Attorneys for Petitioner.

§ 1040. The same.

Form No. 350.

[Where the ground of removal is that the suit is one "arising under the constitution and laws of the United States, or treaties made under their authority," follow the above form down to the star (*), and then insert the following:]

Your petitioner further shows that said suit is one arising under the laws [or, constitution; or, treaties, as the case may be] of the United States, in this: [Here state the facts showing that a federal question necessary to a proper decision of the case is involved.]

[After which, follow above form to the conclusion.]

§ 1041. Notice of motion for removal.

Form No. 351.

[TITLE OF STATE COURT AND CAUSE.]

To . . . , Plaintiff's Attorney:

Take notice, that upon the petition and appearance of the defendant, of which a copy is hereto annexed, and which were on, etc., [or, upon the petition, a copy of which is hereto annexed, and which, together with the petitioner's appearance herein already served on you, was, on, etc.] filed in this court, and upon the bond of the

petitioner and his sureties [or, the bond on behalf of the petitioner], a copy of which is also annexed, defendant will, on . . . , at . . . , at the hour of . . . , move the court that said cause be removed from this court to the circuit court of the United States for the district of . . .

[DATE.]

[SIGNATURE.]

§ 1042. Order to show cause.

Form No. 352.

[TITLE OF STATE COURT AND CAUSE.]

To . . . , Plaintiff's Attorney:

The defendant having this day entered an appearance in this cause, and at the same time filed a petition praying for the removal of this action to the circuit court of the United States for the district of California, pursuant to the act of Congress of the United States in such case made and provided, and offered the surety as therein provided by a bond now filed, it is ordered that the plaintiff show cause on . . . , the . . . day of . . . next, before this court, at the opening of court on that day, or as soon thereafter as practicable, why the prayer of said petition should not be granted, and in the mean time, and until the hearing of said petition, let all proceedings on the part of the plaintiff herein be stayed.

[DATE.]

E. D., District Judge.

§ 1043. Order for removal of cause to United States court.

Form No. 353.

[TITLE.]

Upon reading and filing the petition of . . . , the defendant in the above-entitled action, and upon filing the bond, and good and sufficient sureties having been offered by the said defendant in the premises, and the same being by me, the judge of said superior court, duly accepted, it is hereby ordered that no further proceedings be had in this cause, and the removal of the same to the circuit court of the United States for the district of California, to be held in and for the . . . district of California, be and the same is hereby allowed and ordered, in accordance with the aforesaid petition and the statute of the United States in such case made and provided.

[DATE.]

[SIGNATURE.]

§ 1044. Writ of certiorari under section 7 of the act of March 3, 1875.

Form No. 354.

The President of the United States of America to the Judge of the Superior Court of the County of . . . , in and for the State of California:

Whereas, it hath been represented to the circuit court of the United States for the district of . . . , that a certain suit was commenced in the [here name the state court], wherein . . . , a citizen of the state of . . . , was plaintiff, and . . . , a citizen of the state of . . . , was defendant, and that the said . . . duly filed in the said state court his petition for the removal of said cause into the said circuit court of the United States, and filed with said petition the bond with surety required by the act of Congress of March 3, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," and that the clerk of the said state court above named has refused to the said petitioner for the removal of said cause a copy of the record therein, though his legal fees therefor were tendered by the said petitioner:

You, therefore, are hereby commanded that you forthwith certify, or cause to be certified, to the said circuit court of the United States for the district of . . . , a full, true and complete copy of the record and proceedings in the said cause, in which the said petition for removal was filed as aforesaid, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said circuit court may be able to proceed thereon, and do what shall appear to them of right ought to be done. Herein fail not.

Witness, the Honorable Melville W. Fuller, chief justice of the supreme court, and the seal of said circuit court thereto affixed, this, the . . . day of . . . , A. D. 19..

[SEAL.]

. . . , Clerk of said Court.

CHAPTER XXXIX.

SUMMONS.

§ 1045. **Nature of the writ.**—Before a court can proceed with the trial of a case, it is necessary, in order to invest the court with jurisdiction, that some process be served upon the defendant. This process is generally termed a “summons,” and is a notice to the defendant that an action has been commenced against him. It informs the defendant as to who has commenced the action, where it is brought, in what court it is brought, the relief demanded, and that if the defendant fails to answer within a specified time after the service of the summons default will be taken against him. The object of the writ is to put the defendant upon notice of the demand against him and to bring him into court at the time therein specified.¹ Summons need not be served on plaintiff or upon any co-defendants when a defendant files a cross-complaint.²

In California, the summons always follows the complaint, and is issued only after the filing of a complaint; in some states the summons precedes the complaint, and the issuance of it is the first step in the commencement of the action.³ In California, the writ may be issued at any time within one year after the filing of the complaint,⁴ and unless the summons and a certified copy of the complaint, duly attested, in condition to serve, are placed at the disposal of the plaintiff for service within one year from the filing of the complaint, the action should be dismissed.⁵ The only limitation upon the exercise of the power of the court to dismiss a cause for delay in the service of the summons is that it must not be abused.⁶

The provision of the Colorado statute,^{6a} that the complaint must be filed within ten days after the summons is issued, or the action may be dismissed, is not mandatory; but the authority to dismiss rests in the sound discretion of the court, and should not be arbi-

¹ Sweeney v. Schultes, 19 Nev. 53, 6 Pac. 44.

² Barnes v. Colo. Sprs. C. C. D. Ry., 42 Colo. 461, 94 Pac. 570.

³ Cal. Code Civ. Proc., § 405; Hill v. Morgan, 9 Idaho, 718, 76 Pac. 323; Nevada Civ. Prac. Act, § 22.

⁴ Cal. Code Civ. Proc., § 406.

⁵ Reynolds v. Page, 35 Cal. 296.

⁶ Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125. Compare Kubli v. Haw-kett, 89 Cal. 638, 27 Pac. 57; Saville v. Frisbie, 70 Cal. 87, 11 Pac. 502; Cowell v. Stuart, 69 Cal. 525, 11 Pac. 57.

^{6a} Code Civ. Proc., § 32.

trarily exercised.⁷ And under the provision of the same statute,⁸ providing that the court has jurisdiction from the time of filing the complaint, the court may exercise its discretion in granting or refusing leave to issue the summons after the time for issuing it has expired. A complaint which has been served, and which seeks recovery for a certain amount, cannot be amended without further service so as to include, on default, interest accruing after the commencement of the action, or otherwise to enlarge the amount of recovery.⁹ But where, in an action to foreclose a mechanic's lien after the service of summons, other lien claimants intervene by stipulation with the plaintiffs, but serve no summons on the owner, the filing of such intervention does not constitute an amendment to the plaintiff's complaint.¹⁰ A merely formal amendment of a complaint does not require a new service on a defendant who had not appeared to the original complaint.¹¹

§ 1046. **Requisites of the writ.**—The summons shall state: 1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed; 2. A direction that the defendant appear and answer the complaint within a certain time; 3. A notice that unless the defendant so appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint.¹²

A statement of the names of the parties to a suit must be contained in the summons.¹³ If there are several defendants, it is not sufficient to give the name of one, followed by "et al." The section of the code on this point is mandatory, and not directory merely.¹⁴ Where the plaintiff is ignorant of the name of a defendant, he must state that fact in his complaint, and he may then designate him by any name, and when his true name is discovered,

⁷ Knight v. Fisher, 15 Colo. 176, 25 Pac. 78; Burkhardt v. Haycox, 19 Colo. 339, 35 Pac. 730.

⁸ Colo. Code Civ. Proc., § 44.

⁹ Schuttler v. King, 12 Mont. 149, 30 Pac. 25.

¹⁰ Goodale v. Coffee, 24 Or. 346, 33 Pac. 990.

¹¹ White v. Hinton, 3 Wyo. 756, 30 Pac. 953, 17 L. R. A. 66.

¹² Cal. Code Civ. Proc., § 407;

Alaska Codes, pt. 4, ch. 4, §§ 42-53; Ariz. Civ. Code, pars. 1314, 1316; Idaho Rev. Codes, §§ 4140-4144; Mont. Rev. Codes, §§ 6513-6516; Nev. Comp. Laws, § 3121; N. Mex. Comp. Laws, § 2685, subds. 18, 19; Or. B. & C. Codes, § 2201; Utah Rev. Stats., § 2939; Wash. Bal. Codes, §§ 4869-4872; Wyo. Rev. Stats., §§ 3507-3519.

¹³ Lyman v. Milton, 44 Cal. 630.

¹⁴ Id.

the pleading must be amended accordingly.¹⁵ So where there is no allegation that the name of the defendant is unknown, there is no foundation for the bringing of the action against the fictitious person, and consequently no authority to make the service of the summons by publication.

If the name by which a party is known be inserted, it is sufficient.¹⁶ And where a party sues or is sued in a representative character, the character should be stated after his name in the summons.¹⁷

If process be served on the right party, the mere fact that it erroneously states his Christian name does not invalidate it.¹⁸ The rule of *idem sonans* applies to the statement of names in a summons, and where a defendant defaults, and the real name is substantially the same as that under which the defendant was served, the default will not be disturbed.¹⁹

Under the California statute, prior to its amendment in 1897, the summons was required to state the cause and general nature of the action. While this is no longer required in California, it is still the rule in several of the code states. Where this rule obtains, the summons must state the amount for which judgment is demanded, if the sum sued for is certain in amount or is capable of being reduced to a certainty by computation.²⁰ And if the summons is radically defective in this effect, it will not support a judgment by default.²¹ In ejectment, if the summons contains no description of the demanded premises, except to refer to the complaint for such description, and two or more of the defendants reside in the same county, and the summons is served on all the defendants in that county, but a copy of the complaint on one only, the summons is sufficient to sustain a judgment by default against those not served with a copy of the complaint.²² And this is so, even though such defendant disclaims any interest in the property under controversy, if nothing appears to show that he was not made a party defendant in good faith.²³ And a summons showing

¹⁵ Cal. Code Civ. Proc., § 474.

¹⁶ Cooper v. Burr, 45 Barb. 9; Miller v. Stettiner, 7 Bosw. 692.

¹⁷ Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891.

¹⁸ Welsh v. Kirkpatrick, 30 Cal. 202, 89 Am. Dec. 85; Foshier v. Narver, 24 Or. 441, 34 Pac. 21, 41 Am. St. Rep. 874.

¹⁹ Gilliano v. Kilfoy, 94 Cal. 86, 29 Pac. 416.

²⁰ People v. Bennett, 6 Abb. Pr. 343.

²¹ State v. Woodlief, 2 Cal. 242; Porter v. Hermann, 8 Cal. 625.

²² Calderwood v. Brooks, 28 Cal. 151.

²³ Mantle v. Casey, 31 Mont. 408, 78 Pac. 591; Mont. Rev. Codes, § 6518.

that the action is to recover money and to foreclose liens contains "a statement of the nature of the cause of action in general terms," although it does not show the nature of the liens or for what or on what they are claimed.²⁴

The object of the requirement of the statute as to what the summons shall contain is carried out by a general statement of what is specified in the complaint to which the summons points expressly or by implication of law.²⁵ Thus the omission in the notice in the summons of the amount for which the plaintiff will take judgment on failure to answer, when a certified copy of the complaint served with the summons states the amount, if it be an error at all, is one not affecting substantial rights, and the court should disregard it.²⁶ Where, however, the action is one arising on contract for the recovery of money or damages, the notice of the summons should follow substantially the provision of the statute.²⁷

A merely defective statement of the relief demanded does not render a summons void, provided such statement be not manifestly misleading.²⁸

§ 1047. Notice to appear.—The summons must contain a notice that unless the defendant appears and answers within the time specified, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint.²⁹ Under this section, it is only where the sum demanded is definite, and is "for money or damages as arising upon contract," that the plaintiff may take judgment without calling upon the

²⁴ *Bewick v. Muir*, 83 Cal. 368, 23 Pac. 389.

²⁵ *Bewick v. Muir*, 83 Cal. 368, 23 Pac. 389; *Barndollar v. Patton*, 5 Colo. 46; *Tabor v. Goss etc. Co.*, 11 Colo. 419, 18 Pac. 537; *Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456; *DeCorvet v. Dolan*, 7 Wash. 365, 35 Pac. 72, 1072.

²⁶ *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895; *Schuttler v. King*, 12 Mont. 149, 30 Pac. 25.

²⁷ *Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456; *Sweeney v. Schultes*, 19 Nev. 53, 6 Pac. 44; *Odell v. Campbell*, 9 Or. 298; *Atchison etc.*

R. R. Co. v. Nicholls, 8 Colo. 188, 6 Pac. 512.

²⁸ *Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730. See, also, *Swem v. Newell*, 19 Colo. 397, 35 Pac. 734.

²⁹ Cal. Code Civ. Proc., § 407; Alaska Codes, pt. 4, ch. 4, §§ 42-53; Ariz. Civ. Code, pars. 1314-1316; Colo. (Mills') Code, § 37; Idaho Rev. Codes, §§ 4140-4144; Mont. Rev. Codes, §§ 6513-6516; Nev. Comp. Laws, § 3121; N. Mex. Comp. Laws, § 2685; Or. B. & C. Codes, § 2201; Utah Rev. Stats., § 2939; Wash. Bal. Codes, §§ 4869-4872; Wyo. Rev. Stats., §§ 3507-3519.

court to ascertain or adjudge anything. In other actions, the notice is to the effect that, unless the defendant appears and answers, the plaintiff will apply to the court for the relief demanded.³⁰ Where, however, a copy of the complaint is served with the summons, a notice to the effect that if the defendant fail to appear the plaintiff will "take judgment" against him for the relief demanded in the complaint, instead of "will apply to the court for the relief demanded," is sufficient.³¹ So, also, where the summons served on defendant stated that the action was to recover a certain sum for services and for certain property sold to him, which would more fully appear in the complaint on file, a copy of which complaint was served with the summons, the summons was sufficient although it did not state the amount for which judgment would be taken.³² And where the case is a proper one for the plaintiff to take judgment against the defendant for the amount claimed, the summons is not defective in stating that the plaintiff will apply to the court for the relief demanded.³³ Although a summons may not give the notice required by statute, that in case of default the plaintiff will take judgment for a specified sum, it is sufficient if enough appears to apprise the defendant clearly of the amount claimed.

In the summons, as in all legal proceedings, such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.³⁴

§ 1048. In action on contract for money or damages.—There shall be inserted in the summons a notice, first, in actions arising on contracts for the recovery of money or damages only, that unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint, stating it.³⁵ A statement in a summons that "the said action is brought to recover judgment against the defendants for the sum of five thousand three hundred and seventy-four dollars and twelve cents, and interest at three per cent per month from November 14, 1863, and

³⁰ Behlow v. Shorb, 91 Cal. 141, 27 Pac. 546; Atchison etc. R. R. Co. v. Nicholls, 8 Colo. 188, 6 Pac. 512; Kimball v. Castagnio, 8 Colo. 525, 9 Pac. 488; Sawyer v. Robertson, 11 Mont. 416, 28 Pac. 456.

³¹ Clark v. Palmer, 90 Cal. 504, 27 Pac. 375. But see Atchison etc. R. R. Co. v. Nicholls, 8 Colo. 188, 6 Pac. 512

³² Higley v. Pollock, 21 Nev. 198, 27 Pac. 895; Prezeau v. Spooner, 22 Nev. 88, 35 Pac. 514.

³³ Schuttler v. King, 12 Mont. 149, 30 Pac. 25.

³⁴ Cal. Code Civ. Proc., § 186.

³⁵ Cal. Code Civ. Proc., § 407, subd. 4.

the further sum of eleven dollars and twenty cents, and the costs of this action," is sufficient to answer the requirements of section 24 of the Practice Act (corresponding substantially to section 407 of the Code of Civil Procedure), as a copy of the complaint is served with the summons, and the defendants are thus notified of the general nature and object of the action.³⁶ Relief under this subdivision must be applied only to actions for a definite sum of money as such, and without calling upon the court to ascertain or adjudge anything but the existence or terms of the contract.³⁷ Thus, in cases for goods sold and delivered,³⁸ or for liquidated damages on breach of contract,³⁹ or for specific sum on breach of contract,⁴⁰ or for penalty given by statute,⁴¹ or for money demand where the plaintiff waives tort.⁴² So an action on an undertaking in replevin is substantially one for the payment of money, and a summons for a money demand in such a case is proper.⁴³

§ 1049. Time for appearance.—The summons must contain a direction that the defendant appear and answer the complaint within a certain time. A summons which requires the defendant to answer the complaint that "will be filed in the clerk's office on the second Monday after service" thereof, fixes that day as the time when the defendant must answer, and not as the time when the complaint will be filed. A writing directing the defendant to appear and answer "forthwith" is not a summons to appear and answer "on the return day" within the meaning of the Oregon statute;⁴⁴ and a judgment in default thereof is void.⁴⁵ If judgment by default is entered before the time fixed for answering expires, it will be reversed on appeal.

A summons duly served on a defendant, which notifies him of the court, term, time, and place where he is required to appear, and that he is required to answer the claim of the plaintiff, is not

³⁶ *King v. Blood*, 41 Cal. 317.

³⁷ *Tuttle v. Smith*, 6 Abb. Pr. 329, 14 How. Pr. 395; approved, *People v. Bennett*, 6 Abb. Pr. 343; *Luling v. Stanton*, 8 Abb. Pr. 378; *Cobb v. Dunkin*, 19 How. Pr. 164; reversing 17 How. Pr. 97; *Cook v. Pomeroy*, 10 How. Pr. 103, being overruled. See, also, *Norton v. Cary*, 14 Abb. Pr. 364, 23 How. Pr. 469.

³⁸ *Diblee v. Mason*, 1 N. Y. Code Rep. 37.

³⁹ *Cemetery Board etc. Hyde Park v. Teller*, 8 How. Pr. 504.

⁴⁰ *Croden v. Drew*, 3 Duer, 654.

⁴¹ *People v. Bennett*, 5 Abb. Pr. 384; *Commissioners of Albany v. Classon*, 17 How. Pr. 193.

⁴² *Goff v. Edgerton*, 18 Abb. Pr. 381.

⁴³ *Montegriffo v. Musti*, 1 Daly, 77.

⁴⁴ *Laws 1854*, p. 85, § 25.

⁴⁵ *Hunsaker v. Coffin*, 2 Or. 107.

fatally defective because it omits to state the penalty for his failure to appear, the defect being merely one of form, and not of substance.⁴⁶ A published summons is not fatally defective for omitting the words "after the date of the first publication of this summons, to-wit," which precede the actual date given as prescribed by statute.⁴⁷

§ 1050. **Amendment of summons.**—Every court has power to amend and control its process and orders, so as to make them conformable to law and justice.⁴⁸ If a writ be amendable, it will be accorded the same effect, with reference to acts done in execution of it, as if it had been amended.⁴⁹ Under section 4869 of Ballinger's Annotated Codes and Statutes, providing that civil actions shall be commenced by service of summons, and under section 4873, providing that a copy of the complaint shall be served with the summons, a return showing service of the complaint, but not the summons, may be amended according to the true service, so as to give the court jurisdiction, if in fact service of the summons was made.⁵⁰ The court may allow the summons to be amended by inserting a notice to the defendant of the nature of the demand, and that unless he appear and answer within the time specified, judgment by default will be taken against him.⁵¹ But amendments can only be made by order of the court upon motion.⁵² Sheriffs have no right, after making a return, to amend it so as to affect rights which have already vested in third parties.⁵³ But courts should exercise great liberality in allowing sheriffs to amend so as to make returns conform to facts, and to correct errors and mistakes.⁵⁴ A summons may be amended so as to make it conform to law.⁵⁵ An officer's return may always be amended to correspond with the facts, in affirmance of a judgment, but never to defeat a judgment.⁵⁶ Where an amended complaint is filed before the defendants are brought into court, and an amended summons

⁴⁶ *Ammons v. Brunswick etc. Co.*, 5 Indian T. 636, 82 S. W. 937.

⁴⁷ *Stubbs v. Continental Timber Co.*, 49 Wash. 431, 95 Pac. 1011.

⁴⁸ Cal. Code Civ. Proc., § 128. See, also, Cal. Code Civ. Proc., § 473.

⁴⁹ *Brann v. Blum*, 138 Cal. 644, 72 Pac. 168.

⁵⁰ *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

⁵¹ *Polock v. Hunt*, 2 Cal. 194.

⁵² *McCrane v. Moulton*, 3 Sandf. 736; *Allen v. Allen*, 14 How. Pr. 248.

⁵³ *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Cal. 25, 68 Am. Dec. 287.

⁵⁴ *Gavitt v. Doub*, 23 Cal. 79.

⁵⁵ *Pierse v. Miles*, 5 Mont. 552, 6 Pac. 347.

⁵⁶ *Chicago etc. Mill Co. v. Merchants etc. Bank*, 97 Ill. 294; *Mills v. Howland*, 2 N. Dak. 30, 49 N. W.

is issued which refers to the complaint on file, and not in terms to the amended complaint, the amended summons is not misleading, nor is such reference uncertain or ambiguous. The amended complaint entirely takes the place of the former one, and becomes the complaint.⁵⁷

§ 1051. **Form of summons.**—The style of summons is generally prescribed by the codes of the respective states. In California, it must run in the name of “The People of the State of California,”⁵⁸ and this is the rule also in Colorado.^{58a} A summons issued and signed by the plaintiff’s attorney, under the Colorado statute, is not “process” within the purview of the constitutional provision requiring all process to run in the name of the people, although its service is the statutory method of beginning a suit.⁵⁹ In Oregon, the summons authorized by the code is not within the meaning of the term “process” as defined in section 1227 of the code, and need not run in the name of the state.⁶⁰

Where at the head of a summons was written “District Court of the Fourth Judicial District,” but the summons was issued from the county court and attested by the county judge, it was held that the words at the top were no part of the writ.⁶¹

As a general rule, the summons must be signed by the clerk and directed to the defendant, and be issued under the seal of the court,⁶² and it is void if issued without the seal.⁶³ The rule is, however, otherwise in Colorado.⁶⁴ Where a summons is issued on a blank to which the clerk’s name is printed, his affixing of the seal of the court is a sufficient adoption of the printed signature.⁶⁵ In Oregon and Colorado, it is sufficient if the summons be subscribed by the plaintiff or his attorney.⁶⁶ The summons is generally required to be indorsed with the name of the plaintiff’s attorney;⁶⁷ but the attorney’s name is not a part of the summons

413. See *Dunham v. Wilfong*, 69 Mo. 355; *Montgomery v. Merrill*, 36 Mich. 97.

⁵⁷ *Dowling v. Comerford*, 99 Cal. 204, 33 Pac. 853.

⁵⁸ Const., art. vi, § 18; Pol. Code, § 30.

^{58a} Act of April 7, 1885.

⁵⁹ *Comet etc. Min. Co. v. Frost*, 15 Colo. 310, 25 Pac. 506.

⁶⁰ *Bailey v. Williams*, 6 Or. 71.

⁶¹ *Crane v. Brannan*, 3 Cal. 195.

⁶² Cal. Code Civ. Proc., § 407.

⁶³ *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, 20 L. R. A. 424.

⁶⁴ *Rand v. Pantagraph Co.*, 1 Colo. App. 270, 28 Pac. 661.

⁶⁵ *Ligare v. California Southern R. R. Co.*, 76 Cal. 610, 18 Pac. 777.

⁶⁶ Or. B. & C. Code, § 52; *Rand v. Pantagraph Co.*, 1 Colo. App. 270, 28 Pac. 661.

⁶⁷ Cal. Code Civ. Proc., § 407; Kan. § 59.

so as to render a publication of notice void on account of the attorney's name being omitted, if the record shows that his name was indorsed on the summons.⁶⁸ Inasmuch as that section of the statute which permits an attorney who is a citizen of another state to become a member of the bar of the state, puts no restrictions on his privileges not placed upon resident attorneys, and was enacted subsequent to section 4870, a summons issued without the state by a non-resident attorney entitled to practice in the state, and naming a place in the state at which service may be had on him, is valid.⁶⁹ A summons following the statutory form subscribed by an attorney authorized to issue it, giving, after his name, his post-office address within the state, is sufficient against a general objection that it is void on its face, raised for the first time on appeal.⁷⁰ The mere failure to indorse the name of the attorney upon the back of a summons will not invalidate it, where the name appears on the face of the writ.⁷¹ A substantial compliance with the statute is all that is necessary.⁷²

§ 1052. Summary proceedings for obtaining possession of real property.—In summary proceedings for possession of realty, the summons must require defendant to appear and answer within three days after service of summons upon him, and that, if he fails, plaintiff will apply for the relief demanded. In all other respects, the summons, or any *alias* summons, must be issued and returned in the same manner as summons in a civil action.⁷³

A summons in condemnation proceedings must contain, besides the usual parts of a summons, a general description of the whole property, a statement of the public use for which it is sought, reference to the complaint for description of the respective parcels, and notice to defendant to appear and show cause why the property should not be condemned.⁷⁴

⁶⁸ *People v. Wrin*, 143, Cal. 11, 76 Pac. 646.

⁶⁹ *Wagnitz v. Ritter*, 31 Wash. 343, 71 Pac. 1035.

⁷⁰ *Id.*

⁷¹ *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133.

⁷² *Higley v. Pollock*, 21 Nev. 207, 27 Pac. 895; *Ralph v. Lomer*, 3 Wash. 405, 28 Pac. 760; *Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730.

⁷³ Cal. Code Civ. Proc., §§ 1166-7,

as amended 1907; *Ariz. Civ. Code*, par. 2673; *Idaho Rev. Codes*, § 5100; *Mont. Rev. Codes*, § 7277; *Nev. Comp. Laws*, §§ 3842, 3855; *N. Mex. Comp. Laws*, § 2685, subds. 17, 18; *Or. B. & C. Codes*, § 5749; *Utah Rev. Stats.*, § 3580; *Wash. Bal. Codes*, § 5532; *Wyo. Rev. Stats.*, § 4488.

⁷⁴ *Cal. Code Civ. Proc.*, § 1245; *Ariz. Civ. Code*, pars. 2453, 2454; *Idaho Rev. Codes*, § 4140; *Mont. Rev. Codes*, § 7333; *Nev. Comp.*

§ 1053. **Action in justice's court.**—An action in a justice's court is commenced by filing a complaint,⁷⁵ in some states, or by service of summons.⁷⁶ Parties may appear and act in person, or by attorney, and any person, except the constable by whom the summons or jury process was served, may act as attorney.⁷⁷ At any time after the complaint is filed, the defendant may, in writing or by appearing and pleading, waive the issuing of summons.⁷⁸ The time specified in the summons for the appearance of the defendant must be as follows: 1. If an order of arrest is indorsed upon the summons, forthwith; 2. In all other cases, within five days, if the summons be served in the city and county, township, or city in which the action is brought; within ten days, if served out of the township or city, but in the county in which the action is brought; and within twenty days, if served elsewhere.⁷⁹ A copy of the complaint must be served with the summons, and the return on a justice's summons is presumed to show all that was done by the person making the service.⁸⁰

§ 1054. **Justice's court—Service of summons.**—The summons may be served by a sheriff or constable of any of the counties of California; but when it is to be served out of the county the summons shall have attached to it a certificate of the county clerk that the person issuing the same was an acting justice of the peace at the date of the summons. A justice's summons may also be served by any male resident over the age of twenty-one years, not a party to the suit, within the county where the action is brought, and must be served and returned as provided by title 5, part 2 (§§ 405-416), of the California Code of Civil Procedure. Summons may also be served by publication under the same circumstances and in the same manner as a superior court summons.⁸¹

Laws, §§ 3121, 3919; N. Mex. Comp. Laws, § 2685, subs. 17, 18; Or. B. & C. Codes, § 5098; Utah Rev. Stats., §§ 2939, 3593; Wash. Bal. Codes, §§ 779, 780.

⁷⁵ Cal. Code Civ. Proc., § 839. As to sufficiency of complaint in justice's court, see *Montgomery v. Superior Court*, 68 Cal. 407, 9 Pac. 720; *Terry v. Superior Court*, 110 Cal. 85, 42 Pac. 464.

⁷⁶ *Cheeseman v. Fenton*, 13 Wyo.

436, 110 Am. St. Rep. 1010, 80 Pac. 823.

⁷⁷ Cal. Code Civ. Proc., § 842.

⁷⁸ Cal. Code Civ. Proc., § 841. As to appearance of infants, see *Code Civ. Proc.*, § 843. What the summons must contain and to whom directed, see *Code Civ. Proc.*, § 844.

⁷⁹ Cal. Code Civ. Proc., § 845, as amended 1907.

⁸⁰ *State v. Harrington*, 31 Mont. 294, 78 Pac. 484.

⁸¹ Cal. Code Civ. Proc., § 849.

The summons cannot be served out of the county wherein the action is brought except when the action is brought upon the joint contract or obligation of two or more persons, one of whom resides within the county; when defendant has contracted to perform the obligation in the county of the action, and resides in another county; when the action is for injury to person or property; when defendant was a resident of the county at the time action was commenced, or in actions of forcible entry and detainer, or to enforce liens on, or to recover, personal property situated within the county.⁸²

§ 1055. *Alias or additional writs.*—If the summons is returned without being served on any or all of the defendants, or if it has been lost, the clerk, upon the demand of the plaintiff, may issue an *alias* summons in the same form as the original; provided, that no such *alias* summons shall be issued after the expiration of one year from the date of the filing of the complaint.⁸³ Before the amendment of the above section of the code so as to prohibit the issuance of an *alias* summons after the time for the service of the original had expired, it was held that the clerk could, on demand of the plaintiff, issue an *alias* summons after the expiration of the year during which the original was required to be issued.⁸⁴

If the plaintiff is guilty of laches in failing to serve either the original or the *alias* summons, the defendant may move to quash, and his appearance for this purpose is not to be deemed a waiver of summons.⁸⁵ While the defendant's motion to quash the summons is pending he is under no obligation to obey a second summons correcting defects in the first, when such defects have not been confessed, and the court has not directed such second summons to issue.⁸⁶

After a summons has been served on some of the defendants and returned, the court may order it delivered to the plaintiff for further service on other defendants in the same or another county. A redelivery of the summons without an order of the court is an irregularity, of which the opposite party may avail himself by direct attack, but such irregularity will not render the service void.⁸⁷

⁸² Cal. Code Civ. Proc., § 848, as amended 1907.

53 Cal. 245; *Coombs v. Parish*, 6 Colo. 296.

⁸³ Cal. Code Civ. Proc., § 408.

⁸⁶ *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231.

⁸⁴ *Dunker v. Lutz*, 48 Cal. 464.

⁸⁷ *Hancock v. Preuss*, 40 Cal. 572.

⁸⁵ *Linden etc. Min. Co. v. Sheplar*, P. P. F. Vol. I—41

In an action in a justice's court, the justice may, within a year from the date of the filing of the complaint, issue as many *alias* summonses as may be demanded by the plaintiff.⁸⁸ A judgment based upon an *alias* summons issued without any return of the original, and which imperfectly states the nature of the cause of action, and fails to notify the defendant to appear and answer at the office of the justice, while irregular, cannot be attacked collaterally.⁸⁹

An *alias* summons that substantially complies with the original is not defective as to form, under section 4141 of the Revised Statutes of 1887, providing that, if the summons is returned without being served, the clerk may issue an *alias* summons in the same form as the original.⁹⁰ Section 408 of the Code of Civil Procedure, providing for the issuance of an *alias* summons by the clerk, does not impair the power of the court to authorize it to be withdrawn for the purpose of further service, or for its service by publication.⁹¹

§ 1056. Service of summons.—After the issuance of the summons by the clerk, the next step is to have it properly served, together with a copy of the complaint. Allowing an action to rest without serving the summons for two years and eight months after the summons is issued is such a want of diligence as to justify the court in dismissing the action.⁹² Though section 408 of the Code of Civil Procedure provides that a clerk cannot issue an *alias* summons more than a year after the commencement of the action, the original summons may be served at any time within three years from the commencement of the action, and the court may order the returned summons to be served or may issue a new summons.⁹³ If notice is given of a motion to dismiss an action for want of prosecution before summons is served, and the plaintiff then serves the summons, and at the end of ten days takes a default, but judgment is not entered up, the entry of the default does not preclude the court from dismissing the action. The dismissal

⁸⁸ Cal. Code Civ. Proc., § 847.

⁸⁹ Dore v. Dougherty, 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 621.

⁹⁰ Hill v. Morgan, 76 Pac. 323, 9 Idaho, 718.

⁹¹ Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

⁹² Grigsby v. Napa Co., 36 Cal.

585, 95 Am. Dec. 213. As to degree of diligence required in service of summons, see Murray v. Gleeson, 100 Cal. 511, 35 Pac. 88.

⁹³ Hibernia Savings & Loan Soc. v. Cochran, 141 Cal. 653, 75 Pac. 315; Rue v. Quinn, 137 Cal. 651-7, 66 Pac. 216, 70 Pac. 732.

takes effect by relation back to the time of the service of the motion.⁹⁴ Most of the codes provide that when the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.⁹⁵ The entry of judgment against a defendant who has been served after the overruling of his demurrer to the complaint, without at the same time entering judgment against a co-defendant not served, is in accordance with the statute.⁹⁶ So where S. and B. admitted "due service" of summons in an action against them and others, the court thereby acquired jurisdiction of them, and as to them the judgment was valid.⁹⁷ Where a defendant, on foreclosure of a mortgage, filed a cross-bill seeking foreclosure of a mortgage held by him as prior to plaintiff's, it was not necessary for him to serve summons on his co-defendants, they having been served with summons by plaintiff; and hence the cross-complainant's motion for a continuance, on the ground that no process had been served on the co-defendants, no showing of diligence or excuse for delay being made, was properly refused.⁹⁸ Any writ or order and all other papers in any civil suit or proceeding may be served by telegraph in California.⁹⁹ In Oregon, service of complaint and notice upon a defendant before the same are filed in the office of the clerk of the court is a good service.¹⁰⁰ Under the North Dakota practice, unless the summons in an action is served in the manner prescribed by law within thirty days after the issue of a warrant of attachment, the writ becomes void, and will be set aside on motion.¹⁰¹ A summons, otherwise in due form, in which the defendants are designated only by their firm name, is irregular, but not absolutely void, and may be amended in the trial court so as to show the names of the partners. Such a summons, when issued, is sufficient to sustain an attachment.¹⁰²

⁹⁴ Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213.

⁹⁵ Cal. Code Civ. Proc., § 414. See, also, Cal. Code Civ. Proc., § 579.

⁹⁶ Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218.

⁹⁷ Sharp v. Brunnings, 35 Cal. 523.

⁹⁸ Rodgers v. Parker, 136 Cal. 313, 68 Pac. 975.

⁹⁹ Cal. Code Civ. Proc., § 1017.

¹⁰⁰ Keith v. Quinney, 1 Or. 364.

As to service of summons and complaint under Colorado statute of 1885, see Gwillim v. First Nat. Bank, 13 Colo. 278, 22 Pac. 458.

¹⁰¹ Rhode Island etc. Trust Co. v. Keeney, 1 N. Dak. 411, 48 N. W. 341; McLaughlin v. Wheeler, 2 S. Dak. 379, 50 N. W. 834. See Gribbon v. Freel, 93 N. Y. 93; Blossom v. Estes, 84 N. Y. 615.

¹⁰² Gaus v. Beasley, 4 N. Dak. 140,

A merely formal amendment of a complaint does not require a new service on a defendant who had not appeared to the original complaint.¹⁰³

§ 1057. **Mode of service in general.**—A summons may be served by the sheriff of the county where the defendant is found, or by any other person over the age of eighteen not a party to the action.¹⁰⁴ In Oregon, however, it must be served by the sheriff or his deputy, or by a person specially appointed by him or by the court or judge;¹⁰⁵ and this is also the rule in Colorado.¹⁰⁶ Under the Colorado statute providing that summons shall be served by the sheriff or by one appointed by him, and the statute providing that, whenever the sheriff shall be a party to the cause, the coroner shall execute all process therein, a plaintiff cannot serve his own summons.¹⁰⁷

§ 1058. **Redelivery and service after return.**—After a summons has been served on some of the defendants, and returned, the court may order it delivered to the plaintiff for further service on other defendants in the same or another county. A redelivery of the summons without an order of the court is an irregularity of which the opposite party may avail himself by direct attack; but such irregularity will not render the service void.¹⁰⁸

§ 1059. **Service by sheriff, effect of.**—In a collateral attack on a judgment, the return of the sheriff that he served a copy of the summons will be held equivalent to a return that he served a copy certified by the clerk.¹⁰⁹ Where judgment of foreclosure was obtained on a defective service, and the premises sold under the judgment to a party who was, at the time of such purchase, cognizant of the fact of such defective service, and also that the defendant was a married woman, and where the defendant has a valid defense to such action, the judgment will be set aside.¹¹⁰ Courts should presume that the sheriff served all proc-

59 N. W. 714. Service of a summons on Sunday is void. *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798; *McLaughlin v. Wheeler*, 2 S. Dak. 379, 50 N. W. 834. But see *Savings etc. Soc. v. Thompson*, 32 Cal. 347; *Whitney v. Blackburn*, 17 Or. 564, 11 Am. St. Rep. 857, 21 Pac. 874.

¹⁰³ *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

¹⁰⁴ Cal. Code Civ. Proc., § 410.

¹⁰⁵ Or. B. & C. Codes, § 54.

¹⁰⁶ Colorado (Mills') Code, § 39.

¹⁰⁷ *Toenniges v. Drake*, 7 Colo. 471, 4 Pac. 790.

¹⁰⁸ *Hancock v. Preuss*, 40 Cal. 572.

¹⁰⁹ *Brown v. Lawson*, 51 Cal. 615.

¹¹⁰ *McMillan v. Reynolds*, 11 Cal. 372.

esses within his jurisdiction, where no place of service is stated.¹¹¹ Where the return of a sheriff states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, and not by some one else.¹¹² Where the official return of the sheriff shows personal service of the summons upon the defendant, an affidavit by the defendant made after a great lapse of time showing that he had no recollection of the service of summons is entitled to but little weight as against the official return of the sheriff, and a finding in such case by the court below that the defendant was personally served with the summons and a certified copy of the complaint will not be disturbed on appeal.¹¹³ Where, in Montana, several defendants reside in the same county, and a copy of the complaint is served on one of them with the summons, a return of service need not show that defendants all reside in the county.¹¹⁴ A sheriff's return is not traversable, nor can it be attacked collaterally, even if he has been guilty of fraud or collusion.¹¹⁵ Personal service of writs and process can only be made by delivering a copy to the party upon whom the service is required. In the absence of the statute it will be necessary to show the original with the seal of the court, and also to deliver a copy.¹¹⁶ A summons cannot be served on defendant's attorney in fact.¹¹⁷ In making service of a summons, and in the return of such service, the provisions of the statute must be shown to have been substantially followed by the officer; otherwise, the proceedings cannot be supported upon a direct appeal.¹¹⁸ Where the record itself shows that no service of summons has been had upon a defendant, as required by the statute, the court is without jurisdiction of the person of the defendant, and a judgment rendered under such circumstances is a nullity.¹¹⁹ A description in a sheriff's return of city lots by numbers referring to the official map is sufficient.¹²⁰

¹¹¹ Crane v. Brannan, 3 Cal. 192.

¹¹² Curtis v. Herriek, 14 Cal. 117, 73 Am. Dec. 632. As to sufficiency of service and return, see Thomas v. Colorado Nat. Bank, 11 Colo. 511, 19 Pac. 501.

¹¹³ People v. Dodge, 104 Cal. 487, 38 Pac. 203. See McCoy v. Vanness, 98 Cal. 675, 33 Pac. 761.

¹¹⁴ Mantle v. Casey, 31 Mont. 408, 78 Pac. 591.

¹¹⁵ Egery v. Buchanan, 5 Cal. 56.

¹¹⁶ Edmondson v. Mason, 16 Cal. 388.

¹¹⁷ Drake v. Duvenick, 45 Cal. 455.

¹¹⁸ People v. Bernal, 43 Cal. 385.

¹¹⁹ Davidson v. Clark, 7 Mont. 100, 14 Pac. 663.

¹²⁰ Welch v. Sullivan, 8 Cal. 165.

§ 1060. **Service by deputy.**—The general rule of the common law is that officers who exercise judicial functions cannot act by deputy, but those who exercise merely ministerial functions may, without express authority to that effect. In the absence of statutory provisions as to the appointment of deputies by constables, the common-law rule applies, and constables may act by deputy in the exercise of their ministerial functions.¹²¹ Courts cannot know an under-officer, and the act and return on a summons of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal.¹²² Where a summons was served by the deputy sheriff, and returned, with the following signature to the return: "Elijah F. Cole, D. S.," and judgment was rendered by default, it was held that the judgment was null and void; the return should have been made in the name of the sheriff by the deputy.¹²³

§ 1061. **On a minor.**—If a father sues his infant son, residing with him, and the statute requires the summons to be served personally on the infant, and also on the father, a service on the infant alone is sufficient, for the father has notice of the suit without service.¹²⁴

§ 1062. **On corporations.**—Where the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company," it was not sufficient evidence of service to give the court jurisdiction, it not appearing that Street was president or head of the corporation, or secretary, cashier, or managing agent thereof.¹²⁵ A sheriff's return that he served the summons on the president and secretary of the company is *prima facie* evidence that the persons named in the return were such officers.¹²⁶ But if the service was upon the president of a foreign corporation which does no business within the state, and is in no manner a resident of the state, the service is of no avail.¹²⁷

¹²¹ Jobson v. Fennell, 35 Cal. 711.

¹²² Joyce v. Joyce, 5 Cal. 449;
Reinhart v. Lugo, 86 Cal. 395, 21 Am.
St. Rep. 52, 24 Pac. 1089.

¹²³ Rowley v. Howard, 23 Cal. 401.

¹²⁴ Brown v. Lawson, 51 Cal. 615.

¹²⁵ O'Brien v. Shaw's Flat &
Tuolumne Canal Co., 10 Cal. 343.
See, also, Blanc v. Paymaster Min.
Co., 95 Cal. 524; 29 Am. St. Rep.

149, 30 Pac. 765; Mathias v. White
Sulphur Springs Assoc., 17 Mont.
542, 43 Pac. 921; Blodgett v.
Schaffer, 94 Mo. 652, 7 S. W. 436;
Dickerson v. Burlington etc. R. R.
Co., 43 Kan. 702, 23 Pac. 936.

¹²⁶ Rowe v. Table Mountain Water
Co., 10 Cal. 441.

¹²⁷ Knapp v. Wallace, 50 Or. 348,
126 Am. St. Rep. 742, 92 Pac. 1054.

§ 1063. **On partners.**—The return of a sheriff that he served the summons on one Pendleton, one of the partners and associates of the company, is *prima facie* evidence that Pendleton was such partner and associate.¹²⁸ Where the summons was issued against Adams & Co., and served on C. B. Macy, and nothing appeared to connect Macy with Adams & Co., judgment by default could not be sustained.¹²⁹ It seems that a misdescription of an administrator as “executor” in the summons and entry of default, in an action to enforce a street assessment against the property of a decedent, will not render void a judgment enforcing the assessment upon such property, as against the administrator of the estate, if the complaint charges him as administrator, and the affidavit of service of summons shows that he was served as administrator.¹³⁰

§ 1064. **Abuse of process.**—Breaking and entering into defendant’s dwelling, and breaking open the door to his private room, where he is confined in bed with sickness, in order to serve a summons in a civil action, is an abuse of process by the sheriff.¹³¹

§ 1065. **Service, by whom made.**—The summons may be served by the sheriff of the county where the defendant is found, or by any other person, over the age of eighteen, not a party to the action. A copy of the complaint must be served with the summons, upon each of the defendants. When the summons is served by the sheriff, it must be returned with his certificate of service, and of the service of a copy of the complaint where such copy is served, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place with an affidavit of such person of its service, and of the service of a copy of the complaint, where such copy is served.¹³² The service of a summons by a person not a sheriff is “according to the course of the common law.”¹³³

§ 1066. **Husband and wife defendants.**—The service of summons on one spouse, in an action to enforce a mechanic’s lien

¹²⁸ *Wilson v. Spring Hill Quartz Min. Co.*, 10 Cal. 445.

¹²⁹ *Adams v. Town*, 3 Cal. 247.

¹³⁰ *Lyons v. Roach*, 84 Cal. 27, 23 Pac. 1026.

¹³¹ *Foley v. Martin*, 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842.

¹³² Cal. Code Civ. Proc., § 410.

¹³³ *Peck v. Strauss*, 33 Cal. 683.

against community property, is not the commencement of the action under section 4869 of Ballinger's Annotated Codes and Statutes.¹³⁴ Where the husband is made a necessary party in actions against the wife, he must not only be named in the complaint, but he must be served.¹³⁵

§ 1067. **Personal service—Mode of.**—In making a personal service of a summons, the provisions of the statute regulating such service must be observed and followed by the service officer.¹³⁶ The summons must be served by delivering a copy to the defendant personally, excepting in the following instances: 1. In a suit against a corporation; 2. In a suit against a minor under the age of fourteen years; 3. In a suit against an insane person; 4. In a suit against a county, city, or town. In these cases the summons must be served on the person designated in the statute.¹³⁷ In California, personal service is made by delivering a copy to the party upon whom the service is required, together with a copy of the complaint. In Oregon, service must be on the defendant personally, or, if he be not found, some person of the family above the age of fourteen years at the dwelling-house or usual place of abode of the defendant.¹³⁸ In Utah, service may be made on the defendant personally, or by leaving a certified copy at his usual place of abode with some suitable person, of at least the age of fourteen.¹³⁹ In Colorado, where service of process requires the reading of the writ, the whole of it must be read; merely stating the material parts is not enough.¹⁴⁰

In a suit against a corporation where service was made upon M., as president, and C., as secretary, it was held sufficient without proof beyond the mere return that those persons were such officers;¹⁴¹ but service "upon J. S., one of the proprietors of the company," was held insufficient to give the court jurisdiction. A baggage-master, or one who merely sells tickets, is not the

¹³⁴ *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

¹³⁵ *McDonald v. Parish*, 136 Cal. 301, 68 Pac. 817.

¹³⁶ *People v. Bernal*, 43 Cal. 385.

¹³⁷ Cal. Code Civ. Proc., § 411; Alaska Codes, pt. 4, ch. 5, § 52; Ariz. Civ. Code, par. 1327; Idaho Rev. Code, § 4144; Mont. Rev. Code, §§ 6519-6525; Nev. Comp. Laws, §§ 3128, 3129;

Or. B. & C. Codes, § 820; Utah Rev. Stats., § 2952; Wash. Bal. Codes, § 4875; Wyo. Rev. Stats., § 3705.

¹³⁸ Or. B. & C. Codes, § 55.

¹³⁹ Laws 1884, pp. 201, 202; *People v. House*, 4 Utah, 382, 10 Pac. 843.

¹⁴⁰ *Crary v. Barber*, 1 Colo. 172.

¹⁴¹ *Rowe v. Table Mountain Water Co.*, 10 Cal. 444.

"managing agent" of a railroad company;¹⁴² but a person acting under power of attorney for an insurance company located elsewhere is a "managing agent."¹⁴³ In a suit against a mining company, service cannot be had on the foreman of one of its mines who is under the orders of and makes his reports to its general agent;¹⁴⁴ but the service upon the vice-president of a corporation is sufficient, although the return does not show that the president could not be found in the county.¹⁴⁵ The fact that a defendant corporation has knowledge of the pendency of a suit against it will not dispense with the necessity for proper service.¹⁴⁶ A service of summons on one of the principal officers of a corporation, at its principal office or place of business, gives the court jurisdiction of the corporation, regardless of whether the officer served resided in or had an office in such county;¹⁴⁷ and it is immaterial in the case of such service whether the corporation has representatives in the county where service is had or not.¹⁴⁸

If the suit is against a minor living within the state, service must be made on such minor personally, and also on his father, mother, or guardian; or if there be none such within the state, then on any person having the care or control of such minor or with whom he resides or in whose service he is employed.¹⁴⁹ A return of service of summons, showing that it was served on minors "by delivering to each of them a true and correct copy thereof," is insufficient, in that it does not show that it was served "personally" by the sheriff.¹⁵⁰

In a suit against a person judicially declared to be of unsound mind, service must be made by delivering a copy to such person, and also to his guardian, if a guardian has been appointed.¹⁵¹ The rule that the appointment and appearance of a guardian *ad litem* without a personal service of summons upon the incom-

¹⁴² Flynn v. Hudson R. R. Co., 6 How. Pr. 308.

¹⁴³ Bain v. Globe Ins. Co., 9 How. Pr. 448.

¹⁴⁴ Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771.

¹⁴⁵ Comet Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506.

¹⁴⁶ Osborne v. Columbia etc. Alliance Corp., 9 Wash. 666, 38 Pac. 160.

¹⁴⁷ Weaver v. Southern Oregon Co., 30 Or. 350, 48 Pac. 171; Farrell v. Oregon Gold Co., 31 Or. 475, 49 Pac. 876.

¹⁴⁸ Bailey v. Malheur Irr. Co., 36 Or. 59, 57 Pac. 910.

¹⁴⁹ Cal. Code Civ. Proc., § 411; Or. B. & C. Code, § 55.

¹⁵⁰ Harris v. Sargeant, 37 Or. 43, 60 Pac. 608.

¹⁵¹ Cal. Code Civ. Proc., § 411; Or. B. & C. Codes, § 55.

petent is void does not apply where the incompetent person appears by a general guardian.¹⁵² In New York, service of summons on an insane person who has no committee must be by personal service on such person.¹⁵³

Where an action is against a county, city, or town, service must be made on the president of the board of supervisors, president of the counsel or trustees, or other head of the legislative department thereof.¹⁵⁴ In Washington and Oregon, service must be had on the clerk of such public corporation.¹⁵⁵ Where there are two parties who make adverse claim to be the officers of such public corporation, the proper person to be served is the officer *de facto*, the one having actual possession of the office.¹⁵⁶ After a corporation has ceased to do business, a service of summons on a stockholder who had been a director and trustee is of no binding force on the other stockholders.¹⁵⁷

Under the California Code, where two or more persons are associated in any business, transacting such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name; the summons in such cases being served on one or more of the associates, and the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants and had been sued upon their joint liability.¹⁵⁸ This provision, however, is to be strictly construed, and judgment cannot be rendered against parties not served in a suit not strictly within the provisions of this section.¹⁵⁹ Thus where an action is brought against two defendants alleged to be partners, but sued by their individual names, to enforce a partnership liability, and the summons is served on only one of them, who makes default, the plaintiff is not entitled to a judgment against both defendants.¹⁶⁰ In 1907, this section was amended so that such service is made sufficient to sustain judgment and execution

¹⁵² Redmond v. Peterson, 102 Cal. 595, 41 Am. St. Rep. 204, 36 Pac. 923.

¹⁵³ Heller v. Heller, 1 Code Rep. (N. S.) 309.

¹⁵⁴ Cal. Code Civ. Proc., § 411.

¹⁵⁵ Or. B. & C. Codes, § 55; Wash. Bal. Codes, § 4875; Downs v. Board of Directors, 4 Wash. 309, 30 Pac. 147.

¹⁵⁶ Berrian v. Methodist Soc., 4

Abb. Pr. 424. See Rowe v. Table Mountain Water Co., 10 Cal. 444.

¹⁵⁷ Stanton v. Gilpin, 38 Wash. 191, 80 Pac. 290.

¹⁵⁸ Cal. Code Civ. Proc., § 388.

¹⁵⁹ Davidson v. Knox, 67 Cal. 143, 7 Pac. 413; Hamner v. Ballantyne, 16 Utah, 439, 67 Am. St. Rep. 643, 52 Pac. 770.

¹⁶⁰ Feder v. Epstein, 69 Cal. 457, 10 Pac. 785.

upon all the common property, and also upon the individual property of the parties actually served.

§ 1068. **Time for service.**—The statutory requirement that service of summons be made within a certain period is mandatory.¹⁶¹ Allowing an action to rest without serving the summons for two years and eight months after the summons is issued is such a want of diligence as to justify the court in dismissing the action.¹⁶²

§ 1069. **Substituted service.**—The summons can be served “on the defendant personally, or by leaving a certified copy thereof at his usual place of abode, with some suitable person of at least the age of fourteen.” And an alternative writ of prohibition may be so served.¹⁶³

Under section 4874 of Ballinger’s Annotated Codes and Statutes, authorizing such service to be made by any person other than the plaintiff, the person making the service is agent for the plaintiff only for that purpose, and cannot waive any of the terms of the summons, unless specially authorized.¹⁶⁴ Section 3514 of the Revised Statutes of 1899, providing for substituted service of a summons on an individual by the leaving of a copy at his usual place of residence, with some member of the family over fourteen years of age, does not authorize such substituted service on one who is temporarily within the state for the purpose of carrying out a temporary employment.¹⁶⁵ In the case of a married man, the house of his usual abode, for the purpose of the service of summons, is the house wherein his wife and family reside.¹⁶⁶ Under the presumption that a permanent abode once acquired continues until shown to have been changed by the acquisition of another, a judgment and decree based on such service would not be disturbed under a direct attack.¹⁶⁷ Proof

¹⁶¹ *Linden Gravel Min. Co. v. Sheplar*, 53 Cal. 245.

¹⁶² *Grigsby v. Napa County*, 36 Cal. 585, 95 Am. Dec. 213.

¹⁶³ *Utah Laws of 1884*, pp. 201, 202, § 268, subd. 8; *People v. House*, 4 Utah, 382, 10 Pac. 843. For the mode of transmitting summonses, and other writs, orders, or papers, by telegraph, for service in any place, and

mode of service and return, see Cal. Code Civ. Proc., § 1017.

¹⁶⁴ *Washington Mill Co. v. Marks*, 27 Wash. 170, 67 Pac. 565.

¹⁶⁵ *Honeycutt v. Nyquist Peterson & Co.*, 12 Wyo. 183, 109 Am. St. Rep. 975, 74 Pac. 90.

¹⁶⁶ *Northwestern etc. Hypotheek Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139.

¹⁶⁷ *Id.*

of service showing service on defendant by delivering a copy of the process to his wife, a person of suitable age and discretion, at the usual place of his residence, is a sufficient compliance with the statute, since even on direct attack it would be presumed that the wife resided with her husband, and that her residence would be that of his usual abode.¹⁶⁸

The California statute makes no provision for service upon any person other than the defendant himself. As we have already noted, however, some of the states permit service upon members of the defendant's family, or persons above a certain age, found at the defendant's residence.

Substituted service of process must show the facts which confer jurisdiction;¹⁶⁹ as, that the party cannot be found, and that therefore service is made on his wife.¹⁷⁰ Service at the dwelling of a defendant on a male over fourteen years of age, "who resides with the family," is service on such male person "of the family."¹⁷¹ A return which showed that the defendant could not be found, and that a copy of the summons was delivered to a "member of the family" at his usual place of abode in the county, does not confer jurisdiction, because of its failure to show that the substituted service of the summons was made at the defendant's usual place of abode in the state, in whatever county it might be.¹⁷²

FORMS OF SUMMONS.

§ 1070. Summons in action on contract for payment of money only.

Form No. 355.

[STATE AND COUNTY.]

[COURT.]

A. B., Plaintiff,	}	No. . . .
v.		
C. D., Defendant.		. . . , Attorneys for Plaintiff.

The People of the State of California send greeting:

To . . . , defendant: You are hereby required to appear in an action brought against you by the above-named plaintiff in the superior court of the state of California, in and for the city of . . .

¹⁶⁸ Powell v. Nolan, 27 Wash. 318,
67 Pac. 712, 68 Pac. 389.

¹⁶⁹ Caro Brothers v. Oregon etc. R.
R. Co., 10 Or. 510.

¹⁷⁰ Hass v. Sedlak, 9 Or. 462.

¹⁷¹ Carland v. Heineborg, 2 Or. 75.

¹⁷² Swift v. Meyers, 37 Fed. 39,
13 Sawy. 583.

and county of . . . , and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or if served elsewhere, within thirty days.

The said action is brought to recover the sum of . . . dollars, gold coin of the United States, due from defendant to plaintiff upon [a certain promissory note made by the defendant on the . . . day of . . . , 19.. , to said plaintiff, for . . . dollars, payable . . . months after date], particularly described in the complaint; also for interest thereon, at the rate of . . . per cent per month.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for said sum of . . . dollars, in gold coin of the United States, interest and costs.

Given under my hand and the seal of the superior court of the state of California, in and for the city and county of . . . , this . . . day of . . . , 19..

A. B., Clerk.

By C. D., Deputy Clerk.

§ 1071. The same—Summons in justice’s court.

Form No. 356.

[STATE AND COUNTY.]

[COURT.]

A. B., Plaintiff, }
v. }
C. D., Defendant. }

The People of the State of California send greeting:

To . . . , defendant: You are hereby required to appear in an action brought against you by the above-named plaintiff, in the justice’s court of . . . township, county of . . . , state of California, and to answer before the justice at his office in the said township, the complaint filed therein, . . . within five days (exclusive of the day of service) after the service on you of this summons—if served within the township in which this action is brought; or if served out of said township, but in said county, within ten days; or within twenty days if served elsewhere.

The said action is brought to recover [. . . dollars principal, and interest at the rate of . . . per cent per month from the . . . day of . . . , 19.. , upon a promissory note made by the defendant to the order of A. B., dated the . . . day of . . . , 19.. , and payable . . .

months after date, and which note was indorsed and delivered to the plaintiff by said A. B.]. And you are hereby notified that if you fail to so appear and answer said complaint, as above required, said plaintiff will take judgment against you for the sum of . . . dollars, together with costs . . . Make legal service and due return hereof.

Given under my hand this . . . day of . . . , 19..

. . . , Justice of the Peace of said Township.

. . . , Plaintiff's Attorney.

§ 1072. Summons in action to foreclose mortgage.

Form No. 357.

[TITLE, as in No. 355.]

The People of the State of California send greeting:

To . . . , defendant: You are hereby required to appear in an action brought against you by the above-named plaintiff, in the superior court of the state of California, in and for the . . . , county of . . . , and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or if served elsewhere, within thirty days.

The said action is brought to obtain a decree of this court for the foreclosure of . . . certain mortgage described in the said complaint, and executed by the said . . . on the . . . day of . . . , 19.., to secure the payment of a certain . . . , that the premises conveyed by said mortgage may be sold, and the proceeds applied to the payment of said . . . ; and in case such proceeds are not sufficient to pay the same, then to obtain an execution against said . . . for the balance remaining due, and also that the said defendant, and all persons claiming by, through, or under . . . may be barred and foreclosed of all right, title, claim, lien, equity of redemption, and interest in and to said mortgaged premises, and for other and further relief, as will more fully appear by reference to the complaint on file herein.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the said complaint.

[Attestation, date, and signature as in No. 355.]

CHAPTER XL.

SERVICE OF SUMMONS BY PUBLICATION.

§ 1073. **When permitted.**—The codes generally provide for the service of summons by publication in certain cases. Usually, this mode of service may be resorted to in the following cases: 1. When the defendant resides out of the state; 2. When the defendant has departed from the state; 3. When the defendant cannot be found within the state, or he conceals himself to avoid service; 4. When the defendant is a foreign corporation, having no managing or business agent, cashier, or secretary within the state. In such cases, the court or judge may make an order that the service be had by publication of the summons.¹ It is now well settled that this procedure is constitutional,² and such a statute is not invalid because it includes in its provisions proceedings purely *in personam*.³ The basis of jurisdiction, however, acquired by such service is the power of the state over persons and property within its territory. It can only reach a non-resident by virtue of his having property within the state; therefore service by publication is sufficient to inform him of the object of proceedings taken where the property is once brought under the control of the court by seizure or some equivalent act. But where the suit is brought to determine his personal rights and obligations,—i. e. where it is merely *in personam*,—such service is ineffectual for any purpose, and personal judgment thereon is invalid, and no title to property passes by a sale thereunder.⁴

Statutes providing for this mode of acquiring jurisdiction of a defendant are in derogation of the common law, and must be strictly followed in order to give the court jurisdiction;⁵ and

¹ Cal. Code Civ. Proc., § 412; Alaska Codes, pt. 4, ch. 4, § 47; Ariz. Civ. Codes, par. 1329; Idaho Rev. Codes, § 4145; Mont. Rev. Codes, § 6520; Nev. Comp. Laws, §§ 3125, 3126; Or. B. & C. Codes, §§ 820, 822; Utah Rev. Stats., § 2948; Wash. Bal. Codes, § 4877; Wyo. Rev. Stats., §§ 3552, 3705.

² *Pennoy v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

³ *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51.

⁴ *Pennoy v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Alliance Trust Co. v. O'Brien*, 32 Or. 335, 50 Pac. 801, 51 Pac. 640.

⁵ *Ricketson v. Richardson*, 26 Cal. 149; *Cohn v. Kember*, 47 Cal. 145; *Columbus Screw Co. v. Warner Lock Co.*, 138 Cal. 446, 71 Pac. 498; *Northcut v. Lemery*, 18 Or. 316; *Odell v. Campbell*, 9 Or. 298; *Park v. Higbee*, 6 Utah, 416, 24 Pac. 524; *Cordray v. Cordray*, 19 Okla. 36, 91 Pac. 781.

where the statute thus provides a method, it is not only to be strictly followed, but must also be followed to the exclusion of any other method not clearly provided.⁶ In some states, the statute does not abrogate the common-law rule requiring personal service of summons in actions *in personam*.⁷ This procedure is constitutional only when the action is for the purpose of affecting the *status* of the defendant. If the object of the action is to subject the property of the defendant within the state to execution issued on a judgment against him, such property must be attached at the inception of the proceeding. After attachment and a publication of summons in the manner provided by statute, the action becomes in effect a proceeding *in rem* against the property attached, and the judgment is *in rem* against such property, and not *in personam* against the defendant. A judgment against a defendant not personally served with process, and whose property has not been attached, is void for want of due process of law.⁸

The existence of any one of the conditions specified by the statute is not alone sufficient. In addition thereto, it must also appear by the affidavit or the verified complaint on file that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to the action.⁹ The proceeding, however, is sufficient on collateral attack, if the affidavit tends to prove the facts required to be shown, and if the court adjudges it sufficient by acting upon it, although there may be defects in it which could have been taken advantage of in direct proceedings.¹⁰ The necessary facts appearing by affidavit or otherwise, it is only necessary that one of the grounds enumerated in the statute exist in order that publication may be made.¹¹

No presumption will be indulged in favor of jurisdiction acquired by publication.¹² Where, however, a court has jurisdiction of the subject-matter, the question as to whether it acquires jurisdiction over the defendants served by publication is one which the court had authority to pass upon.¹³ And it has been held that

⁶ Cooper v. Reynolds, 10 Wall. 319, 19 L. Ed. 931; Bauer v. Widholm, 49 Wash. 310, 95 Pac. 277; Pennoyer v. Neff, 95 U. S. 723, 24 L. Ed. 565.

⁷ Silver Camp Min. Co. v. Dickert, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940.

⁸ Pennoyer v. Neff, 95 U. S. 723, 24 L. Ed. 565; Belcher v. Chambers, 53 Cal. 635; Denny v. Ashley, 12

Colo. 165, 20 Pac. 331; Hanscom v. Hanscom, 6 Colo. App. 97, 39 Pac. 885.

⁹ Cal. Code Civ. Proc., § 412.

¹⁰ George v. Nowlan, 38 Or. 542, 64 Pac. 1.

¹¹ De Corvet v. Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

¹² McMinn v. Whelan, 27 Cal. 309.

¹³ Mines etc. Soc. v. Superior Court, 91 Cal. 101, 27 Pac. 532.

the court will presume, in order to sustain a service by publication, that a minor was over the age of fourteen, in which case no service is required on his guardian.¹⁴

These statutes do not provide that the judge may order summons to issue; his only power is to order a summons which has already been issued to be served in a particular manner.¹⁵ Thus, where the order for the publication of a summons precedes the issuance of a summons, a judgment by default based thereon is void.¹⁶

§ 1074. Affidavit for order.—The service of a summons by publication made without an affidavit for publication is void.¹⁷ The affidavit is necessary to bring into exercise the jurisdiction of the court to make the order.^{17a} Where the statute requires the affidavit to be made by the plaintiffs or by one of the plaintiffs, an affidavit made by the plaintiffs' attorney is sufficient.¹⁸ The affidavit may be made by plaintiff's attorney if it states that he is such attorney, even though he does not appear of record as plaintiff's attorney.¹⁹ The affidavit must contain a statement of some fact which would be legal evidence, having some tendency to make the fact of jurisdiction appear for the court to act upon, before he has any jurisdiction to make the order.²⁰ And this statement of facts must be positive, and not one of opinion.²¹ An affidavit is sufficient if it sets forth substantially in the language of the statute enough of the ultimate facts recited in the statutes as reasons for the publication.²² So, where the statute provides that the affidavit set forth the fact that the defendant has property in the state, an averment that the suit is one to foreclose a mortgage on property in the state executed by the defendant is sufficient.²³

¹⁴ *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418.

¹⁵ *People v. Huber*, 20 Cal. 81.

¹⁶ *Coffin v. Bell*, 22 Nev. 169, 58 Am. St. Rep. 738, 37 Pac. 240.

¹⁷ *People v. Pearson*, 76 Cal. 400, 18 Pac. 424.

^{17a} *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Goodale v. Coffee*, 24 Or. 346, 33 Pac. 990; *Braly v. Seaman*, 30 Cal. 610.

¹⁸ *Sayre-Newton Lumber Co. v. Park*, 4 Colo. App. 482, 36 Pac. 445; *Evert v. Connecticut Mutual Life Ins. Co.*, 4 Colo. App. 509, 36 Pac. 616.

¹⁹ 2 Ballinger's Annot. Codes, § 4877; *Swanson v. Hoyle*, 32 Wash. 169, 72 Pac. 1011.

²⁰ *Forbes v. Hyde*, 31 Cal. 342; *Palmer v. McMaster*, 13 Mont. 189, 40 Am. St. Rep. 436, 33 Pac. 132; *Ervin v. Milne*, 17 Mont. 499, 43 Pac. 706; *Odell v. Campbell*, 9 Or. 302; *Goore v. Goore*, 24 Wash. 143, 63 Pac. 1092.

²¹ *Yolo County v. Knight*, 70 Cal. 430, 11 Pac. 662.

²² *Ervin v. Milne*, 17 Mont. 494, 43 Pac. 706.

²³ *Pike v. Kennedy*, 15 Or. 420, 15 Pac. 637.

Where the statute requires that the affidavit or the verified complaint on file shall show a cause of action, the cause of action may be shown by an affidavit which refers to and adopts a complaint on file showing a cause of action.²⁴ And where the affidavit is to be acted upon exclusively by the clerk, it need not specifically set forth the cause of action, and an averment that the cause of action exists is sufficient.²⁵ It must, however, show that a cause of action exists against the defendants.²⁶

The affidavit must show whether the residence of the person upon whom such service is sought is known to the affiant, and, if known, the residence must be stated,²⁷ or his last known residence,²⁸ or last known address.^{28a} And it is not sufficient for this purpose to repeat the language or substance of the statute.²⁹ In such a case the affidavit must state facts which show that due diligence to find the defendant has been used, and it must also appear that the diligence has not been awarded by discovery,³⁰ though the results need not now be expressly stated.³¹ Thus an affidavit that the defendant could not, after due diligence, be found in the county where the action was pending, that the affiant had inquired of the defendant's friends who would give him no information, and that the plaintiff did not know where the defendant could be found within the state, is wholly insufficient.³² But if the affidavit states that the defendant resides out of the state, and gives his residence, it is sufficient.³³ An affidavit which recites that at the time of the commencement of the action, and ever since, the defendant was, and has been, absent from the state, and residing out of the state, and now resides, "as the affiant is informed and believes at S. in the state of New York," is not subject to collateral attack on the ground that the statements contained therein were on information

²⁴ *Ligare v. California etc. R. R. Co.*, 76 Cal. 610, 18 Pac. 777.

²⁵ *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043.

²⁶ *Beckett v. Cuenin*, 15 Colo. 281, 22 Am. St. Rep. 399, 25 Pac. 167.

²⁷ *Ricketson v. Richardson*, 26 Cal. 149; *Braly v. Seaman*, 30 Cal. 610.

²⁸ *Mills v. Smiley*, 9 Idaho, 317, 76 Pac. 783; *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, 71 Pac. 498.

^{28a} *San Diego Sav Bank v. Goodsell*, 137 Cal. 420, 70 Pac. 299.

²⁹ *Ricketson v. Richardson*, 26 Cal. 149.

³⁰ *Braly v. Seaman*, 30 Cal. 610; *Forbes v. Hyde*, 31 Cal. 342.

³¹ *Chapman v. Moore*, 151 Cal. 509, 121 Am. St. Rep. 130, 91 Pac. 324.

³² *Swain v. Chase*, 12 Cal. 283.

³³ *Pike v. Kennedy*, 15 Or. 420, 15 Pac. 637; *De Corvet v. Colan*, 7 Wash. 365, 35 Pac. 72, 1072; *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; *Furnish v. Mullan*, 76 Cal. 646, 18 Pac. 854.

and belief only;³⁴ although, as a general rule, such averments should not be made on information and belief.³⁵ Diligence is in all cases a relative term, and what is due diligence must be determined by the circumstances of the particular case.³⁶

But where the summons has been returned by the sheriff of the county in which the land in controversy is located, and inquiry of the county officials and others well acquainted in the county fails to disclose the whereabouts of defendant, such an affidavit may confer jurisdiction if supported by lapse of time and the sound discretion of the court.³⁷

The affidavit must state the steps taken to obtain personal service.³⁸ Under the Colorado practice, the affidavit is to be acted upon exclusively by the clerk of the court, and it is only necessary that it contain sufficient averments to inform the clerk that the defendant is a non-resident, that the plaintiff has a cause of action, and that the defendant is a necessary party thereto. It is not required by the statute that the court judicially ascertain before granting the order that such a cause of action has been stated in the affidavit as will sustain a judicial decree.³⁹ In Washington, the affidavit for publication is not necessary to personal service out of the state, and the summons is the same as the ordinary summons, except it requires defendant to answer in sixty days.⁴⁰

§ 1075. Amendment of affidavit.—An affidavit for service by publication which states defectively but inferentially the matters required is voidable only, and may be amended.⁴¹ But if the affidavit is insufficient, it is immaterial if personal service is afterwards had upon defendant.⁴²

§ 1076. Order for publication.—To support an order for the service of summons against a non-resident by publication, it is essential, in order to give the court jurisdiction, that a cause of

³⁴ *Johnson v. Miner*, 144 Cal. 785, 78 Pac. 240.

³⁵ *Forbes v. Hyde*, 31 Cal. 342.

³⁶ *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

³⁷ *People v. Wrin*, 143 Cal. 11, 76 Pac. 646.

³⁸ *Beach v. Beach*, 6 Dak. 371, 43 N. W. 701; *Palmer v. McMaster*, 13 Mont. 184, 40 Am. St. Rep. 434, 33 Pac. 132; *Victor Mill etc. Co. v. Justice Court*, 18 Nev. 21, 1 Pac. 831.

³⁹ Code Civ. Proc., § 41; *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043.

⁴⁰ *Jennings v. Rocky Bar Gold Min. Co.*, 29 Wash. 726, 70 Pac. 136; *Hunter v. Wenatchee Land Co.*, 36 Wash. 541, 79 Pac. 40.

⁴¹ *Reister v. Land*, 14 Okla. 34, 76 Pac. 156. But see *Knapp v. Wallace*, 50 Or. 348, 126 Am. St. Rep. 742, 92 Pac. 1054.

⁴² *McKibbin v. McKibbin*, 139 Cal. 448, 73 Pac. 143.

action be shown either by a properly verified complaint or by affidavit. Accordingly, where a complaint is not verified, an affidavit by the attorney for the plaintiff, showing that all of the facts stated therein concerning the indebtedness sued upon are stated upon information received by him from the plaintiff, shows no cause of action for the order of publication, and the publication based on such affidavits is void.⁴³ The order must state the facts proved by the affidavit upon which it is based,^{43a} and provide for a certain publication, specifying the time in which the defendant must appear.⁴⁴ It is not sufficient that it state, generally, that the defendant resides out of the state, or cannot after due diligence be found within the state, or that a cause of action exists against the defendant.⁴⁵ Jurisdiction, in cases of published summons, is based upon the affidavit, and not on the recitals of fact found in the order; the order is only the conclusion of the court based upon the affidavit.⁴⁶

An order of the court directing service by publication is absolutely essential to render such service valid.⁴⁷ So an order to publish a summons made in advance of the issuance of the motion is a nullity. Accordingly, where after the complaint was filed, and before any summons was issued, an order was obtained from the judge that "summons do issue," and that it be published, and without any further order summons was subsequently issued and published, it was held that the attempt thus to acquire jurisdiction of the defendant was ineffectual.⁴⁸ The authority of the court to order service by publication is not, however, taken away by reason of the fact that the summons has been previously returned to the clerk's office. The provision for an *alias* summons does not impair the power of the court to authorize the summons to be withdrawn for further service, or for service by publication.⁴⁹

Where the statute requires that the order be published in the newspaper "most likely to give notice to the person to be served," the order need not recite the fact that the newspaper designated is the one most likely to give such notice, where it appears from

⁴³ Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 71 Pac. 498.

^{43a} Ricketson v. Richardson, 26 Cal. 149.

⁴⁴ McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

⁴⁵ Ricketson v. Richardson, 26 Cal. 149.

⁴⁶ Goodale v. Coffee, 24 Or. 346, 33 Pac. 990.

⁴⁷ People v. Pearson, 76 Cal. 400, 18 Pac. 424; People v. Harrison, 107 Cal. 544, 40 Pac. 956.

⁴⁸ Sharp v. Daugney, 33 Cal. 505.

⁴⁹ Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

the record that the paper is a public newspaper published in the proper county.⁵⁰

The fact that the clerk, on failing to enter the original order in the records, failed to sign his name to it does not render the order invalid, where it was in every other respect regular.⁵¹

§ 1077. Mailing copy to defendant.—The codes generally provide that where the residence of a non-resident or absent defendant is known, the court must direct a copy of the summons and complaint to be “forthwith” deposited in the post-office, directed to the person to be served at his place of residence.⁵² This is in addition to an order directing the publication.⁵³ Where an order for service of publication directed that a copy of the summons be deposited in the post-office, addressed to the defendant at her last place of residence, it was held sufficient, notwithstanding the omission of the word “forthwith” contained in the statute.⁵⁴ Section 12 of the California Political Code does not necessarily apply to persons without the state, and service by mailing to defendant’s last known address, though the address, as stated in the affidavit, was not the residence of defendant, is sufficient.⁵⁵ It is not necessary that such order contain findings of the jurisdictional facts, the finding of such facts being presumed from the granting of the order.⁵⁶ Where the order for deposit in the post-office is not made, the court acquires no jurisdiction.⁵⁷

Service of summons upon infants, although under the age of fourteen years, should be made by depositing the summons and certified copy of the complaint in the post-office, directed to the infants the same as to other defendants.⁵⁸ Failure to so deposit the summons when directed to the minor is not cured by the appearance of the mother in her own behalf.⁵⁹

The attorney for the plaintiff may deposit the copy of the summons and complaint in the post-office, and his affidavit is

⁵⁰ *Seaver v. Fitzgerald*, 23 Cal. 85; *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043.

⁵¹ *In re James Estate*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

⁵² Cal. Code Civ. Proc., § 413; Alaska Code, pt. 4, ch. 4, § 42; Or. B. & C. Codes, § 57; Utah Rev. Stats., § 2, Comp. Laws. 1888, p. 241.

⁵³ *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

⁵⁴ *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043.

⁵⁵ *San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 70 Pac. 299.

⁵⁶ *Goodale v. Coffee*, 24 Or. 346, 33 Pac. 990.

⁵⁷ *Park v. Higbee*, 6 Utah, 414, 24 Pac. 524.

⁵⁸ *Gray v. Palmer*, 9 Cal. 616.

⁵⁹ *Id.*

sufficient proof thereof;⁶⁰ and the deposit may properly be made in the post-office where the attorney resides and has his office, although the order for publication was made at a different place.⁶¹ Some of the codes provide that when publication is ordered, personal service of the copy of the summons and complaint out of the state is equivalent to publication and deposit in the post-office. In such a case, however, personal service out of the state can be made if at all, only where a publication of the summons has been ordered; and prior service out of the state is of no avail.⁶² Where the summons and complaint were mailed to the defendant and were taken from the post-office by her husband and delivered to her in a sealed envelope, this was held not to be personal service within the meaning of a statute permitting personal service without the state as a substitute for publication and deposit in the post-office.⁶³ A Nevada statute⁶⁴ provides that in a suit against a corporation organized under the laws of another state, a copy of the summons and complaint shall be mailed to the president and trustees of such corporation at their place of business in the latter state, in addition to the personal service required by the same statute; and it is held that, in the absence of the personal service so required, the mailing of a copy of the summons and complaint adds no force to the officer's return on the summons.⁶⁵ Where an order of publication required the mailing of the copy of the summons and complaint "forthwith," a finding by the trial court that a delay of ten days was not unreasonable will not be disturbed.⁶⁶ Where plaintiff's true name, "McKnight," appeared in the copy mailed to defendant, but in the summons as published appeared as "Knight," it is not fatal error.⁶⁷

§ 1078. **Sufficiency of publication.**—In order to acquire jurisdiction by publication, all the statutory requirements must be substantially complied with.⁶⁸ The summons must be published as

⁶⁰ *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73.

⁶¹ *Mudge v. Steinhart*, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147.

⁶² *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. 61.

⁶³ *Rhode Island Hospital etc. Co. v. Keeney*, 1 N. Dak. 411, 48 Pac. 341.

⁶⁴ Gen. Stats., § 305.

⁶⁵ *Lonkey v. Keyes Min. Co.*, 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351.

⁶⁶ *Star v. Mahan*, 4 Dak. 213, 30 N. W. 169.

⁶⁷ *McKnight v. Grant*, 13 Idaho, 629, 121 Am. St. Rep. 287, 92 Pac. 989.

⁶⁸ *Mills v. Smiley*, 9 Idaho, 317, 325, 76 Pac. 785.

it was when the order of publication was made.⁶⁹ Accordingly, when an order was made for service of summons by publication and a summons was issued, and a supplemental complaint was afterwards filed and a summons issued thereon, it was held that the original action became merged in the action as supplemented, and the court did not acquire jurisdiction of the persons of absent defendants by publication of the original summons, but it was essential to serve by publication the summons issued on the supplemental complaint.⁷⁰ But discrepancies of a purely literal character between the summons as issued and as published will be disregarded where in sense and meaning they are identical.⁷¹ It cannot be said on appeal that the court erred in construing its order for publication of summons in the "San Diego Union" as referring to the "San Diego Union and Daily Bee," in which it was published.⁷²

Where the statute provides that a publication of summons against a defendant residing out of the state must be made at least once a week for a period extending over at least two full calendar months, it is not necessary that the two full calendar months should intervene between the first and last publication; but it is necessary that the summons be published once each week for those two months, and that from the day of the first publication two calendar months should intervene before the service of the summons is complete. After the completion of such service, thirty days must elapse before a judgment by default can be taken against the defendant.⁷³ Where the requirement is for a publication of three full calendar months, a publication of summons weekly commencing on the tenth day of January and ending on the ninth day of April, is a publication of three full calendar months, and the first day of the forty, within which the defendant is required to answer, is the tenth day of April.⁷⁴ If the last day of the publication is in the same week in which the three months expire, the publication is sufficient, although this day is less than three months from the first day of publication. Under a statute requiring publication of summons to be made not less than once a week for six consecutive weeks, its publications are sufficient

⁶⁹ *McMinn v. Whelan*, 27 Cal. 309.

⁷⁰ *Forbes v. Hyde*, 31 Cal. 342.

⁷¹ *Sharp v. Daugney*, 33 Cal. 505.

⁷² *People v. McFadden*, 144 Cal.

⁷³ *Foster v. Vehmeyer*, 133 Cal. 459,

65 Pac. 974.

⁷⁴ *Savings etc. Soc. v. Thompson*,

32 Cal. 347.

where it is made once in each of six consecutive weeks.⁷⁵ A publication for seventy days is a publication for ten weeks,^{75a} and a publication for thirty-nine days has been held to be a publication for six weeks.⁷⁶ The publication of summons under a proper order directing such publications, made in a weekly newspaper for five consecutive weeks, the first being on July 18th and the last on August 5th, was a publication each week for at least one month, as required by statute.⁷⁷ The requirement in an order for publication of summons, that it be published for two months, must yield to section 3549 of the Political Code, making four weeks' publication sufficient, so that it is enough that it was published four weeks.⁷⁸

§ 1079. Time to appear.—The California Code of Civil Procedure⁷⁹ provides, in relation to service on non-residents by publication, that "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication."⁸⁰ It is held that the publication only affects the service of the summons, and the defendant is entitled to thirty days after the period of publication to file his answer.⁸¹ In Colorado, fifty days must elapse after the last publication required by law before the defendant can properly be considered in default.⁸² Publication of the summons, beyond the time required by the order of the court does not extend the time in which the defendant is required to answer.⁸³

The Political Code of California⁸⁴ makes provision for the publication of summons, in certain cases, for four weeks only. As to those cases, section 413 of the Code of Civil Procedure, prescribing a different period, is inapplicable.⁸⁵

⁷⁵ *State v. Superior Court*, 6 Wash. 352, 33 Pac. 827.

^{75a} *People v. Gray*, 10 Abb. Pr. 468.

⁷⁶ *Olcott v. Robinson*, 21 N. Y. 150, 78 Am. Dec. 126.

⁷⁷ *Forsman v. Bright*, 8 Idaho 467, 69 Pac. 473.

⁷⁸ *People v. McFadden*, 144 Cal. xvii, 77 Pac. 999.

⁷⁹ Code Civ. Proc., § 413.

⁸⁰ See, also, Alaska Codes, pt. 4, ch. 4, §§ 52, 638; Ariz. Civ. Code, pars. 1329, 1334; Idaho Rev. Codes, §§ 4145, 4146; Mont. Rev. Codes, §§ 6520-6523;

Nev. Comp. Laws, §§ 3128, 3129; Or. B. & C. Codes, §§ 57, 62, 539-543; Utah Rev. Stats., § 2952; Wash. Bal. Codes, § 4882; Wyo. Rev. Stats., § 3705.

⁸¹ *Grewell v. Henderson*, 5 Cal. 465; Cal. Code Civ. Proc., § 407.

⁸² *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. 621.

⁸³ *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73.

⁸⁴ Cal. Pol. Code, § 3549.

⁸⁵ *People v. Norris*, 144 Cal. 422, 77 Pac. 998.

§ 1080. **Proof of publication—By whom made, and what to contain.**—Where the affidavit was made by a publisher and proprietor, and not by the printer, foreman, or chief clerk, it was held sufficient, as being within the spirit of the statute.⁸⁶ When service is had by the publication, proof thereof can only be made by affidavit of the printer, his foreman, or clerk; and the affidavit should state that the person taking the same holds one of these positions.⁸⁷ And there being but one clerk in the office of the newspaper, and the affidavit describing him as principal clerk, the affidavit was held sufficient.⁸⁸ A provision that such affidavit shall be made within six months after the last publication is merely directory, and failure to make the affidavit within that time does not deprive the court of jurisdiction to enter judgment.⁸⁹ If the affidavit does not show facts sufficient to give jurisdiction, but the judgment in the recitals supplies those facts, or recites that service had been had upon the defendant, the judgment will control. It will be presumed that other evidence than that contained in the judgment-roll was made. The recital imports absolute verity.⁹⁰ An affidavit commencing, "A. B., principal clerk, etc., being sworn, deposes," etc., was held insufficient.⁹¹ He should swear that he is principal clerk in direct and positive terms.

§ 1081. **Service by publication, when conclusive.**—If the code intended a judgment rendered against a defendant served by publication to be final under all circumstances, the constitutionality of such service might admit of very grave doubt. But the legislature did not so intend. The affidavit is only *prima facie* evidence of the facts, and, if untrue, the defendant can at any time have the judgment set aside.⁹² If the defendant in fact conceals himself to avoid the service of process, he will not be heard to complain that he was not personally served.⁹³ If jurisdiction of the person of a defendant was to be acquired by publication of the summons in lieu of personal service, the statutory mode must be strictly pursued; and if it appear that the

⁸⁶ Sharp v. Daugney, 33 Cal. 505.

⁸⁷ Steinbach v. Leese, 27 Cal. 295.

⁸⁸ Gray v. Palmer, 9 Cal. 616.

⁸⁹ McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

⁹⁰ Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

⁹¹ Steinbach v. Leese, 27 Cal.

295.

⁹² Ware v. Robinson, 9 Cal. 111.

⁹³ Id. See, also, Swain v. Chase, 12 Cal. 285; Ricketson v. Richardson, 26 Cal. 154; Braly v. Seaman, 30 Cal. 617.

court never had jurisdiction of the person of the defendant by reason of non-compliance with the provisions of the statute, the judgment entered in the case against such defendant will be pronounced a nullity, whether it come directly or collaterally in question.⁹⁴ True, the irregularity of a summons or its service which deprives a court of jurisdiction must be so defective that it will authorize a collateral impeachment of the judgment rendered thereon,⁹⁵ and amending the return of service may not aid the jurisdiction.⁹⁶ But a judgment rendered against a non-resident of the state who has not been personally served within the state, nor submitted himself to the jurisdiction of the court, can only be enforced within the state in which the judgment is rendered, and no personal liability will result therefrom which will be recognized beyond the state in which the action originated.⁹⁷

FORMS FOR PUBLICATION OF SUMMONS.

§ 1082. Affidavit for publication of summons.

Form No. 358.

[TITLE.]

[VENUE.]

A. B., of . . . , being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled action. The complaint in said action was duly filed with the clerk of this court on the . . . day of . . . , 19.., and summons thereupon issued; and the said action is brought for the purpose of [state the purpose of the action].

II. The defendant, C. D., last resided at the city and county of . . . , but he has departed from this state, and now resides at . . . ,

⁹⁴ *McMinn v. Whelan*, 27 Cal. 312. See, also, *Forbes v. Hyde*, 31 Cal. 347-355; *McCauley v. Fulton*, 44 Cal. 359; *Martin v. Parsons*, 50 Cal. 502.

⁹⁵ *Clause v. Columbia Sav. & Loan Assoc.*, 16 Wyo. 450, 95 Pac. 54.

⁹⁶ *Knapp v. Wallace*, 50 Or. 348, 126 Am. St. Rep. 742, 92 Pac. 1054. But see *McKnight v. Grant*, 13 Idaho, 629, 92 Pac. 989.

⁹⁷ See *Wilson v. Graham*, 4 Wash. C. C. 53, Fed. Cas. No. 17804; *Folger*

v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; *Holmes v. Holmes*, 4 Lans. 388; *Weil v. Lowenthal*, 10 Iowa, 578; *Harris v. Hardeman*, 14 How. 340, 14 L. Ed. 444; *Reber v. Wright*, 68 Pa. St. 471; *Freeman on Judgments*, § 564; *Pennoyer v. Neff*, 95 U. S. 728, 24 L. Ed. 570; *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101, 3 Sup. Ct. 586; *Beleher v. Chambers*, 53 Cal. 635; *Smith v. Montoya*, 3 N. Mex. 39, 1 Pac. 175; *McKinney v. Collins*, 88 N. Y. 216.

in the county of . . . , state of Nevada. [Or, that the last known place of residence of said defendant, C. D., was at . . . , within this state, but that he removed thence on or about the . . . day of . . . , 19.., and his residence at this time cannot with due diligence be ascertained. I have diligently made such inquiry of . . . and . . . , his former neighbors and acquaintances, and of . . . , his wife, and of his father and brother, who reside at the said city and county of . . . , and I am informed by them that they are ignorant of defendant's residence, but that he is not, as they believe, within this state.]

III. That a summons was duly issued out of this court to the sheriff of the city and county of . . . , with directions to said sheriff to serve the same upon said defendant, and the said sheriff has returned the same to the clerk of this court, with his return thereon indorsed, to the effect that the said defendant could not be found in his county [or state particulars of the return].

IV. That there has not been filed by or on behalf of the defendant in the office of the county recorder of said county of . . . any certificate of residence as provided in section 1163 of the Civil Code of the state of California.

V. I have fully and fairly stated the facts of the case to E. F., of No. . . . street, in the city of San Francisco, my counsel, and I am by him informed, and I verily believe, that I have a good cause of action in this suit against the said defendant, as will fully appear by my verified complaint filed herein, to which reference is hereby made, and the said defendant, C. D., is a necessary and proper party defendant thereto, as I am advised by my said counsel after such statement made, as aforesaid, and as I verily believe.

VI. Personal service of said summons cannot be made on the said defendant, and I, therefore, demand an order that service of the same may be made by publication. A. B.

§ 1083. Order for publication of summons.

Form No. 359.

[TITLE.]

Upon reading and filing the affidavit of A. B., and it satisfactorily appearing therefrom to me, the judge of the superior court of the state of . . . , in and for the county of . . . , that the defendant C. D. resides out of this state, and cannot, after due diligence, be found therein [or, has departed from the state; or, cannot, after due

diligence, be found within the state; or, conceals himself to avoid the service of summons, as the case may be], and it appearing from the affidavit aforesaid that a cause of action exists in this action in favor of the plaintiff therein, and against the said defendant, and that the said defendant C. D. is a necessary and proper party defendant thereto; and it further appearing that a summons has been duly issued out of said court in this action, and that personal service of the same cannot be made upon the said defendant for the reasons hereinbefore contained, and by the said affidavit made to appear: on motion of E. F., Esq., attorney for the plaintiff, it is ordered that the service of the summons in this action be made upon the defendant by publication thereof in the . . . , a newspaper published at . . . , hereby designated as the newspaper most likely to give notice to said defendant; that such publication be made at least once a week for two months.

And it further in like manner satisfactorily appearing to me that the residence of said defendant is known to be at the city of . . . , in the county of . . . , in the state of . . . , it is ordered that a copy of the summons and a copy of the complaint in this action be forthwith deposited in the post-office, postpaid, directed to the said defendant, at his said place of residence.

[DATE.]

J. D., Judge of the Superior Court
of the county of . . . , state of . . .

§ 1084. Affidavit of publication.

[TITLE.]

Form No. 360.

[VENUE.]

A. B., of said . . . county, being duly sworn, deposes and says as follows:

I. I am a citizen of the United States, and at all the times hereinafter mentioned was over eighteen years of age, and am not a party to the above-entitled action.

II. I am the principal clerk and bookkeeper in the office of the daily . . . , a newspaper printed and published in the city and county of . . . [or, printer, foreman, or principal clerk].

III. The summons of which the annexed is a printed copy was published in said newspaper at least once each week for . . . months, commencing on the . . . day of . . . , 19.., and ending on the . . . day of . . . , 19..

[JURAT.]

[SIGNATURE.]

§ 1085. Affidavit of service by mail of summons and copy of complaint.

Form No. 361.

[TITLE.]

[VENUE.]

A. B., of . . . , being duly sworn, deposes and says as follows:

I. I am, and at the several times hereinafter mentioned was, a citizen of the United States, over eighteen years of age, and am not a party to the above-entitled action.

II. That on the . . . day of . . . , 19.., the complaint in the said action was filed, and afterwards, to-wit, on the . . . day of . . . , 19.., an order was made by the court for the publication of the summons in the said action, and also a further order that a copy of said complaint and a copy of the said summons should be forthwith deposited in the post-office, and directed to the defendant in said action, at his place of residence, to-wit, at the city of . . . , in the county of . . . , state of . . . ; that afterwards, to-wit, on the . . . day of . . . , 19.., and in pursuance of said order of the court in the premises heretofore made, I deposited in the post-office at the city of . . . , a copy of the said summons, attached to a copy of the said complaint, directed to C. D., the said defendant, at the city of . . . , in the county of . . . , state of . . . , the place of his residence as aforesaid, and prepaid the postage thereon.

[JURAT.]

[SIGNATURE.]

CHAPTER XLI.

SUMMONS—RETURN AND PROOF OF SERVICE.

§ 1086. **Return in general.**—An officer's return of the service of a summons must show that the provisions of the statute regulating the service of summons was substantially observed and followed;¹ and if the summons is served by any person empowered to act, the affidavit thereon must show that he is one of the persons described by the statute.² The record, showing as to the mode of service, is conclusive, and no presumption can be indulged in that there was some other and different kind of service made from that appearing in the record.³ If served by the sheriff, he makes his certificate to the service; if by any other person or officer, he makes affidavit to the service.⁴ Under the California statute,⁵ providing that where the summons is served by any one other than the sheriff proof must be made by the affidavit of the person serving it. Service of a summons by a notary in England cannot be proved by his certificate and seal.⁶ Under the Colorado code,⁷ requiring the summons to be served by the sheriff of the county where the defendant is found, or by his deputy, and to be returned, with the certificate of the officer, to the office from which it is issued, and section 47, providing that such certificate shall be proof of service, a return, dated at the office of the sheriff of the county of the defendant's residence, stating that the summons was served personally by delivering a copy to the defendant, and signed by the sheriff or his deputy, is not insufficient because it does not show that such person was at the time the duly qualified sheriff of the county.⁸

The general rule of the common law is that officers who exercise judicial functions cannot act by deputy, but those who exercise

¹ *People v. De Bernal*, 43 Cal. 385; *Linott v. Rowland*, 119 Cal. 453, 51 Pac. 687.

² *Black v. Clendenin*, 3 Mont. 47.

³ *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 320, 31 Pac. 57, 17 L. R. A. 351.

⁴ Cal. Code Civ. Proc., § 411; Alaska Codes, pt. 4, ch. 5, § 52; Ariz. Civ. Code, par. 1327; Idaho Rev. Codes, § 4148; Mont. Rev. Codes,

§§ 6524, 6525; Nev. Comp. Laws, §§ 3128, 3129; Or. B. & C. Codes, § 820; Utah Rev. Stats., § 2952; Wash. Bal. Codes, § 4875; Wyo. Rev. Stats., § 3705.

⁵ Code Civ. Proc., § 415.

⁶ *Yolo County v. Knight*, 70 Cal. 430, 11 Pac. 662.

⁷ Code Civ. Proc., § 39.

⁸ *Thomas v. Colorado Nat. Bank*, 11 Colo. 511, 19 Pac. 501.

merely ministerial functions may, without express authority to that effect.⁹ In the absence of statutory provisions as to the appointment of deputies by constables, the common-law rule applies, and constables may act by deputy in the exercise of their ministerial functions.¹⁰ Courts cannot know an under-sheriff, and the act and return on a summons of the deputy sheriff is a nullity, unless done in the name and by the authority of his principal.¹¹

The California statute,¹² which requires a summons when served by a person other than the sheriff to be returned with such person's affidavit of service to the office from which it issued, does not require the affidavit when returned to be filed.¹³

§ 1087. Form and sufficiency of return.—The proof of personal service, if made by an officer, is by his affidavit or certificate setting forth the mode, time, and place of such service; if made by a citizen, then by his affidavit setting forth such facts, and, in addition, the facts constituting his qualifications. Proof of constructive service, or service by publication, is made by the affidavit of the printer, his foreman or principal clerk, setting forth the fact where and how long the publication of summons has been made and where a deposit in the post-office has been ordered, by an affidavit showing such deposit.¹⁴ The affidavit must show affirmatively a compliance with all the requirements of the statute.¹⁵ The affidavit required by the Washington statute¹⁶ for publication of summons is not necessary to personal service on a defendant out of the state.¹⁷ The Montana statute¹⁸ provides that a copy of the complaint must be served with the summons, unless two or more defendants reside in the same county, in which case a copy of the complaint need only be served on one of such defendants. In such a case, where a copy of the complaint is served on one of the defendants, with the summons, a return of service need not show that the defendants all reside in the county.¹⁹ If the affidavit states the county in which the service was made, it will be pre-

⁹ *Jobson v. Fennell*, 35 Cal. 711.

¹⁰ *Id.*

¹¹ *Joyce v. Joyce*, 5 Cal. 449; *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089; *Rowley v. Howard*, 23 Cal. 401.

¹² Code Civ. Proc., § 410.

¹³ *Hibernia etc. Soc. v. Clarke*, 110 Cal. 27, 42 Pac. 425.

¹⁴ *Hahn v. Kelley*, 34 Cal. 391, 94 Am. Dec. 742.

¹⁵ *McMillan v. Reynolds*, 11 Cal. 378.

¹⁶ *Ballinger's Codes*, § 4877.

¹⁷ *Hunter v. Wenatchee Land Co.*, 36 Wash. 541, 79 Pac. 40.

¹⁸ Code Civ. Proc., § 635.

¹⁹ *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591.

sumed that the defendant was a resident of such county.²⁰ And if the affidavit states the facts constituting the affiant competent, it is sufficient without stating that he is competent;²¹ but the affidavit must state that the person making the service, other than the sheriff, was, at the time of service, of the requisite age; an allegation that he was of such age at the time of making proof of service is not sufficient.²²

Where the time, place, and manner of service appear in the officer's return, it is immaterial that the defendant is not mentioned in the return either by name or as defendant.²³ A return in the following form sufficiently shows the date of service: "Feb. 19, 1874. I have duly served the within by reading the same to the within named J., as I am therein commanded."²⁴ A sheriff's return, that he served the summons upon "James Mayberry," and "delivered to said Jane May a certified copy of the complaint," was held to be sufficient;²⁵ and a return of service on two defendants, to the effect that "I served the within summons on C. by then and there delivering a true copy of the original; and I further certify that I served the within on L. on the twenty-seventh day of March, 1891, by then and there delivering to C. the true and certified copy of the original," was held to sufficiently show that both services took place at the same time, and that the return was not defective for failure to show when service was made on C.²⁶ Where the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company," it was held not to be sufficient evidence of service, it not appearing that Street was president or head of the corporation, or secretary, cashier, or managing agent thereof.²⁷ But a sheriff's return that he served the summons on the president and secretary of the company is *prima facie* evidence that the persons named in the return were such officers;²⁸

²⁰ Calderwood v. Brooks, 28 Cal. 151; Pellier v. Gillespie, 67 Cal. 583, 8 Pac. 185.

²¹ Dimick v. Campbell, 31 Cal. 238.

²² Maynard v. MacCrellish, 57 Cal. 355; Howard v. Galloway, 60 Cal. 10; Horton v. Gallardo, 88 Cal. 581, 26 Pac. 375; Lyons v. Cunningham, 66 Cal. 42, 4 Pac. 938.

²³ Cardwell v. Sabichi, 59 Cal. 490.

²⁴ Marlow v. Kuhlenbeck, 2 Colo. 602.

²⁵ Allen v. Mayberry, 14 Nev. 115.

²⁶ Senescal v. Bolton, 7 N. Mex. 351, 34 Pac. 446.

²⁷ O'Brien v. Shaws Flat etc. Co., 10 Cal. 343. See, also, Blanc v. Postmaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; Mathias v. White Sulphur Springs Assoc., 17 Mont. 542, 43 Pac. 921.

²⁸ Rowe v. Table Mountain Water Co., 10 Cal. 441.

and a return showing service on one P., one of the partners and associates of the company, is *prima facie* evidence that P. was such partner and associate.³⁰ Where, however, a summons is issued against "Adams & Co.," and the return shows service on "C. B. Macy," with nothing to connect Macy with Adams & Co., the return is defective.³¹

It seems that a misdescription of the administrator as "executor" in a summons and entry of default will not render void a judgment against the administrator of an estate, if the complaint charges him as administrator and the affidavit of service shows that he was served as such administrator.

In case of service otherwise than by publication, the certificate or affidavit shall state the time and place of the service.³² The only object of the designation of the place where service is made is to determine the period within which the answer must be filed or when default may be taken.³³ Where the evidence of place of service is insufficient, advantage of it should be taken either by appeal or by motion to vacate the judgment.³⁴

Where the summons is served by publication, a return by the publisher and proprietor, and not by the printer, foreman, or chief clerk, is sufficient, as being within the spirit of the statute;³⁵ and where there is but one clerk in the office of a newspaper, an affidavit describing him as principal clerk is sufficient.³⁶ The clerk making the affidavit should swear that he is the principal clerk in direct and positive terms; the affidavit commencing "A. B., principal clerk, being sworn, deposes," is insufficient.³⁷ A direct statement in an affidavit of publication that summons was published each week for two months between two named dates is not overcome by a subsequent statement therein of publication on each seventh day between the two dates except two.³⁸ Proof that a notice is published in a weekly newspaper for seven successive issues, commencing on December 25, 1891, and concluded on February 5, 1892, is sufficient to show a publication thereof "once in each week for six successive weeks."³⁹

³⁰ *Wilson v. Spring Hill Quartz Min. Co.*, 10 Cal. 445.

³¹ *Adams v. Town*, 3 Cal. 247.

³² Cal. Code Civ. Proc., § 415.

³³ *Alderson v. Bell*, 9 Cal. 315.

³⁴ *Pico v. Sunol*, 6 Cal. 294.

³⁵ *Sharp v. Daugney*, 33 Cal. 505;
People v. Thomas, 101 Cal. 573, 36 Pac. 9.

³⁶ *Gray v. Palmer*, 9 Cal. 616.

³⁷ *Steinbach v. Leese*, 27 Cal. 295;
McChesney v. People, 174 Ill. 49, 50 N. E. 1110.

³⁸ *Howard v. McChesney*, 103 Cal. 536, 37 Pac. 523.

³⁹ *Iowa State Sav. Bank v. Jacobson*, 8 S. Dak. 292, 66 N. W. 453.

An affidavit of deposit of summons in the post-office need not state that the deposit was made by a white male citizen or that the affiant is such citizen; it is sufficient if the deposit and affidavit are made by a human being. Nor is it necessary to state that there is connection by mail between the place of deposit and the place to which the packet was addressed, nor that the post-office was a United States post-office.⁴⁰ It is not necessary that a return of the fact of deposit in the post-office should be indorsed on the summons.⁴¹ Unless deposit in the post-office pursuant to the terms of the statute is proved by affidavit, the court is without jurisdiction.⁴²

§ 1088. Amendments of summons and return.—Every court has power to amend and control its process and orders so as to make them conform to law and justice.⁴³ All mere clerical errors in the return do not affect defendant personally served, and may be corrected.⁴⁴ The court may allow a summons to be amended by inserting a notice to the defendant of the nature of the demand, and that, unless he appear within the time specified, judgment by default will be taken against him.⁴⁵ A summons in an action against a firm in which the defendants are designated only by their firm name is not absolutely void, and may be amended in the trial court so as to show the names of the partners.⁴⁶ It has been held, however, that where service of a summons is had on a defendant under a wrong name, a substitution of his proper name by amendment, over the defendant's objection, will not confer jurisdiction.⁴⁷ Where the amended complaint is filed before the defendants are brought into court, and an amended summons is issued which refers to the complaint on file, and not in terms to the amended complaint, the amended summons is not misleading, nor is such reference uncertain or ambiguous. The amended complaint entirely takes the place of the former one and

⁴⁰ Sharp v. Daugney, 33 Cal 505.

⁴¹ Seaver v. Fitzgerald, 23 Cal. 85.

⁴² Roberts v. Roberts, 3 Colo. App. 6, 31 Pac. 941; Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370.

⁴³ Idaho Rev. Codes, § 3862; Ridenbaugh v. Sandlin, 14 Idaho, 472, 125 Am. St. Rep. 175, 94 Pac. 827; Cal. Code Civ. Proc., § 128. See, also, Cal. Code Civ. Proc., § 473.

⁴⁴ Abraham v. Miller (Or.), 95 Pac. 814.

⁴⁵ Polock v. Hunt, 2 Cal. 194; Pierse v. Miles, 5 Mont. 552, 6 Pac. 347; Sweeney v. Schultes, 19 Nev. 56, 6 Pac. 44.

⁴⁶ Gans v. Beasley, 4 N. Dak. 140, 59 N. W. 714.

⁴⁷ Union Pacific etc. Ry. Co. v. Perkins, 7 Colo. App. 184, 42 Pac. 1047.

becomes the complaint.⁴⁸ A merely formal amendment of a complaint does not require a new service on a defendant who has not appeared to the original complaint.⁴⁹ If a defendant who has been sued by a fictitious name appears and answers by his true name, it is not necessary that the summons should be amended by inserting the true name, since the appearance is a waiver of any defect in the summons or of any summons at all. Amendments can only be made by order of the court upon motion.⁵⁰

Courts should exercise great liberality in allowing a sheriff to amend his return so as to make it conform to the facts and to correct errors and mistakes;⁵¹ but it is error for the court to permit an amendment to a return so as to affect rights which have already vested.⁵² A sheriff cannot be compelled to amend a return of summons regular in form and in conformity to the requirements of law.⁵³ The officer may be allowed to amend a return which states that he served the summons by delivering a copy to a certain person, so as to insert the words "and by reading this summons to him";⁵⁴ but a defective return cannot be corrected by an *ex parte* affidavit on error,⁵⁵ and an ex-sheriff cannot amend a return made by his deputy during his term of office.⁵⁶

§ 1089. Defects in summons.—If the affidavit upon which an order for publication of summons is made is insufficient, no jurisdiction can be acquired by reason of such summons, and any judgment rendered thereon will be void;⁵⁷ and where service of summons is had on a defendant under a wrong name, a substitution of his proper name by amendment, over his objection, will not confer jurisdiction.⁵⁸ Where the summons is irregular or defective, the remedy, if any, is by an application to the trial court to quash or set it aside.⁵⁹ A motion to quash does not stay proceedings or deprive the clerk of the court of power to enter

⁴⁸ Dowling v. Comerford, 99 Cal. 204, 33 Pac. 853.

⁴⁹ White v. Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

⁵⁰ McCrane v. Moutlon, 3 Sandf. 736; Allen v. Allen, 14 How. Pr. 248.

⁵¹ Gavitt v. Doub, 23 Cal. 78.

⁵² Newhall v. Provost, 6 Cal. 85.

⁵³ Washington Mill Co. v. Kin-
near, 1 Wash. T. 99.

⁵⁴ Golden Paper Co. v. Clark, 3 Colo. 321.

⁵⁵ Barndollar v. Patton, 4 Colo. 474, 5 Colo. 29.

⁵⁶ Knapp v. Wallace, 50 Or. 348, 126 Am. St. Rep. 742, 92 Pac. 1054.

⁵⁷ Braly v. Seaman, 30 Cal. 611.

⁵⁸ Union Pacific etc. Ry. Co. v. Perkins, 7 Colo. App. 184, 42 Pac. 1047.

⁵⁹ Parke v. Wardner, 2 Idaho, 285, 13 Pac. 172.

judgment on a money demand against the defendant on his default.⁶⁰ Under the Colorado practice, it is not sufficient ground to quash a summons that it was signed by the attorneys of the plaintiff and was not under the seal of the court.⁶¹

A defendant cannot avail himself of defects in the service of summons on other defendants.⁶² A *mandamus* may issue to compel judicial determination of the preliminary question as to the sufficiency of the service of a summons.⁶³

§ 1090. **Construction and operation of return.**—A sheriff's return, to the effect that he served a "copy" of the summons, is equivalent to a return that he served a copy certified by the clerk.⁶⁴ The courts will also presume that a sheriff has served process within his jurisdiction where no place of service is stated.⁶⁵ A sheriff's return is not traversable; nor can it be attacked collaterally, even if he has been guilty of fraud or collusion.⁶⁶ And where the official return of the sheriff shows personal service of the summons upon the defendant, an affidavit by the defendant, made after a great lapse of time, showing that he had no recollection of the summons, is entitled to but little weight as against the official return of the sheriff.⁶⁷ A return as follows: "I delivered a copy of the said summons to the within named D., defendant," where there is only one D. mentioned in the summons, is sufficient to show service on D.⁶⁸ But the recital in a sheriff's return, that the person served was the agent of the company, does not relate to a matter within the sheriff's personal knowledge, and may be impeached.⁶⁹

Where a summons has been returned, it is *functus officio*, and subsequent service on the defendant of a copy made by the

⁶⁰ Higley v. Pollock, 21 Nev. 198, 27 Pac. 895.

⁶¹ Comet Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506; Rand v. Pantagraph Co., 1 Colo. App. 270, 28 Pac. 661.

⁶² Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

⁶³ Hill v. Morgan, 9 Idaho, 718, 76 Pac. 323.

⁶⁴ Brown v. Lawson, 51 Cal. 615; Curtis v. Herrick, 14 Cal. 117, 73 Am. Dec. 632.

⁶⁵ Crane v. Brannan, 3 Cal. 192;

Stoddard v. Mattice, 10 S. Dak. 255, 72 N. W. 891.

⁶⁶ Egery v. Buchanan, 5 Cal. 56; Griffin v. Smith, 2 Nev. 378; Nash v. Muldoon, 16 Nev. 404.

⁶⁷ People v. Dodge, 104 Cal. 487, 38 Pac. 203. See McCoy v. Van Ness, 98 Cal. 675, 33 Pac. 761.

⁶⁸ Barnes v. Colorado Springs etc. Ry., 42 Colo. 461, 94 Pac. 570.

⁶⁹ Great Western Min. Co. v. Woodmas etc. Min. Co., 12 Colo. 46 13 Am. St. Rep. 204, 20 Pac. 771.

plaintiff from the files of the court is a nullity,⁷⁰ unless so ordered by the court.⁷¹

An affidavit of the personal service of summons may be amended by leave of the court after judgment, to supply *nunc pro tunc* the statement omitted by inadvertence that the affiant was over the age of eighteen years when he made the service. And although the practice of allowing such amendment to be made without notice is not to be commended, yet where it was allowed *ex parte*, and the defendants had subsequent notice and a full opportunity to take steps to have the truth of the matter ascertained and did not ask to have the order vacated for any reason, or controvert any facts stated therein, the *ex parte* order allowing the amendment, and directing that the amended affidavit be made part of the judgment-roll, will not be disturbed upon appeal.⁷² An ex-sheriff cannot amend a return of service made by his deputy during his term of office.⁷³

§ 1091. Conclusiveness of return or certificate.—A motion to vacate a judgment for want of jurisdiction being a direct attack, the want of jurisdiction may be shown by matters outside the record;⁷⁴ but a judgment cannot be overcome by evidence of any lower degree.⁷⁵

The recital in the officer's return is not conclusive as to the particular place being the place of defendant's abode;⁷⁶ but the return made by a disinterested person is *prima facie* evidence of the material facts stated therein.⁷⁷

§ 1092. Evidence and presumptions.—Where the return of a sheriff states that he served the defendant with a certified copy of the complaint, the clerk being the only one allowed to certify such copies, it will be presumed that the certification was by him;⁷⁸ and where the summons is served, after having been first returned, and the court thereupon assumes jurisdiction of the defendants

⁷⁰ Fanning v. Foley, 99 Cal. 336, 33 Pac. 1098.

⁷¹ Ridenbaugh v. Sandlin, 14 Idaho, 472, 125 Am. St. Rep. 175, 94 Pac. 827.

⁷² Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

⁷³ Knapp v. Wallace, 50 Or. 348, 126 Am. St. Rep. 742, 92 Pac. 1054.

⁷⁴ Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

⁷⁵ Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007.

⁷⁶ Krutz v. Isaacs, 25 Wash. 566, 66 Pac. 141.

⁷⁷ Northwestern & Pac. etc. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139.

⁷⁸ Curtis v. Herrick, 14 Cal. 117, 73 Am. Dec. 632.

and renders judgment against them, it will be presumed that the court made the requisite order permitting the summons to be withdrawn for future service.⁷⁹ Where a writ, as returned by a sheriff, is served, but the place of service is not stated therein in the return, the court will presume that it was served within his jurisdiction.⁸⁰ So, also, where the record shows that summons was served by the coroner, the court must presume, in the absence of a contrary showing, that the sheriff was disqualified under the statute.⁸¹ If the affidavit does not state where the defendant resided, it will be presumed that he resided in the county where the service was made.⁸²

It is competent for the court to allow in evidence a second affidavit showing that publication was made on the date omitted in the first affidavit.⁸³

§ 1093. **Acknowledgment of service.**—An acknowledgment of service must be in writing and signed.⁸⁴ Courts will take judicial notice of the signatures of their officers as such, but there is no rule which extends such notice to the signatures of parties to an action. When, therefore, the proof of service of summons consists of the written admissions of the defendants, such admissions, to be available in the action, should be accompanied by some evidence of the genuineness of the signatures of the parties. In the absence of such evidence, the court cannot notice them.⁸⁵ A party is bound by an acknowledgment of service outside of the territorial jurisdiction of the court to which it is returnable.⁸⁶

The statute does not require an admission of the service to designate the place where the service was made; the object of such designation, when required, is to determine the period within which the answer must be filed or when default may be taken.⁸⁷ Where the defendant's attorneys accept service of summons and attach no date thereto, the date of the return by the sheriff is held to be the true date of the service.⁸⁸

⁷⁹ *Hancock v. Preuss*, 40 Cal. 572; *Coffin v. Bell*, 22 Nev. 184, 58 Am. St. Rep. 740, 37 Pac. 240.

⁸⁰ *Crane v. Brannan*, 3 Cal. 192.

⁸¹ *Rodolph v. Mayer*, 1 Wash. T. 133.

⁸² *Calderwood v. Brooks*, 28 Cal. 151; *Pellier v. Gillespie*, 67 Cal. 582, 8 Pac. 185.

⁸³ *Howard v. McChesney*, 103 Cal. 536, 37 Pac. 523.

⁸⁴ *Montgomery v. Tutt*, 11 Cal. 307.

⁸⁵ *Alderson v. Bell*, 9 Cal. 321; *Moffit v. McGrath*, 25 Or. 480, 36 Pac. 578.

⁸⁶ *Cheney v. Harding*, 21 Neb. 65, 31 N. W. 255.

⁸⁷ *Alderson v. Bell*, 9 Cal. 315.

⁸⁸ *Crane v. Brannan*, 3 Cal. 192.

FORMS FOR PROOF OF SERVICE.

§ 1094. Return of sheriff on summons—General form.

Form No. 362.

[COURT.]

[STATE AND COUNTY.]

Office of the Sheriff, }
 City and County of . . . }

I hereby certify that I received the within summons on the . . . day of . . . , 19.., and personally served the same on the . . . day of . . . , 19.., by delivering to [names], said defendants personally, in the city and county of . . . , a copy of said summons attached to a true copy of the complaint in the said action therein named.

Dated at . . . , this . . . day of . . . , 19..

G. H., Sheriff.

By J. K., Deputy Sheriff.

§ 1095. Where one defendant was not found.

Form No. 363.

I further certify that I have made diligent search for the defendant A. B., named in said summons, but have been unable to find him within my said county.

§ 1096. Affidavit of service of summons upon several defendants.

Form No. 364.

[TITLE.]

STATE OF CALIFORNIA, }
 CITY AND COUNTY OF . . . }

ss.

A. B., being duly sworn, deposes and says:

I received the annexed summons in the above-entitled cause on the . . . day of . . . , 19.., and on the . . . , day of . . . , 19.., personally served the same, by delivering to C. D., one of said defendants, personally, in the city and county of San Francisco, a copy of said summons, attached to a copy of the complaint in the above-entitled cause, and by leaving the same with him, and also, on the . . . day of . . . , 19.., by delivery to E. F., one of said defendants, personally, in the city and county aforesaid, a copy of said summons, and also, personally, on the . . . day of . . . , 19..,

by delivering to G. H., one of said defendants, in the city and county of San Francisco, a copy of said summons; and I further depose that each of said defendants was, on said mentioned days, resident of the said city and county of San Francisco; and I further depose that I am, and was at all the times hereinbefore named, a citizen of the United States, over eighteen years of age, and not a party to the above-entitled action.

Subscribed and sworn to, etc.

§ 1097. Affidavit of service of summons—Another form.

Form No. 365.

[TITLE.]

STATE OF CALIFORNIA, }
 . . . COUNTY OF . . . } ss.

. . . , being duly sworn, deposes and says that he is, and at the several times hereinafter mentioned was, a citizen of the United States, above the age of eighteen years, and not a party to the above-entitled action; that he received the annexed summons in said action on the . . . day of . . . , A. D. 19.., and personally served the same upon . . . , the above-named defendant, on the . . . day of . . . , A. D. 19.., by delivering to . . . , the said defendant, personally, in the . . . , county of . . . , a copy of said summons, attached to a copy of the complaint in said action.

[JURAT.]

[SIGNATURE.]

§ 1098. Admission of due service.

Form No. 366.

Due service of the within [give name of paper] by copy is hereby admitted this . . . day of . . . , 19..

A. B., Attorney for . . .

[Add acknowledgment, if the admission is made by a party not an attorney.]

§ 1099. Simple admission, not conceding it to be timely.

Form No. 367.

Service of the within [give name of paper] is hereby admitted this . . . day of . . . , 19..

A. B., Attorney for . . .

[Add acknowledgment, if necessary.]

CHAPTER XLII.

APPEARANCE.

§ 1101. **What constitutes.**—The codes generally provide that a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice or appearance for him. After appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice of papers need not be made upon him, unless he is imprisoned for want of bail.¹

A defendant may appear and submit himself to the jurisdiction of the court in many ways without either answering, demurring, or giving the plaintiff written notice of his appearance; and the fact that he misapprehends the character of the action when he answers does not detract from his appearance made by answer.² He may do this by appearing in person or by an attorney in open court, by attacking the complaint by motion, or by an application for a continuance, and in many other ways. But before he can as a matter of right be held in the action or in any proceeding pertaining thereto, or be served with notice, he must appear in the manner prescribed by statute.³ The only purpose of the statute defining the mode of appearance is to state what shall constitute a technical appearance as shall give him these rights.⁴ A notice by an attorney to the plaintiff's attorney that the defendant will move before a court commissioner that an attachment issued in the case be dissolved does not constitute an appearance in the action.⁵ It has been held that when a defendant appears for the purpose of taking advantage of an irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect.⁶ A

¹ Cal. Code Civ. Proc., § 1014; Or. B. & C. Codes, § 542.

² Tyler v. McKenzie, 43 Colo. 233, 95 Pac. 943.

³ Belknap v. Charlton, 25 Or. 41, 34 Pac. 758.

⁴ Id.

⁵ Glidden v. Packard, 28 Cal. 649; Belknap v. Charlton, 25 Or. 41, 34 Pac. 758.

⁶ Lyman v. Milton, 44 Cal. 631; Arroyo etc. Water Co. v. Superior Court, 92 Cal. 52, 27 Am. St. Rep. 94, 28 Pac. 54; Black v. Clendenin, 3 Mont.

motion going to matters other than jurisdiction, such as can be raised only on a general appearance, is an appearance.⁷ This does not mean, however, that a defendant who thus objects to the process may then, if his objections are overruled, answer to the merits, and on appeal from the judgment still avail himself of his objections to the jurisdiction of the court over him. To so hold would "give the defendant, whose objections to the jurisdiction of the court have been erroneously overruled, an opportunity to go to trial, and if the judgment is favorable, to abide by it, while, if it is unfavorable, he could procure a reversal."⁸ A defendant coming in to have his default set aside thereby makes a general appearance.⁹

A defendant specially appearing by attorney to move to strike out an amended complaint, and asking for an extension of time in which to move or plead until the determination of the motion, does not appear within the meaning of the statute.¹⁰ And it has been held that where a defendant cited to appear in an action before a justice of the peace asks for a continuance for one day, and on the next day appears specially to object to the jurisdiction, he does not thereby enter a general appearance.

A notice signed by attorneys, and filed with the clerk after a complaint has been filed, stating that "we have been retained by, and hereby appear for, the above-named defendants in the above-entitled cause," is a sufficient appearance of the defendant.¹¹ And where a plaintiff amended his complaint by adding new parties defendant, and these defendants filed an acknowledgment of "service of summons and a copy of the complaint," and consented that the decree therein prayed for by the plaintiff be entered, it was held to be a sufficient appearance to authorize a decree against them.¹² The appearance of a defendant who has not been served with notice to testify as a witness does not constitute an appearance bringing him within the jurisdiction of the court as a party.¹³

49; *Miner v. Francis*, 3 N. Dak. 549, 58 N. W. 343; *Kinkade v. Myers*, 17 Or. 472, 21 Pac. 557; *Sealey v. California Lumber Co.*, 19 Or. 95, 24 Pac. 197; *Benedict v. Johnson*, 4 S. Dak. 392, 57 N. W. 66.

⁷ *Rogers v. McCord*, 19 Okla. 115, 91 Pac. 864; *Boulder (Colorado) Sanatorium v. Vanston*, (N. Mex.), 94 Pac. 945.

⁸ *In re Clarke*, 125 Cal. 392, 58 Pac. 22.

⁹ Cal. Code Civ. Proc., § 416; *Blackburn v. Bucksport*, 7 Cal. App. 649, 95 Pac. 668.

¹⁰ *Powers v. Braly*, 75 Cal. 237, 17 Pac. 197.

¹¹ *Dyer v. North*, 44 Cal. 157.

¹² *Foote v. Richmond*, 42 Cal. 439.

¹³ *Nixon v. Downey*, 42 Iowa, 78.

A good test as to what constitutes an appearance within the meaning of the statute is to be found in two Oregon cases.¹⁴ The distinction between a general appearance and a special appearance is there made as follows: When one appears who asks some relief which cannot be granted only on the hypothesis that the court has jurisdiction, appearance is general, whether it be limited by terms or not; but if granting the relief would be consistent with a want of jurisdiction, the appearance may be special, without submitting to the jurisdiction for any other purpose. Neither execution of a forthcoming bond in attachment, nor special appearance to move for dismissal for lack of jurisdiction, nor subsequent plea in abatement constitutes a general appearance.¹⁵

In a suit against infants, where there is no personal service upon them, an appearance and defense for them by their general guardian will give the court jurisdiction of their persons;¹⁶ and this is true even where no summons has been issued at all,¹⁷ and a judgment rendered against an infant in an action in which he has appeared by an attorney will be upheld as fully as though he had appeared in person.¹⁸ In proceedings to probate a will, if the heirs at law enter a personal appearance and expressly consent to the admission of the instrument to probate, the court acquires jurisdiction of such parties.¹⁹

§ 1102. Appearance by attorney.—A party to an action may appear in his own person or by attorney, but he cannot do both; and if he appears by attorney, he cannot assume control of the case.²⁰ In this connection, it is to be noted that when in the trial of an action at law the parties appear in person and undertake its management, each for himself and without the aid of counsel, the law presumes them to have full knowledge of the

¹⁴ Belknap v. Charlton, 25 Or. 41, 34 Pac. 758; Winter v. Union Packing Co. (Or.), 93 Pac. 930.

¹⁵ Winter v. Union Packing Co. (Or.), 93 Pac. 930.

¹⁶ Smith v. McDonald, 42 Cal. 484; Western etc. Co. v. Phillips, 94 Cal. 56, 29 Pac. 328; Redmond v. Peterson, 102 Cal. 599, 41 Am. St. Rep. 206, 36 Pac. 923.

¹⁷ Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

¹⁸ Childs v. Lanterman, 103 Cal. 387, 42 Am. St. Rep. 121, 37 Pac. 382.

¹⁹ Camplin v. Jackson, 34 Colo. 447, 83 Pac. 1017.

²⁰ Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Crane v. Crane, 121 Cal. 100, 53 Pac. 433; Toy v. Haskell, 128 Cal. 560, 79 Am. St. Rep. 71, 61 Pac. 89; Coonan v. Loewenthal, 129 Cal. 200, 61 Pac. 940.

situation of their case.²¹ While an attorney of record remains such, his right to manage and control the action cannot be questioned by the opposite party.²²

If an attorney appears for a part only of the defendants, and inadvertently answers for all, and obtains leave of the court to withdraw his answer and substitute a new one, answering only for the parties for whom he appears, the court acquires jurisdiction only of those for whom he does actually appear.²³ And where an attorney expressly appears for certain defendants in an action, his signature to papers in the case after that time, as attorney for the defendants, will be construed as limited to those for whom he expressly appeared.²⁴

§ 1103. **Authority of attorney.**—As a general rule, the authority of an attorney to appear will be presumed.²⁵ An attorney is an officer of the court, and answerable to it for the proper performance of his professional duties. He appears and participates in the proceedings only by the license of the court,²⁶ and his license is *prima facie* evidence of his authority to appear for the person whom he professes to represent; but if the supposed client denies his authority, the court may require him to produce evidence of his retainer, either upon the direct application of the person represented or upon motion of the attorney of the opposite party to dismiss, founded upon the affidavit of the person or party concerning whom the motion is made.²⁷ The adverse party or his attorney cannot, upon mere suggestion at the bar, deny that the attorney so appearing has full authority to prosecute the suit.²⁸

While an attorney cannot without special authority admit service of jurisdictional process upon his client, it will be presumed in collateral proceedings that the attorney who did so admit service had authority to do so.²⁹ And it has been held

²¹ Waldez v. Archuleta, 3 N. Mex. 195, 5 Pac. 327.

²² Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164.

²³ Forbes v. Hyde, 31 Cal. 342; Merced County v. Hicks, 67 Cal. 108, 7 Pac. 179.

²⁴ Spangel v. Dellinger, 42 Cal. 148; Hobbs v. Duff, 43 Cal. 492; Kenney v. Parks, 120 Cal. 23, 52 Pac. 40.

²⁵ County of San Luis Obispo v.

Hendricks, 71 Cal. 242, 11 Pac. 682; Williams v. Uncompahgre Canal Co., 13 Colo. 474, 22 Pac. 806.

²⁶ Clark v. Willett, 35 Cal. 534.

²⁷ Id.

²⁸ Turner v. Caruthers, 17 Cal. 431; Pacific Paving Co. v. Vizelich, 141 Cal. 8, 74 Pac. 352.

²⁹ Hunter v. Bryant, 98 Cal. 248, 33 Pac. 51; Pacific Paving Co. v. Vizelich, 141 Cal. 8, 74 Pac. 352.

that the appearance of an attorney wholly unauthorized, there being no fraud or allegation of insolvency, did not give the party a right to attack the judgment on that ground.³⁰ Where a defendant has been served with summons, and a default has been entered against him, it is immaterial whether or not the attorney who appeared for him was authorized to do so, and a judgment afterward rendered against such defendant by default will not be set aside upon the ground that the attorney appeared without authority.³¹ The formal notice of appearance required by the statute is unnecessary, unless the right of the attorney to appear is challenged by the adverse party.³² But if an attorney were unauthorized to appear for a defendant without service of process, and the fact of want of authority is made to appear in the action, the entry of the appearance is void.³³ In such a case, a judgment procured and a foreclosure and sale based thereon will be vacated in equity, although the defendant had no defense to the action, if he offers to pay the amount of the mortgage debt and interest.³⁴

The practice of permitting appearance without producing a warrant of attorney is as applicable to appearance for a corporation as for a natural person;³⁵ but the court has inherent power to determine by what authority an attorney appears either to prosecute or defend for another, whether that other be a natural or an artificial person.³⁶

If an attorney has been admitted to practice in another state, and has been accustomed to practice in California, and has been recognized by the courts and the bar of that state as a member of the bar, he is a *de facto* officer of the courts of that state; and an entry of appearance by such attorney is of the same effect as though he had been admitted to practice there.³⁷

If an answer has the signature of the attorney of record and that of an associated attorney attached to it, the court will not strike it out. The court will not try the question whether the

³⁰ Hayes v. Shattuck, 21 Cal. 51.

³¹ Hunter v. Bryant, 98 Cal. 252, 33 Pac. 55.

³² Carter v. Koshland, 12 Or. 492, 8 Pac. 556.

³³ Great Western Min. Co. v. Woodmas etc. Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; Garrison v. McGowan, 48 Cal. 592.

³⁴ McEachern v. Brackett, 8 Wash. 656, 40 Am. St. Rep. 925, 36 Pac. 690.

³⁵ Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204.

³⁶ Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806.

³⁷ Garrison v. McGowan, 48 Cal. 592.

signature of the attorney of record was attached by himself or by his associate without his authority.³⁸ It is well settled that the courts will take judicial cognizance of the signatures of officers as such, although there is no rule which extends such notice to the signatures of the parties.³⁹

If the plaintiff's attorney stipulates that a party may file an answer *nunc pro tunc* as of a certain date, he is estopped from saying that such defendant was not a party to the action on that date;⁴⁰ but an attorney for one of the parties in a proceeding to determine conflicting claims to town lots cannot, after the board of trustees have awarded the lots to his client, pass his client's right or title by a stipulation in the case for the entry of a void judgment.⁴¹

§ 1104. Notice of appearance.

Form No. 368.

STATE OF CALIFORNIA,	}	In the Superior Court.
CITY AND COUNTY OF . . .		
A. B., Plaintiff,	}	
v.		
C. D., Defendant.		

E. F., Esq., Attorney for Plaintiff A. B.—Sir: Please take notice, that the defendant C. D. hereby appears in this action by the undersigned, his attorney.

[DATE.]

G. H., Attorney for Defendant.

³⁸ Willson v. Cleaveland, 30 Cal. 192.

³⁹ Alderson v. Bell, 9 Cal. 321; Moffitt v. McGrath, 25 Or. 480, 36 Pac. 578.

⁴⁰ Lawrence v. Ballou, 50 Cal. 258.

⁴¹ Ryan v. Tomlison, 31 Cal. 11.

CHAPTER XLIII.

LIS PENDENS.

§ 1105. **Statutory provisions.**—In most of the code states it is provided by statute that in an action affecting the title or the right of possession of real property the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may record, in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties and the object of the action or defense and the description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.¹

§ 1106. **Nature and object of rule.**—Strictly speaking, the doctrine of *lis pendens* is not founded upon notice, but upon reasons of public policy based upon necessity. The main purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise, by successive alienations pending the litigation, its judgment or decree should be rendered abortive and impossible of execution.²

The *lis pendens* may be defined to be the jurisdiction, power, or control which courts exercise over property involved in a suit pending the continuance of the action and until final judgment therein.³

If either of the parties assumes to make, after the notice of *lis pendens* has become operative, any transfer of the subject-matter

¹ Cal. Code Civ. Proc., § 409; Ariz. Civ. Code, par. 1318; Idaho Rev. Codes, § 4142; Mont. Rev. Codes, §§ 6517, 6889; Nev. Comp. Laws, §§ 3122, 3364, 3394; N. Dak. Civ. Code, §§ 5251, 5798, 5907; S. Dak. Code Civ. Proc., § 108; Utah Rev. Stats., § 2953; Or. B. & C. Codes, § 5476;

Wash. Bal. Codes, § 4887; Wyo. Rev. Stats., § 3529.

² *Houston v. Timmerman*, 17 Or. 499, 11 Am. St. Rep. 848, 21 Pac. 1037, 4 L. R. A. 716.

³ *Dupee v. Salt Lake Valley etc. Co.*, 20 Utah, 103, 77 Am. St. Rep. 902, 57 Pac. 845.

of the litigation, or to create any incumbrance or charge against it, or to enter into any contract affecting it, or to deliver possession of it to another, the action may proceed without taking any notice whatever of such transfer, incumbrance, or change in possession, and the final judgment or decree, when entered, may be carried into effect, notwithstanding the attempted dealing with the subject-matter.⁴

The statute applies to all actions affecting the title to real property which is applicable to court proceedings for the condemnation of land,⁵ but not to proceedings before a board of supervisors for the condemnation of land for road purposes.⁶ If a wife who sues for a divorce describes the property of her husband in the complaint, and asks to have it set aside to her for her support, the rule of *lis pendens* may be invoked by her against one who purchases during the pendency of the action and with notice thereof.⁷

§ 1107. **Operation and effect of notice.**—*Lis pendens* is sometimes spoken of as operating as constructive notice of the suit and of the material allegations of the pleadings therein. The effect of the notice is to keep the subject-matter of the litigation within the control of the court, and to render the parties powerless to place it beyond the reach of final judgment. One acquiring an interest *pendente lite*, is sometimes, on his application, permitted to appear in the action and defend or prosecute in the place of the person to whose interest he has succeeded. Whether, however, he appears in the cause or not, and whether he had any actual notice of its pendency or not, the judgment when rendered must be given the same effect as if he had not acquired his interest.⁸ Such a statute does not make it imperative upon plaintiff to examine the records and name as defendants all persons having adverse interests in the land.⁹

The only way to charge a purchaser of the property pending the action with constructive notice of the suit is by filing a

⁴ *Montgomery v. Byers*, 21 Cal. 107; *Sharp v. Lumley*, 34 Cal. 611; *Cheever v. Minton*, 12 Colo. 557, 13 Am. St. Rep. 258, 21 Pac. 710.

⁵ *Roach v. Riverside Water Co.*, 74 Cal. 263, 15 Pac. 776.

⁶ *Curran v. Shattuck*, 24 Cal. 427.

⁷ *Powell v. Campbell*, 20 Nev. 233,

19 Am. St. Rep. 350, 20 Pac. 156, 2 L. R. A. 615; *Wilkinson v. Elliott*, 43 Kan. 590, 19 Am. St. Rep. 158, 23 Pac. 614.

⁸ *Welton v. Cook*, 61 Cal. 481; *Roach v. Riverside Water Co.*, 74 Cal. 263, 15 Pac. 776.

⁹ *Blackburn v. Bucksport*, 7 Cal. App. 649, 95 Pac. 668.

notice of *lis pendens*, according to the statute.¹⁰ From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby. The notice applies to parties to the action, and purchasers under them, subsequent to the filing of the notice, and is as effectual as an injunction.¹¹

The effect of the notice is to make a subsequent purchaser from the party a mere volunteer, affected by the judgment which may be rendered in the suit in which notice is given.¹² The provisions of the codes abrogate the old rule making the mere pendency of an action constructive notice.¹³ The statute does not give any new rights to the plaintiff, but, on the contrary, limits rights which he previously had. It simply adds to the common-law rule a new requirement,—viz. not only a suit, but the filing of notice of it,—and there is no distinction under the statute between different kinds of interest in or title to real estate.¹⁴ The only office of the notice is to give constructive notice to, and bind by the subsequent proceeding, those who deal with the party in regard to the property involved in the action during its pendency and before judgment. No notice is necessary to bind a purchaser or incumbrancer after judgment.¹⁵

Lis pendens is constructive notice of all facts apparent on the face of the pleadings, and of those other facts of which the facts so stated necessarily put the purchaser on inquiry.¹⁶ It is not a conveyance, nor is the person filing it a purchaser, and as such protected against pre-existing unrecorded conveyances.¹⁷ While ignorance of any material fact disclosed by the record cannot be successfully urged by a purchaser for the purpose of escaping from or limiting the effect of the judgment finally entered in the action, constructive notice of matters not in issue and not pertinent to any issue, and which therefore cannot be determined in the action or proceeding, cannot be given by merely mentioning them in the pleadings.¹⁸

¹⁰ Ault v. Gassaway, 18 Cal. 205.

¹¹ People v. Connolly, 8 Abb. Pr. 128; Chapman v. West, 17 N. Y. 125; Stevenson v. Fayerweather, 21 How. Pr. 449.

¹² Gregory v. Haynes, 13 Cal. 594; Haynes v. Calderwood, 23 Cal. 409; Hurlbutt v. Butenop, 27 Cal. 50.

¹³ Sampson v. Ohleyer, 22 Cal. 200.

¹⁴ Richardson v. White, 18 Cal. 102; Sampson v. Ohleyer, 22 Cal. 200; Horn v. Jones, 28 Cal. 194.

¹⁵ Abadie v. Lobero, 36 Cal. 390.

¹⁶ Powell v. Campbell, 20 Nev. 232, 19 Am. St. Rep. 350, 20 Pac. 156, 2 L. R. A. 615.

¹⁷ Baker v. Bartlett, 18 Mont. 446, 56 Am. St. Rep. 594, 45 Pac. 1084.

¹⁸ Page v. Waring, 76 N. Y. 463.

§ 1108. **Necessity for filing.**—The notice must be filed strictly according to the statute in order to charge a purchaser of the subject-matter of the suit; mere pendency of the suit does not so charge him.¹⁹ If no notice of *lis pendens* is filed, the jurisdiction of the court is not thereby affected, notwithstanding section 749 of the California Code of Civil Procedure;²⁰ but a *bona fide* purchaser of land, without notice of proceedings pending for its condemnation at the time of purchase, is not affected by those proceedings,²¹ notwithstanding a statute provides for the filing of a notice of *lis pendens*, and “from the time of filing such notice only shall the pendency of the action be constructive notice to a purchaser or incumbrancer from a party affected thereby.” A purchaser of the property in controversy in such action is not affected by the notice, unless his purchase is during the pendency of the action, and it is not during such pendency if final judgment has been entered therein, though such judgment is ultimately reversed on a writ of error subsequently sued out.²² The *lis pendens* operates as notice only during the pendency of the suit in which it is filed.²³ If the notice be not filed, the plaintiff cannot successfully set up that the notice would have done no good to the purchaser, because he could make no defense or no better defense than the vendor.²⁴

The Washington statute^{24a} providing for the filing of a notice of *lis pendens* in actions affecting real property does not supersede or control the statutes²⁵ providing that an action to recover possession of real property cannot be prejudiced by any alienation made by the person in possession, and declaring that the judgment in an action to recover the possession of real property shall be conclusive as to the estate in such property, and the right to the possession thereof, upon the parties against whom the same is rendered, and all persons claiming under them after the commencement of the action.²⁶

¹⁹ Head v. Fordyce, 17 Cal. 149; Ault v. Gassaway, 18 Cal. 205.

²⁰ Blackburn v. Bucksport, 7 Cal. App. 649, 95 Pac. 668.

²¹ Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Richardson v. White, 18 Cal. 102.

²² Cheever v. Minton, 12 Colo. 558, 13 Am. St. Rep. 258, 21 Pac. 710.

²³ Pipe v. Jordan, 22 Colo. 392, 55 Am. St. Rep. 138, 45 Pac. 371.

²⁴ Richardson v. White, 18 Cal. 102; Sampson v. Ohleyer, 22 Cal. 200; Horn v. Jones, 28 Cal. 194.

^{24a} Wash. Code 1881, § 61; Ballinger's Annot. Codes & Stats., § 4887.

²⁵ Ballinger's Annot. Codes & Stats., §§ 5515, 5518.

²⁶ May v. Sutherlin, 41 Wash. 609, 84 Pac. 585.

The court has no power to take from the files a *lis pendens* regularly filed.²⁷

§ 1109. **Actions and property to which statute is applicable.**—In order that the *lis pendens* may become operative, it is essential that there be an action or proceeding, and that it be pending in a court having jurisdiction of the subject-matter. Of course, if the court has no such jurisdiction, the pendency of the suit can affect no one, and therefore does not operate as a *lis pendens*.²⁸ Where an action is brought, and *lis pendens* is filed, the notice brings within the operation of the statute all property affected thereby, provided it be not beyond the jurisdiction of the court.²⁹ The interest subsequently acquired, if it comes through some other source than the defendants of the action, is not affected by such notice; but the presumption is that interest derived pending litigation, comes through a defendant.³⁰ Property is not subject to the operation of the notice unless the suit or action directly affects either the title thereto or the possession thereof; it is not sufficient that the title or right of possession may be incidentally affected. Thus a proceeding to forfeit the charter of a corporation does not deprive it of the power to dispose of its property, nor does it place such property within the rule of *lis pendens*, so that purchasers thereof may lose the property or right to the possession through the appointment of a receiver.³¹ And the filing of a notice of *lis pendens* by the plaintiff in a divorce suit by a wife does not affect a judgment, obtained pending such suit against the husband, on community property awarded to the wife by the judgment in a divorce suit dividing such property.³² The purchaser of land subject to the lien of a mortgage is not affected by the notice of *lis pendens* where the title to the mortgage only was involved in the suit, and not the land itself.³³ A statute providing that a purchaser of property in litigation shall be affected by the suit only after the filing of the notice of *lis pendens* applies to suits to foreclose

²⁷ Pratt v. Hoag, 12 How. Pr. 215.

²⁸ Leavell v. Poore, 91 Ky. 328, 15 S. W. 858; Benton v. Shafer, 47 Ohio St. 117, 24 N. E. 197, 7 L. R. A. 812.

²⁹ Majors v. Cowell, 51 Cal. 478.

³⁰ Harrod v. Burke, 76 Kan. 909, 123 Am. St. Rep. 179, 92 Pac. 1128.

³¹ Havemeyer v. Superior Court, 84 Cal. 328, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

³² Mayberry v. Whittier, 144 Cal. 322, 78 Pac. 16.

³³ Green v. Rick, 121 Pa. St. 130, 6 Am. St. Rep. 670, 15 Atl. 497, 2 L. R. A. 48.

the lien of street assessments³⁴ and to condemnation proceedings.³⁵ The rule is applicable to purchasers at sheriffs' sales to the same extent as if the alienations were voluntary.³⁶

Although the action or suit is of such a character that it must necessarily affect the property of the parties, or some of them, as *pendente lite* purchasers, they will not be bound by the judgment unless the particular property is so described that an independent purchaser, upon reading it, will be able to ascertain therefrom what property is to be affected by the judgment, or will, at least, be placed in possession of information making it his duty to prosecute further inquiries.³⁷

§ 1110. **New notice necessary, when.**—The effect of a notice of *lis pendens* is not ordinarily destroyed by an amendment to the complaint;³⁸ but as to any new cause of action introduced by an amendment, and as to property first described thereby, there is no *lis pendens* prior to the date of the filing of the amendment.³⁹ Where an amendment brings in new parties, the filing of the amendment renders necessary the filing of a new notice in order to affect purchasers under it.⁴⁰ The filing of a new notice is, of course, not necessary in case of the addition of new parties, except as to such new parties, so that when they are subsequently stricken out no new notice is necessary.⁴¹

§ 1111. **Diligence in prosecution required.**—Unreasonable delay in the prosecution of a case in which a *lis pendens* has been filed, or in reviving it after its dismissal, will operate to deprive the party filing the notice of its benefit;⁴² but mere delay or lapse of time in the prosecution of a suit will not create any estoppel against the right to enforce the rule of *lis pendens*, unless the plaintiff has been so negligent in its prosecution as to induce the belief that such prosecution had been abandoned.⁴³ In an Oregon case, in which this question arose,⁴⁴ the court said:

³⁴ Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

³⁵ Portland etc. Ry. Co. v. Ladd, 47 Wash. 88, 91 Pac. 573.

³⁶ Cooley v. Brayton, 16 Iowa, 10; Hart v. Marshall, 4 Minn. 294.

³⁷ Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

³⁸ Brock v. Pearson, 87 Cal. 581, 25 Pac. 963.

³⁹ Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762.

⁴⁰ Marchbanks v. Banks, 44 Ark. 48, Curtis v. Hitchcock, 10 Paige, 399.

⁴¹ Waring v. Waring, 7 Abb. Pr. 472.

⁴² Pipe v. Jordan, 22 Colo. 392, 55 Am. St. Rep. 138, 45 Pac. 371.

⁴³ Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762.

⁴⁴ Bybee v. Summers, 4 Or. 361.

“After the lapse of so long a time as ten years, little opportunity would be afforded a purchaser to ascertain the condition of the title which he might be looking up, so far as it might be affected by the pendency of the legal proceeding, for the reason that papers are liable to be mislaid and the case omitted from the docket, and a new clerk might in the mean time come in who would have no personal knowledge of the former proceedings, and a purchaser under the circumstances, would be very liable to fail to get information of the pendency of the case.”

§ 1112. **Effect of dismissal.**—Where an action has been dismissed or otherwise discontinued, and afterwards reopened or revived, a purchaser during the interval is not bound by the notice filed at the commencement of the action; the dismissal of the first suit terminates the effects of the *lis pendens*, and it is not revived by a second proceeding.⁴⁵

FORMS OF LIS PENDENS.

§ 1113. In an action to foreclose a mechanic's lien.

Form No. 369.

[TITLE OF COURT AND CAUSE.]

Notice is hereby given, that an action has been commenced and is pending in the above-named court, upon a complaint of the above-named plaintiff against the above-named defendant; that the object of said action is to foreclose and enforce a mechanic's lien upon the premises hereinafter described, and the dwelling-house [or, the building, describing it] situate thereon, for work, labor, and services performed [and materials furnished] in and about the erection of said dwelling-house [or other building], such lien having attached to said property pursuant to the laws of the state of . . . , and amounting to the sum of . . . dollars, together with the costs of this action; and that said action affects the title to the real estate described as follows, to-wit: [Here insert accurate description of the property affected as the same is described in the complaint or petition.]

Dated . . . , 19 . .

J. K., Plaintiff's Attorney.

⁴⁵ *Pipe v. Jordan*, 22 Colo. 392, 55 Am. St. Rep. 138, 45 Pac. 371; *Al-*

lison v. Drake, 145 Ill. 500, 32 N. E. 537.

§ 1114. In an action to establish a trust.

Form No. 370.

[TITLE OF COURT AND CAUSE.]

Notice is hereby given, that an action has been commenced and is pending in the above-named court, upon a complaint of the above-named plaintiff against the above-named defendant; that the object of said action is to establish in favor of the plaintiff a trust in the lands hereinafter described, and to compel the defendant to convey the said premises to the plaintiff; and that said action affects the title to the real estate described as follows, to-wit: [Here insert accurate description of the property affected as the same is described in the complaint or petition.]

Dated . . . , 19 . .

J. K., Plaintiff's Attorney.

§ 1115. In an action for specific performance.

Form No. 371.

[TITLE OF COURT AND CAUSE.]

Notice is hereby given, that an action has been commenced and is pending in the above-named court, upon a complaint of the above-named plaintiff against the above-named defendant; that the object of said action is to enforce the specific performance of a certain contract in writing made between the plaintiff and one C. D., dated . . . , 19 . . , and recorded in the office of the register of deeds of . . . county, on the . . . day of . . . , 19 . . , in book . . . , on page . . , by which contract the said C. D. agreed, among other things, to convey to the plaintiff, his heirs or assigns, the premises hereinafter described, upon due payment of the consideration therein named and performance of the other terms of said contract, and said contract having been duly performed by the plaintiff on his part; and that said action affects the title to the real estate described as follows, to-wit: [Here insert accurate description of the property affected as the same is described in the complaint or petition.]

Dated . . . , 19 . . .

J. K., Plaintiff's Attorney.

§ 1116. Notice of pendency of action of ejectment.

Form No. 372.

[TITLE.]

Notice is hereby given, that an action has been commenced in the superior court of the state of . . . , in and for the city and county

of . . . , by the above-named plaintiff against the above-named defendant, to recover certain real estate and the possession thereof with damages for the withholding thereof; and that the premises affected by this suit are situated in the said city and county, and are bounded and described as follows, to-wit: [Describe property.]

[DATE.]

[SIGNATURE.]

§ 1117. Lis pendens, in an action in which a warrant of attachment affecting real property has been issued. (S. Dakota.)

Form No. 373.

[TITLE.]

Notice is hereby given that an action has been commenced and is pending in the above-named court, upon a complaint of the above-named plaintiff against the above-named defendant; that the object of said action is to recover judgment upon a promissory note executed and delivered by the defendant, C. D., to the plaintiff for the sum of . . . dollars [or, otherwise state the object of the action and the relief demanded] and that a warrant of attachment was on the . . . day of . . . , 19.., duly issued out of this court in this action against the defendant C. D., and directed to the sheriff of the county of . . . , and delivered to him for execution, whereby the following real property is intended to be affected [here describe accurately the property attached].

Dated. . . . , 19..

E. F., Plaintiff's Attorney.

§ 1118. Notice of suit in foreclosure.

Form No. 374.

[TITLE.]

Notice is hereby given, that a suit has been commenced in said court by the above-named plaintiff against the above-named defendant, which suit is now pending; that the object of said suit is to foreclose and determine the lien of a certain mortgage, of date . . . , executed by said defendant to said plaintiff, and recorded in the recorder's office of said county of . . . , in volume . . . of mortgages, at page . . . ; and to foreclose the defendant's equity of redemption in and to the premises described in said mortgage. Said premises are described as follows, viz.: [Insert description.]

[DATE.]

E. F., Attorney for Plaintiff.

§ 1119. Notice—Foreclosure—Pendency of action.

Form No. 375.

[TITLE OF COURT AND CAUSE.]

Notice is hereby given, that an action has been commenced in the superior court of the city and county of San Francisco, state of California, by the above-named plaintiff against the above-named defendant, for the foreclosure of mortgage, made the . . . day of . . . , 19. . . , by R. R. to J. D., and recorded in the office of the county recorder of the city and county of San Francisco, state of California, on the . . . day of . . . , 19 . . . , in liber . . . of mortgages, page . . . , and that the premises thereby conveyed described in said complaint and affected by this suit, are situated in the said city and county, state of California, and are described as follows, to-wit: [Description of property.]

§ 1120. Notice of suit in partition.

Form No. 376.

[TITLE.]

Notice is hereby given, that an action has been commenced in the superior court of the state of . . . , in and for the county of . . . , by the above-named plaintiff against the above-named defendant, which suit is now pending; that the object of said suit is to obtain partition between plaintiff and defendant of the premises mentioned in the complaint in said action, and hereinafter described, according to the rights of the parties therein; that the premises affected by the suit are situated in said city and county, and are described as follows, to-wit: [Describe property.]

[DATE.]

E. F., Attorney for Plaintiff.

§ 1121. Notice of pendency of action to quiet title.

Form No. 377.

[TITLE.]

Notice is hereby given, that an action has been commenced in the superior court of the state of. . . , in and for the county of . . . , by the above-named plaintiff against the above-named defendant, to quiet title to the premises and real estate mentioned in the complaint in the said action, and hereinafter described, and to determine all and every claim, estate, or interest therein of said defendants, or either or any of them, adverse to the said plaintiff;

and that the premises affected by this suit are situated in said county, and are bounded and described as follows, to-wit:
[Describe the premises.]

[DATE.]

A. B., Attorney for Plaintiff.

§ 1122. Complaint for maliciously filing a *lis pendens*.

Form No. 378.

[TITLE.]

I. That the plaintiff, at the times hereinafter mentioned, was and still is the owner in fee of the following described real estate:
[Insert description.]

II. That on the . . . day of . . . , 19.., the defendant, by his attorney duly authorized, caused to be filed in the office of the [insert title of officer with whom *lis pendens* was filed] a notice of the pendency of a certain action then pending in the . . . court of the county of . . . wherein the said defendant was plaintiff and this plaintiff [and others] were defendants, by which said notice it was alleged that said action had been brought to recover the interest of the plaintiff's husband, E. F., in the said real estate.

III. That the said complaint, in said last described action, alleged and declared that the said premises hereinafter described were in fact the property of the said E. F., and that the same had theretofore been conveyed to the plaintiff by a certain conveyance which was without consideration, and was fraudulent and void as to said defendant, who claimed to be a creditor of said E. F.

IV. That the allegations of said notice, so filed as aforesaid, and of the said complaint, charging that said land was in fact owned by said E. F., and that this plaintiff's title thereto was fraudulent and void as against the creditors of said E. F. were and are wholly false, and were known so to be by the said defendant at the time of the commencement of the said action, and of the filing of said notice, but that the defendant, notwithstanding his said knowledge of the falsity of all of said statements and allegations, willfully and maliciously caused said action to be commenced and said notice to be filed as aforesaid, with intent thereby to prevent the plaintiff from making a sale of said land, and to cause it to be suspected and believed that the plaintiff had not good title thereto.

V. That thereafter and on the . . . day of . . . , 19.., this plaintiff received a *bona fide* offer for the purchase of said land

from one G. H. and could have sold the same to said G. H. for the sum of . . . dollars, but that in consequence of the filing of said notice, and the aforesaid allegations of said complaint, the said G. H. refused to purchase the said land, whereby the plaintiff wholly lost the sale thereof to the said G. H., and has been prevented from effecting the sale thereof to any person, and has suffered damages in the sum of . . . dollars,

Wherefore, etc.

§ 1123. In application for laying out, widening, vacating, or extending street, alley, water-channel, park, highway, or other public place.

Form No. 379.

[Insert appropriate title of proceedings; as, for instance:]

In the matter of the application of A. B., C. D., [etc.,
naming all petitioners] to the common council of
the city of . . . for the laying out of a certain
street in said city, and the condemnation of lands
therefor.

To whom it may concern:

Notice is hereby given, that the undersigned petitioners, A. B., C. D., [etc., giving names of all], will on the . . . day of . . . , 19 . . . , file with O. P., Esq., city clerk of the city of . . . , their application in writing to the common council of said city, for the laying out and opening of a certain street or highway in said city, extending from . . . to . . . [name termini], and praying that the following described parcels of land be taken and condemned for such purpose: [Describe the parcels with accuracy, as in a deed.]

Further notice is hereby given, that a correct map of the said proposed street or highway, and of the land to be affected thereby, is hereby attached to and made a part of this notice, marked Exhibit "A."

Dated . . . , 19..

A. B.
C. D.
E. F.

CHAPTER XLIV.

ISSUES.

§ 1124. **In general.**—By the term “issues” is meant the points of difference between plaintiff and defendant. In an action there may be a number of issues, each of which is vital and necessary to be tried to make out plaintiff’s cause. They are integral parts of one whole, and if plaintiff fails to plead or prove each of these necessary parts, his action falls. Each is a link in the chain of circumstances which makes up in detail the whole case. It is therefore the better practice for an attorney to make a note of each step to be taken in the course of the trial before going into court, and to do that he must take for his guide the issue in the cause. This is necessary, because the parties to the action, if informed of the facts necessary to be proved to make out their case, need only to bring into court such evidence as will effect the purpose, and not, as is often done, be firing at random, apparently without object, and certainly without success. In most causes the real points will thus be greatly narrowed down, and it will require but a few witnesses or a comparatively small amount of evidence to sustain the action, if there be merit in it, and hence counsel should know before going into court, as far as possible, what he wants to prove, and, second, if the whole issue is made up of parts, to analyze them, and then make the proofs in the order in which they ought to be presented to the court or jury. In many cases it is of vast importance to present the proofs in logical order, which means the natural order, and this should be a point of no small interest to the practitioner; for, if logically presented, unprofessional minds, like jurors’, will grasp the ideas with more readiness, and the judge or professional listener will comprehend the relevancy of the testimony without comment or explanation.¹

The question as to the sufficiency of pleadings to raise an issue has been discussed elsewhere.²

§ 1125. **Joinder of issue.**—The authorities generally define an issue to be a single, certain, and material point, issuing out of the

¹ Estee’s Pl. & Pr. § 4613.

² See ante, chapter X.

allegations or pleas, consisting regularly of an affirmative and negative;³ while an immaterial issue is one taken on an immaterial point, and not necessary to decide the action.⁴ An issue is joined where there is a direct affirmation and denial of the fact in dispute; and it makes no difference whether the affirmative or the negative is first averred.⁵ Where nothing is in fact controverted, no issue is joined.⁶ The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and that the jury may not be misled by the introduction of various matters.⁷ Recovery can be had only upon the issues raised in the pleadings.⁸ But a variance is not material unless it misleads the adverse party.⁹ The pleadings having been made up, the cause is at issue. An issue arises when a fact or conclusion of law is maintained by the one party and is controverted by the other. Issues are of two kinds: 1. Of law; and 2. Of fact.¹⁰

§ 1126. **Issues of law.**—An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof,¹¹ and is tried by the court, unless referred by consent.¹² A court cannot properly, even by consent of parties, pass upon questions not raised by the written allegations of the pleadings.¹³ Where an issue of law goes to only a portion of a pleading, the case may be put on the calendar for trial of the issue of fact, joined by other portions, without waiting for the decision of the former.¹⁴ Various illustrations of issues of law are as follows, to-wit: *Account*: What constitutes an account stated is a question raising an issue of law.¹⁵ *Adverse possession*: The facts to establish adverse posses-

³ 2 Burr. Law Dict. 99; Co. Lit. 126a. See 3 Bl. Com. 313; French Law, 336; Story's Eq. Pl. 1; Steph. Pl. 124; 1 Van Santv. Pl. 733; 1 Chit. Pl. 652.

⁴ Steph. Pl. 129; 1 Chit. Pl. 692; 2 Tidd's Pr. 921; Gould's Pl. ch. 6, 27.

⁵ Van Gieson v. Van Gieson, 12 Barb. 520.

⁶ Pardee v. Schenck, 11 How. Pr. 500; Deer Lodge County v. Kohrs, 2 Mont. 66.

⁷ Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46, 7 L. Ed. 47.

⁸ Soden v. Murphy, 42 Colo. 352, 94 Pac. 353.

⁹ Chicago B. & Q. v. Pollock, 16 Wyo. 321, 93 Pac. 847.

¹⁰ Cal. Code Civ. Proc., § 588; N. Y. Code Civ. Proc., § 963.

¹¹ Cal. Code Civ. Proc., § 589; N. Y. Code Civ. Proc., § 964; Or. B. & C. Codes, § 110; 3 Bl. Com. 314; 3 Steph. Com. 572.

¹² Cal. Code Civ. Proc., § 591; N. Y. Code Civ. Proc., § 969.

¹³ Boggs v. Merced M. Co., 14 Cal. 279.

¹⁴ Palmer v. Smedley, 13 Abb. Pr. 185.

¹⁵ Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81.

sion are to be found by the jury, but what constitutes adverse possession is a question of law.¹⁶ *Agreement*: Whether letters which have passed between parties constitute an agreement, or whether an agreement between parties amounts to an extension of time for the performance of a former contract between them, and, if so, what time, are questions of law for a court, and not of fact for a jury.¹⁷ *Assignment*: The legal effect of an assignment.¹⁸ *Carelessness*: What facts and circumstances constitute evidence of carelessness.¹⁹ *Compliance*: Whether one claiming a discharge in insolvency has strictly complied with the provisions of the insolvent act is a question of law.²⁰ *Contract*: Whether a contract has been rescinded or not, as whether the undisputed acts of parties amount to a rescission,²¹ and the validity and effect of a contract, are questions raising an issue of law;²² but when the meaning is to be judged by facts *aliunde*, it is a question for the jury.²³ *Due diligence*: Due diligence is sufficiently defined to enable courts to determine whether any given state of facts is sufficient to constitute it or not.²⁴ *Evidence*: Admissibility of evidence is a question for the court;²⁵ or of a witness objected to for interest;²⁶ or whether a witness is competent;²⁷ or whether a paper is proper to be read;²⁸ or whether evidence offered tends in any respect to make out fraud;²⁹ or, in slander, if there is no dispute as to the facts, whether the testimony given by plaintiff was material to the point in issue.³⁰ *Fraud*: When there is no dispute upon the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury.³¹ *Grant*: The construction of the

¹⁶ Macklot v. Dubreuil, 9 Mo. 477, 43 Am. Dec. 550; Bowie v. Brahe, 3 Duer, 35; Jackson v. Walker, 7 Cow. 637; Munro v. Merchant, 26 Barb. 383.

¹⁷ Luckhart v. Ogden, 30 Cal. 547.

¹⁸ Goodrich v. Downs, 6 Hill, 438; Sheldon v. Dodge, 4 Denio, 217; Cunningham v. Freeborn, 11 Wend. 240; Spies v. Boyd, 1 E. D. Smith, 445; Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532.

¹⁹ Gerke v. California Steam Nav. Co., 9 Cal. 251, 70 Am. Dec. 650.

²⁰ Schloss v. His Creditors, 31 Cal. 201.

²¹ Healy v. Utley, 1 Cow. 345. Or its construction: Thomas v. Dickinson, 23 Barb. 431.

²² Chapin v. Potter, 1 Hilt. 366.

²³ Gardner v. Clark, 17 Barb. 538.

²⁴ Ophir Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550. See Carroll v. Upton, 3 N. Y. 272.

²⁵ People v. Glenn, 10 Cal. 32; Gould v. Weed, 12 Wend. 12. Compare LaRue v. Rowland, 7 Barb. 107. See, also, Harris v. Wilson, 7 Wend. 57.

²⁶ Tabor v. Staniels, 2 Cal. 240.

²⁷ Reynolds v. Lounsbury, 6 Hill, 534; Scherpf v. Szadeczy, 1 Abb. Pr. 366; Prall v. Hinchman, 6 Duer, 351. ²⁸ Tillou v. Clinton etc. Mut. Ins. Co., 7 Barb. 564.

²⁹ Gage v. Parker, 25 Barb. 141; Erwin v. Voorhees, 26 Barb. 127.

³⁰ Power v. Price, 16 Wend. 450.

³¹ Chenery v. Palmer, 6 Cal. 119,

terms of a grant;³² as to the validity and effect of a Mexican grant; as to its loss and contents; or as to the effect of mesne conveyance through which plaintiff claimed under the grant;³³ if there is no dispute about the facts, the question what premises are embraced by the terms of the instrument, are questions for the court.³⁴ *Insurance*: Whether preliminary proofs of loss of vessel are sufficient to satisfy requirements of policy, and whether facts shown amount to a waiver of defects in the proofs, are questions for the court.³⁵ *Judgment*: Whether a judgment was properly entered³⁶ is a question of law; but the issue *nul tiel record* is for the jury.³⁷ *Jurisdiction*: Whether the proceedings of the probate court showed jurisdiction to make certain orders is a question of law.³⁸ *Libel*: Whether the article is libelous on its face is a question for the court;³⁹ but whether the language is capable of bearing the meaning assigned by the court, or whether the meaning is truly assigned to the language, is for the jury.⁴⁰ *Mining laws*: The construction of mining laws, when introduced in evidence, is a question for the court.⁴¹ *Negligence*: Where facts are ascertained, whether they amount to negligence.⁴² *New promise*: Where the facts are undisputed, it is for the court to determine whether a sufficient promise has been made to take the case out of the statute.⁴³ *Notice*: The sufficiency of the notice of the dishonor of a note, where there is no dispute about the facts, is a question of law.⁴⁴ So the question whether the notice was given within a reasonable time,⁴⁵ or whether the holder used due diligence

65 Am. Dec. 493; *Sturtevant v. Ballard*, 9 Johns. 337, 6 Am. Dec. 281; *Jennings v. Carter*, 2 Wend. 446, 20 Am. Dec. 635; *Gage v. Parker*, 25 Barb. 141; *Erwin v. Voorhees*, 26 Barb. 127; *Edgell v. Hart*, 9 N. Y. 213, 59 Am. Dec. 532.

³² *Frier v. Jackson*, 8 Johns. 495.

³³ *Seaward v. Malotte*, 15 Cal. 304.

³⁴ *St. John v. Bumpstead*, 17 Barb. 100.

³⁵ *Miller v. Eagle Life etc. Ins. Co.*, 2 E. D. Smith, 268.

³⁶ *Leese v. Clark*, 28 Cal. 26.

³⁷ *Fasnacht v. Stehn*, 53 Barb. 650, 5 Abb. Pr. (N. S.) 338.

³⁸ *Seaward v. Malotte*, 15 Cal. 304.

³⁹ *Matthews v. Beach*, 5 Sandf. 256.

⁴⁰ *Blagg v. Start*, 10 Q. B. 899;

Broome v. Goslen, 1 Com. B. 728; *Barrett v. Long*, 3 H. L. Cas. 395.

⁴¹ *Fairbanks v. Woodhouse*, 6 Cal. 433.

⁴² *Dascomb v. Buffalo etc. R. R. Co.*, 27 Barb. 221; *Stevens v. Oswego etc. R. R. Co.*, 18 N. Y. 422; *Mackey v. New York Cent. R. R. Co.*, 27 Barb. 528, note; *Brooks v. Buffalo etc. R. R. Co.*, 27 Barb. 532; *Brendell v. Buffalo etc. R. R. Co.*, 27 Barb. 534, note.

⁴³ *Clarke v. Dutcher*, 9 Cow. 674.

⁴⁴ *Cayuga Co. Bank v. Warden*, 6 N. Y. 19; *Farmers' Bank v. Vail*, 21 N. Y. 487.

⁴⁵ *Bryden v. Bryden*, 11 Johns. 187; *Tindal v. Brown*, 1 T. R. 167; *Scheibel v. Fairbain*, 1 Bos. & Pul. 388.

to find the drawer or indorser.⁴⁶ So whether a written notice of protest is sufficient in terms to charge an indorser.⁴⁷ *Parties*: The question as to proper parties plaintiff is a question of law.⁴⁸ *Partnership*: If facts are undisputed, the question of partnership is for the court.⁴⁹ *Probable cause and reasonable cause* are questions of law.⁵⁰ Probable cause is a mixed question of law and fact.⁵¹ *Receipt*: The facts being undisputed, and as establishing an accord and satisfaction, is a question of law.⁵² *Time*: Where the law defines what is a reasonable time, the question is one of law for the court.⁵³ *Waste*: The question as to what amounts to a waste is a question of law or fact.⁵⁴ *Written instrument*: That a written instrument is or is not a mortgage,⁵⁵ and the legal effect of written documents,⁵⁶ are questions of law.

§ 1127. **Issues of fact.**—An issue of fact is an issue taken upon or consisting of matters of fact, the fact only, and not the law, being disputed.⁵⁷ Such issues arise: 1. Upon a material allegation in the complaint, controverted by the answer; 2. Upon new matters in the answer, except an issue of law is joined thereon.⁵⁸ In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference be ordered. In other cases issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury,

⁴⁶ *Utica Bank v. Bender*, 21 Wend. 643, 34 Am. Dec. 281; *Spencer v. Bank of Salina*, 3 Hill, 520.

⁴⁷ *Remer v. Downer*, 23 Wend. 620; *Ransom v. Mack*, 2 Hill, 587, 38 Am. Dec. 602; *Dole v. Gold*, 5 Barb. 490; *Cook v. Litchfield*, 9 N. Y. 279.

⁴⁸ *Seaward v. Malotte*, 15 Cal. 304.

⁴⁹ *Cumpston v. McNair*, 1 Wend. 457.

⁵⁰ 1 T. R. 542; 1 Gale & D. 504; *Bulkeley v. Keteltas*, 6 N. Y. 384; *Carpenter v. Shelden*, 5 Sandf. 77; *Gordon v. Upham*, 4 E. D. Smith, 9; *Waldheim v. Siehel*, 1 Hilt. 45; *Bulkeley v. Smith*, 2 Duer, 261; *Benson v. Southard*, 10 N. Y. 236; *McCormick v. Sisson*, 7 Cow. 715; *Pangburn v. Bull*, 1 Wend. 345; *Masten v. Deyo*, 2 Wend. 424; *Hall v. Suy-*

dam, 6 Barb. 83; *Stevens v. Lacour*, 10 Barb. 62.

⁵¹ *Potter v. Seale*, 8 Cal. 217; *Grant v. Moore*, 29 Cal. 644; *Brant v. Higgins*, 10 Mo. 728.

⁵² *Vedder v. Vedder*, 1 Denio, 257.

⁵³ *Luckhardt v. Ogden*, 30 Cal. 547.

⁵⁴ *Jackson v. Brownson*, 7 Johns. 227, 5 Am. Dec. 258; *Cooper v. Stower*, 9 Johns. 331; *Jackson v. Tibbits*, 3 Wend. 341; *Kidd v. Dennison*, 6 Barb. 9; *McGregor v. Brown*, 10 N. Y. 114.

⁵⁵ *Fairbanks v. Bloomfield*, 2 Duer, 353.

⁵⁶ *Carpentier v. Thirston*, 24 Cal. 268.

⁵⁷ 3 Bl. Com. 314; Co. Lit. 126a; 3 Steph. Com. 572.

⁵⁸ Cal. Code Civ. Proc., § 590. See,

or to be referred to a referee.⁵⁹ They are made by the pleadings, and should be submitted to the jury as thus made.⁶⁰ The question whether an issue of fact must be tried by a jury or by the court is not to be determined from the nature of the issue, but from the character of the action in which issue is joined.⁶¹

The right of trial by jury is a right of which no litigant in a proper case can be deprived without his consent; and if the court refuses a demand for a jury trial of issues of fact in an action at law, it is an error for which the appellate court ought to grant a new trial, notwithstanding the issues have been fairly tried by the court and proper judgment rendered.⁶²

In an equitable action the issues of fact raised by the pleadings should be tried by the court, unless submitted by the court to a jury.⁶³ In such case the verdict is merely advisory.⁶⁴

Various illustrations of questions which raise an issue of fact are as follows, to-wit: *Abandonment*: When, in ejectment on prior possession, abandonment is pleaded, and evidence on it is introduced, the question of adverse possession is for the jury.⁶⁵ So of mining claims.^{65a} So whether an abandonment of insured vessel is accepted or not.⁶⁶ *Appurtenances*: What are appurtenances of a steamboat is a question of fact for the jury.⁶⁷ *Assent*: Whether a party has assented to acts of the sheriff.⁶⁸ So knowledge or assent, generally, is a question of fact.⁶⁹ *Baggage*: Whether articles of a doubtful character are to be deemed as baggage is a question of fact.⁷⁰ *Bill of exchange*: That a bill was presented for payment, and payment demanded, is a question of fact.⁷¹ *Compensation*: In a suit for services rendered, whether such were intended to be gratuitous is a question for the jury.⁷² *Compulsion*: The question of compulsion in the ejection of a passenger

also, N. Y. Code Civ. Proc., § 964; Or. B. & C. Codes, § 111.

⁵⁹ Cal. Code Civ. Proc., § 592.

⁶⁰ Bankston v. Farris, 26 Mo. 175; Overton v. Webster, 26 Mo. 332.

⁶¹ Danielson v. Gude, 11 Colo. 87, 17 Pac. 283.

⁶² Treadway v. Wilder, 12 Nev. 108.

⁶³ McLaughlin v. Del Re, 64 Cal. 472, 2 Pac. 244; Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; Santa Cruz etc. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934.

⁶⁴ McCarthy v. Gaston & Co., 144 Cal. 546, 78 Pac. 7.

⁶⁵ Roberts v. Unger, 30 Cal. 676; Jackson v. Joy, 9 Johns. 102.

^{65a} Waring v. Crow, 11 Cal. 371.

⁶⁶ Bell v. Smith, 2 Johns. 98.

⁶⁷ Amis v. Steamboat Louisa, 9 Mo. 629.

⁶⁸ Moore v. Westervelt, 2 Duer, 59.

⁶⁹ Weaver v. Page, 6 Cal. 681; Bensley v. Atwill, 12 Cal. 231.

⁷⁰ Grant v. Newton, 1 E. D. Smith, 95.

⁷¹ Graham v. Machado, 6 Duer, 514.

⁷² Pendleton v. Empire Stone Dressing Co., 19 N. Y. 13.

from a railroad-car is one for the jury.⁷³ *Conversion*: The time of the conversion,⁷⁴ and the amount of damages in action for the detention of personal property,⁷⁵ are questions for the jury. *Custom*: Whether such a custom existed or not is a question of fact.⁷⁶ *Death of parties*: Where the death of one of the defendants is put in issue by the pleadings, it should, like every other issue of fact, be left to the jury.⁷⁷ *Dedication*: What amounts to a dedication of homestead is a question of fact.⁷⁸ So of the dedication of land for a street.⁷⁹ *Delivery of goods*: Whether absolute or conditional, is a question of fact.⁸⁰ *Description of land*: Whether the land as described in the deed given in evidence is the same as that described in the deed declaration is a question for the jury.⁸¹ So where parol evidence is resorted to to identify the calls of a survey, the facts must be found by the jury.⁸² *Diligence and care* is a question of fact for the jury.⁸³ *Election or intention* is a question of fact for the jury.⁸⁴ *Evidence*: The weight of evidence is a question for the jury.⁸⁵ Whether evidence is sufficient to prove execution of a bond.⁸⁶ It is for the jury, and not the court, to construe the meaning of an ambiguous reply to a question in a deposition.⁸⁷ *Fixtures*: Whether personal property has been annexed to the freehold, or whether it was so annexed for the purposes of trade only, is a question of fact.⁸⁸ *Foreign law*: What is law of a foreign country is a question of fact.⁸⁹ *Fraud*: Actual fraud is always⁹⁰ a question of fact.⁹¹ Whether omission to

⁷³ Kline v. Central Pacific R. R. Co., 37 Cal. 400, 99 Am. Dec. 282, 39 Cal. 587.

⁷⁴ Hyde v. Stone, 9 Cow. 230, 18 Am. Dec. 501.

⁷⁵ Bartlett v. Hogden, 3 Cal. 55.

⁷⁶ Panaud v. Jones, 1 Cal. 500.

⁷⁷ Fowler v. Houston, 1 Nev. 469.

⁷⁸ Cook v. McChristian, 4 Cal. 23.

⁷⁹ Harding v. Jasper, 14 Cal. 648. See Alemany v. Petaluma, 38 Cal. 553.

⁸⁰ Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331; Fleeman v. McKean, 25 Barb. 474; Downer v. Thompson, 6 Hill, 208.

⁸¹ Lawless v. Newman, 5 Mo. 236; Newman v. Lawless, 6 Mo. 279.

⁸² Ott v. Soulard, 9 Mo. 581.

⁸³ Richmond v. Sacramento Valley R. R. Co., 18 Cal. 351. As to ordinary care, see Aymar v. Astor, 6 Cow. 267.

⁸⁴ Clift v. White, 12 N. Y. 538; Moss v. Riddle, 5 Cranch, 351, 3 L. Ed. 123; Griffin v. Cranston, 1 Bosw. 281; Miller v. People, 5 Barb. 203; Van Neste v. Conover, 20 Barb. 549; Gilman v. Reddington, 24 N. Y. 12.

⁸⁵ Battersby v. Abbott, 9 Cal. 565; Winston v. Wales, 13 Mo. 569; Patterson v. McClanahan, 13 Mo. 507; Van Ness v. Pacard, 2 Pet. 138, 7 L. Ed. 374; People v. Dick, 32 Cal. 213, 34 Cal. 663; Tuttle v. Buck, 41 Barb. 417.

⁸⁶ Hicks v. Chouteau, 12 Mo. 341.

⁸⁷ Marine Ins. Co. v. Young, 5 Cranch, 187, 3 L. Ed. 74.

⁸⁸ Hovey v. Smith, 1 Barb. 372.

⁸⁹ Western v. Genesee Mut. Ins. Co., 12 N. Y. 258.

⁹⁰ Cal. Code Civ. Proc., § 1574.

⁹¹ Seaman v. Mariani, 1 Cal. 336; Billings v. Billings, 2 Cal. 107, 56

change possession under sale or mortgage of chattels was with fraudulent intent.⁹² The question whether a mortgage given for a greater sum than is due was given in good faith, both for a present indebtedness and to secure future advance to be made, is one of fact for the jury, under proper instructions from the court.⁹³ It is only on proof of a good consideration that the cause goes to the jury on the question of fraud in fact.⁹⁴ In an action to obtain chattels purchased at a sale on execution, the questions whether there was an intent to defraud creditors, whether the property was in view of the bidders, whether it was offered in judicious lots, are questions of fact.⁹⁵ Whether the transfer of the interest of a partner to his copartner was made with intent to defraud creditors,⁹⁶ and fraud in the procurement of an entry of land in a contest between two claimants from the United States,⁹⁷ are questions of fact. *Grant*: The question what premises are embraced in a grant depending on evidence outside the grant, identity of landmarks referred to, is for the jury.⁹⁸ *Instigation and request* are questions of fact.⁹⁹ *Insurance*: Whether circumstances not communicated to the insurer, on application for a policy, were material to the risk, and necessary to be communicated;¹⁰⁰ the length of time usual for a vessel to perform a voyage;¹⁰¹ whether a vessel was lost within the time fixed in the policy;¹⁰² whether the acts were done which are relied on as constituting a waiver of defects in the proofs;¹⁰³ whether erecting additional buildings increases the risk;¹⁰⁴ whether keeping a small quantity of tow in a building amounts to using it for storing flax,¹⁰⁵ are questions for

Am. Dec. 319; *Ford v. Chambers*, 19 Cal. 143; *Wellington v. Sedgwick*, 12 Cal. 469.

⁹² *Prentiss v. Slack*, 1 Hill, 467; *Butler v. Van Wyck*, 1 Hill, 438; *Smith v. Acker*, 23 Wend. 653; *Stewart v. Slater*, 6 Duer, 83; *Gardner v. McEwen*, 19 N. Y. 123; *Groat v. Rees*, 20 Barb. 26; compare *Edgell v. Hart*, 9 N. Y. 213, 59 Am. Dec. 532.

⁹³ *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

⁹⁴ *Allen v. Cowan*, 28 Barb. 99.

⁹⁵ *Bruce v. Westervelt*, 2 E. D. Smith, 440.

⁹⁶ *Griffin v. Cranston*, 1 Bosw. 281.

⁹⁷ *Waller v. Von Phul*, 14 Mo. 84.

⁹⁸ *Frier v. Jackson*, 8 Johns. 496.

⁹⁹ *Ives v. Humphreys*, 1 E. D. Smith, 200.

¹⁰⁰ *New York Firemen's Ins. Co. v. Walden*, 12 Johns. 513, 7 Am. Dec. 340; *Livingston v. Delafield*, 1 Johns. 522; *Burritt v. Saratoga Co. Mut. Ins. Co.*, 5 Hill, 188, 40 Am. Dec. 345; *Gates v. Madison Co. Mut. Ins. Co.*, 2 N. Y. 43.

¹⁰¹ *Mackay v. Rhinelanders*, 1 Johns. Cas. 408.

¹⁰² *Brown v. Neilson*, 1 Caine, 525.

¹⁰³ *Miller v. Eagle Life etc. Ins. Co.*, 2 E. D. Smith, 268.

¹⁰⁴ *Grant v. Howard Ins. Co.*, 5 Hill, 10.

¹⁰⁵ *Hynds v. Schenectady Co. Mut. Ins. Co.*, 16 Barb. 119; affirmed in 11 N. Y. 554.

the jury. *Libel*: The truth of a libel is a question for the jury.¹⁰⁶ Whether or not libelous article is applicable to the plaintiff,¹⁰⁷ and the true interpretation of an ambiguous libel, are questions for the jury; but if, upon an examination of the whole writing, and comparison of its different parts, it appears to admit of no just construction except one injurious to the plaintiff, its meaning is to be determined by the court.¹⁰⁸ *Malice* is a question of fact for the jury.¹⁰⁹ *Necessaries*: Necessaries or what are not necessities may be a mixed question of law and fact;¹¹⁰ but what constitutes necessary furniture is a question of fact for the jury.¹¹¹ *Negligence*: Where facts are disputed, the question of negligence is for the jury.¹¹² *Nuisance*: Whether an obstruction amounts to a nuisance.¹¹³ In an action for obstructing access to plaintiff's lot, the question whether the obstruction was carried to an unnecessary or unreasonable degree, or was continued for an unreasonable length of time, is a question of fact.¹¹⁴ But the question of a flagrant nuisance is a mixed question of law and fact.¹¹⁵ *Notice*: Whether notice has been served or not,¹¹⁶ whether a notice referred to the same note, and was so understood by the indorser,¹¹⁷ and whether indorser was misled,¹¹⁸ are questions of fact. *Partnership*: Whether a partnership existed, what must be the firm name, and whether note was given for partnership transactions, are questions for the jury.¹¹⁹ So of notice of dissolution of partnership.¹²⁰

¹⁰⁶ King v. Roof, 4 Wend. 113, 21 Am. Dec. 102.

¹⁰⁷ Green v. Telfair, 20 Barb. 11.

¹⁰⁸ 9 Barn. & Cress. 643; 10 Barn. & Cress. 472; Van Vechten v. Hopkins, 5 Johns. 211, 4 Am. Dec. 339; Lewis v. Chapman, 16 N. Y. 369.

¹⁰⁹ Potter v. Seale, 8 Cal. 217; Bulkeley v. Smith, 2 Duer, 261.

¹¹⁰ Wharton v. McKenzie, 5 Q. B. 606.

¹¹¹ Wilson v. Ellis, 1 Denio, 462.

¹¹² Richmond v. Sacramento Valley R. R. Co., 18 Cal. 351; Bernhardt v. Rensselaer R. R. Co., 23 How. Pr. 166; Buckingham v. Payne, 36 Barb. 81; Mangam v. Brooklyn R. R. Co., 36 Barb. 237; Foot v. Wiswall, 14 Johns. 304; Moore v. Westervelt, 21 N. Y. 103.

¹¹³ Gunter v. Geary, 1 Cal. 467;

Blanc v. Klumpke, 29 Cal. 156; City of San Francisco v. Clark, 1 Cal. 386. But see Fire Department v. Harrison, 9 Abb. Pr. 1, 18 How. Pr. 181; Brown v. Mohawk etc. R. R. Co., 1 How. App. Cas. 5266.

¹¹⁴ St. John v. Mayor New York, 6 Duer, 315.

¹¹⁵ Hentz v. Long Island R. R. Co., 13 Barb. 647, 657.

¹¹⁶ Jackson v. Livingston, 3 Johns. 455.

¹¹⁷ Reedy v. Seixas, 2 Johns. Cas. 337; Ontario Bank v. Petrie, 3 Wend. 456; Bank of Rochester v. Gould, 9 Wend. 279.

¹¹⁸ McKnight v. Lewis, 5 Barb. 681. See Clark v. Dearborn, 6 Duer, 309.

¹¹⁹ Drake v. Elwyn, 1 Caines, 184.

¹²⁰ Rabe v. Wells, 3 Cal. 151; Treadwell v. Wells, 4 Cal. 260.

Payment: Whether acceptance of a part payment is intended by the creditor to be in full or not;¹²¹ where there is a conflict of evidence, the question whether a note was received in payment,¹²² whether money forwarded to acceptor by indorsee through drawer was rendered as a payment so as to discharge acceptor,¹²³ and whether a promissory note was received as payment,¹²⁴ are questions for the jury. *Pre-emption:* Whether acts have been performed giving a person the rights of pre-emption is a question of fact.¹²⁵ *Principal and agent:* Whether the credit was given to the agent or his principal is a question of fact for the jury.¹²⁶ Whether an agent acted within the scope of his authority is a question of fact.¹²⁷ Where goods were sent by a commission merchant to agents, it is for the jury to decide whether such agents were the agents of the commission merchant or the owner of the goods.¹²⁸ The authority of an agent¹²⁹ is a question for the jury. *Prior appropriation:* Priority in the appropriation of water is a question of fact for the jury.¹³⁰ *Prior possession:* The question as to whether a settler on the public land has proceeded with reasonable diligence to follow up his location with the necessary improvements, so as to recover against a subsequent possessor, is a question of fact for the jury.¹³¹ *Private way:* Whether the change in a private way was by agreement or not, and whether it was to be permanent, are questions of fact.¹³² *Prohibited sale:* Whether a sale was made in good faith, or was an invasion of a prohibiting statute, is a question of fact.¹³³ *Reasonable search:* Whether or not reasonable search has been made for lost document is a question of fact.¹³⁴ *Reasonable use:* Reasonableness of the use of water is a question for the jury.¹³⁵ *Reputed ownership* is a question of fact for the jury.¹³⁶ *Sale:*

¹²¹ *Pierce v. Pierce*, 25 Barb. 243.

¹²² *Atlantic Fire etc. Ins. Co. v. Boies*, 6 Duer, 583; *Johnson v. Weed*, 9 Johns. 310, 6 Am. Dec. 279.

¹²³ *Bean v. Canning*, 2 E. D. Smith, 419, note.

¹²⁴ *Myatts v. Bell*, 41 Ala. 222.

¹²⁵ *Megerle v. Ashe*, 33 Cal. 74. See, also, *Toland v. Mandell*, 38 Cal. 30.

¹²⁶ *Hovey v. Pitcher*, 13 Mo. 191.

¹²⁷ *Taylor v. Labeaume*, 14 Mo. 572; *McMorris v. Simpson*, 21 Wend. 610.

¹²⁸ *Pomeroy v. Sigerson*, 22 Mo. 177.

¹²⁹ *Thurman v. Wells*, 18 Barb. 500.

¹³⁰ *Weaver v. Eureka Lake Co.*, 15 Cal. 274.

¹³¹ *Staininger v. Andrews*, 4 Nev. 59; *Sharon v. Davidson*, 4 Nev. 416.

¹³² *Hamilton v. White*, 4 Barb. 60; affirmed, 5 N. Y. 9.

¹³³ *Clark v. Owens*, 18 N. Y. 435.

¹³⁴ *Baker v. Richardson*, 1 Cow. 77; *Suydam v. Morris Canal & Banking Co.*, 6 Hill, 217.

¹³⁵ *Hetrich v. Deachler*, 6 Pa. St. 32; *Esmond v. Chew*, 15 Cal. 143; *Thomas v. Brackney*, 17 Barb. 654.

¹³⁶ *Edwards v. Scott*, 1 Man. & G. 962; 2 Scott N. R. 266.

Whether a sale was completed or not is a question for the jury.¹³⁷ Also, whether a party assented to a sale under execution where property was sold of which he was joint owner.¹³⁸ *Seaworthy or not* is a question of fact for the jury.¹³⁹ *Special agreement*: Whether there was a special agreement by note or receipt in full is a question of fact.¹⁴⁰ *Trespass*: Where possession is proved, it is for the jury to determine whether acts of the defendant of which evidence is given amount to a trespass.¹⁴¹ The amount of damages in actions of trespass is a question of fact for the jury.¹⁴² *Warranty*: The question whether words used by a seller of chattels amount to a warranty,¹⁴³ or whether a defect in the property sold was greater than that excepted in the vendor's warranty,¹⁴⁴ is sound or unsound,¹⁴⁵ is a question of fact. *Written instruments*: It is the province of the court to construe written instruments, but where they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted.¹⁴⁶ The construction and true interpretation of commercial correspondence may, under proper circumstances, be left to the jury,¹⁴⁷ or when an undated instrument was made.¹⁴⁸ It is for the jury to determine whether the note tendered in part payment for a horse was the note understood and intended by the parties in their contract.¹⁴⁹ Whether an indorsement on a note has been erased,¹⁵⁰ or whether an alteration appearing upon the face of an agreement was made before or after its execution.¹⁵¹ The question of the identity of a written instrument is for the jury.¹⁵²

§ 1128. *Mixed issues of law and fact*.—Where there are issues both of law and fact to the same complaint, it is required

¹³⁷ *De Ridder v. M'Knight*, 13 Johns. 294.

¹³⁸ *Fiero v. Betts*, 2 Barb. 633.

¹³⁹ *Sherwood v. Ruggles*, 2 Sandf. 55; *Patrick v. Hallett*, 1 Johns. 241; *Clifford v. Hunter*, 3 Car. & P. 16; *Walsh v. Washington Mar. Ins. Co.*, 32 N. Y. 427.

¹⁴⁰ *Steamboat Charlotte v. Hammond*, 9 Mo. 59, 43 Am. Dec. 536.

¹⁴¹ *Perry v. Block*, 1 Mo. 484.

¹⁴² *Drake v. Palmer*, 4 Cal. 11.

¹⁴³ *Duffee v. Mason*, 8 Cow. 25; *Rogers v. Ackerman*, 22 Barb. 134.

¹⁴⁴ *Wade v. Scott*, 7 Mo. 509.

¹⁴⁵ *Lewis v. Peake*, 7 Taunt. 153.

¹⁴⁶ *Primm v. Haren*, 27 Mo. 205.

¹⁴⁷ *Agin v. Connolly*, 25 Mo. 94, 69 Am. Dec. 450.

¹⁴⁸ *Coons v. Chambers*, 1 Abb. Pr. 165.

¹⁴⁹ *Fenton v. Perkins*, 3 Mo. 23, 144.

¹⁵⁰ *Swan v. O'Fallon*, 7 Mo. 231.

¹⁵¹ *Prindle v. Chambers*, 1 Abb. Pr. 58; *Maybee v. Sniffen*, 2 E. D. Smith, 1.

¹⁵² *Jackson v. Betts*, 6 Cow. 377; *Bank of Cape Fear v. Gomez*, 6 Cow. 435.

that the issues of law be first disposed of by the court.¹⁵³ When there are both a demurrer and an answer to the same complaint, the issue of law raised by the demurrer must be first disposed of.¹⁵⁴ Issues of law are waived after a trial upon the facts.¹⁵⁵ Where the law applicable to a case has been altered by the legislature pending the action, the court will dispose of issues of law arising on a demurrer according to the law at the time of the trial of the issues, if it does not appear upon the face of the complaint when the action was commenced.¹⁵⁶ When the answer contains legal and equitable defenses, the court may first try the equitable defense, and refuse plaintiff a jury trial, and if the facts warrant, grant the equitable relief prayed for.¹⁵⁷ It should distinctly appear from the record that the equitable defenses were first tried and disposed of, or if the whole action and all the issues were tried and submitted together, the fact should appear;¹⁵⁸ but the objection that an equitable defense was not first disposed of cannot be raised for the first time on appeal.¹⁵⁹ Where there are both issues of fact and of law, and the former have been first tried, it will be presumed that the court so directed, if nothing appears to show that objection was made at the time of the trial.¹⁶⁰ An answer in forcible detainer which denies that defendant "unlawfully entered," admits the entry and raises an issue only on its lawfulness.¹⁶¹

Various illustrations of mixed issues of law and fact are as follows, to-wit: *Association*: That persons were illegally associated as a company is a mixed question of law and fact.¹⁶² *Delivery and change of possession*,¹⁶³ *Insolvency*: The question of the insolvency of the maker of a promissory note not negotiable under the statute, in suit against the indorser.¹⁶⁴ *New promise*: Where there is a dispute as to the facts, whether a sufficient promise has been made to take the case out of the statute.¹⁶⁵

¹⁵³ Cal. Code Civ. Proc., § 592; N. Y. Code Civ. Proc., § 966; Or. B. & C. Codes, § 112. See *Hennequin v. Butterfield*, 76 N. Y. 598; *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119.

¹⁵⁴ *Brooks v. Douglass*, 32 Cal. 208.

¹⁵⁵ *Marden v. Wheelock*, 1 Mont. 49; *Orr v. Haskell*, 2 Mont. 225.

¹⁵⁶ *Smith v. Holmes*, 19 N. Y. 271; *Lewis v. City of Buffalo*, 29 How. Pr. 335.

¹⁵⁷ *People v. Lafarge*, 3 Cal. 130;

Bodley v. Ferguson, 30 Cal. 511.

¹⁵⁸ *Martin v. Zellerbach*, 38 Cal. 319, 99 Am. Dec. 365.

¹⁵⁹ *Tormey v. Pierce*, 42 Cal. 338.

¹⁶⁰ *Fry v. Bennett*, 9 Abb. Pr. 45.

¹⁶¹ *Leroux v. Murdock*, 51 Cal. 541.

¹⁶² *Ransford v. Copeland*, 6 Ad. & E. 482.

¹⁶³ *Vance v. Boynton*, 8 Cal. 554.

¹⁶⁴ *Pococke v. Blount*, 6 Mo. 338.

¹⁶⁵ *Clarke v. Dutcher*, 9 Cow. 675.

§ 1129. **Special issues.**—A special issue is one produced upon a special plea,¹⁶⁶ and is usually more specific and particular than the general issues. A question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.¹⁶⁷ The court may direct an issue to be framed upon the pleadings and submitted to the jury;¹⁶⁸ but it is not a matter of right in equity cases.¹⁶⁹ The submission to the jury of special issues is within the discretion of the court, and the refusal of the court to grant a request therefor is not the subject of an exception.¹⁷⁰ And such special issues framed by the court according to chancery practice may be tried by a jury in equity cases.¹⁷¹ But where several defenses, some legal and some equitable, are interposed, it is irregular for the court to frame special issues involving all these, and submit them together to a jury.¹⁷² When, upon the coming in of the report of an auditor, either party desires to try the case by a jury, if there has not been an issue of fact joined between the parties, suitable issues should be made up under the direction of the court.¹⁷³ The proper mode of making up such an issue is for the party having the affirmative to file an allegation of the facts which he asserts, and for the other party to traverse it. It is not a proper course for a party to traverse the conclusions of the auditor.¹⁷⁴ When in a suit on a promissory note one of the issues is whether or not the plaintiff is the owner and holder, and the jury find on the special issues only, it is error to render judgment for the plaintiff until there is a finding on the issue of ownership.¹⁷⁵

¹⁶⁶ Steph. Pl. 162.

¹⁶⁷ Cal. Code Civ. Proc., § 309.

¹⁶⁸ Curtis v. Sutter, 15 Cal. 263.

¹⁶⁹ Moffat v. Moffat, 10 Bosw. 468;
Moffat v. Mount, 17 Abb. Pr. 4;
McCarty v. Edwards, 24 How. Pr.
236.

¹⁷⁰ Smith v. Occidental etc. S. S. Co., 99 Cal. 462, 34 Pac. 84.

¹⁷¹ Brewster v. Bours, 8 Cal. 505.

¹⁷² Weber v. Marshall, 19 Cal. 447.

¹⁷³ Brewer v. Hyndman, 18 N. H. 9.

¹⁷⁴ Id.

¹⁷⁵ Kiel v. Reay, 50 Cal. 61.

CHAPTER XLV.

TRIAL IN GENERAL.

§ 1130. **What constitutes.**—All actions are tried in one of three ways: 1. If it be an action at law, and a jury is not waived, it will be tried by a jury; 2. All equity actions are tried by the court; 3. Trial by referee, which is generally done by consent of counsel, and order of reference being made in pursuance of such consent.¹ A trial is an examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue.² It is a judicial examination of the issues in an action, whether they be issues of law or of fact.³ The term has a general and a restricted meaning. In its general sense, it means the investigation and decision of matter in issue between parties before a competent tribunal; in its restricted sense, it means the investigation of the facts only.⁴

The mere appointment of a day when the trial shall begin is no part of the trial;⁵ but the calling and examination of jurors is a part of the trial.⁶ In Washington, it has been held that a view by the jury is no part of the trial, and that no evidence may be offered to the jury at that time.⁷

Generally speaking, the trial is to be deemed incomplete until all issues, both of law and of fact, have been determined, and until final judgment has been entered.⁸ The hearing and disposition of a motion for a new trial has been held to constitute a trial within the meaning of the California code.⁹

§ 1131. **Time of trial.**—The clerk must enter all causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar must remain upon the calendar until finally disposed of; provided, that causes may be dropped from

¹ See Cal. Code Civ. Proc., § 592.

² Tregambo v. Comanche Min. Co., 57 Cal. 501; Finn v. Spagnoli, 67 Cal. 330, 7 Pac. 746.

³ Mathews v. Clayton County, 79 Iowa, 510, 44 N. W. 722; State v. Kendall, 56 Kan. 238, 42 Pac. 711.

⁴ Jenks v. State, 39 Ind. 1.

⁵ State v. Abrams, 11 Or. 169, 8 Pac. 327.

⁶ Territory v. Kelly, 2 N. Mex. 292.

⁷ State v. Lee Doon, 7 Wash. 308, 34 Pac. 1103.

⁸ Hill v. State, 41 Tex. 253.

⁹ Cal. Code Civ. Proc., § 398; Finn v. Spagnoli, 67 Cal. 330, 7 Pac. 746.

the calendar by consent of the parties, and may be again restored upon notice.¹⁰ In those jurisdictions where terms of court obtain, the trial should be completed, at least so far as the introduction of testimony is concerned, at the term at which it is begun.¹¹ Counsel have a right to rely on the presumption that the causes upon the calendar will be heard in their regular order, and to act upon that belief in calculating how long they will have for preparation.¹² The clerk must keep, among the records of the court, a register of actions. He must enter therein the title of the action, with brief notes under it from time to time of all papers filed and proceedings had therein.¹³ When a jury is waived, and the whole case is tried before the court, the record should show whether the trial was confined to the equitable defenses alone, or included all the defenses in the cause. It should distinctly appear that the equitable defenses were first tried and disposed of; or if all the issues were tried and submitted together, that fact should appear. In the natural order, it is the duty of the court first to try and decide upon the equitable defense before proceeding with the action at law. So held in an action where the judgment enjoined the plaintiff from setting up a particular title, without finally deciding the title or right of possession of the parties to the land in controversy.¹⁴

§ 1132. Notice of trial.—Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action or a verdict or judgment as the case may require; provided, however, if the issue be tried as an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial.¹⁵ In North Dakota, to entitle a party to an action in the district court in which issue has been joined to bring such issue to trial at a term of court, it is necessary that, prior to such term, he shall furnish the clerk of the court with a note of the issue to be tried, and shall also serve his opponent with a notice of trial.¹⁶

¹⁰ Cal. Code Civ. Proc., § 593.

¹¹ *Butler v. McMillen*, 13 Kan. 385.

¹² *Belmont v. Erie R. R. Co.*, 52 Barb. 637.

¹³ Cal. Code Civ. Proc., § 1052.

¹⁴ *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365.

¹⁵ Cal. Code Civ. Proc., § 594.

¹⁶ N. Dak. Rev. Codes, § 5422; *Oswald v. Moran*, 9 N. Dak. 170, 82 N. W. 741.

As to notice of trial before a justice of the peace, the California code^{16a} makes the following provision: "When all the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix the day for the trial of said cause, whether the issue is one of law or fact, and give notice thereof to the parties to the action who have appeared, but in case any of the parties are represented by an attorney, then to such attorney. Such notice shall be in writing, signed by the justice, and substantially in the following form:

"In the justice's court, . . . township [or city, or city and county], county, or city and county of . . . , state of California, . . . , plaintiff, v. . . . , defendant.

"To . . . , plaintiff, or . . . , attorney for plaintiff, and to . . . , defendant, or . . . , attorney for defendant.

"You and each of you will please take notice that the undersigned justice of the peace before whom the above-entitled cause is pending, has set for hearing the demurrer of . . . , filed in said cause [or has set the said cause for trial, as the case may be], before me at my office in said township [or city, or city and county], at . . . o'clock . . . M., on the . . . day of . . . , 19..

"Dated this . . . day of . . . , 19..

[SIGNED] . . . , Justice of the Peace."

The only object of a notice of trial is to give the party upon whom it is served an opportunity to prepare for trial. And a notice of trial, erroneous as to the day of trial is nevertheless sufficient, if, when read in the light of other information which the law gives, it truly informs the party of the time and place of trial.¹⁷

§ 1133. Continuance.—The jurisdiction to hear and determine a cause or proceeding involves the power to postpone the time of hearing for good cause, unless prohibited by statute.¹⁸ A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. A trial shall be postponed when

^{16a} Cal. Code Civ. Proc., § 850, as amended 1909, p. 968. Co., 3 N. Dak. 177, 53 N. W. 173.

¹⁸ Curtis v. Underwood, 101 Cal.

¹⁷ Smith v. Northern Pacific R. R. 661, 36 Pac. 110.

it appears to the court that the attorney of record, the party, or the principal witness is actually engaged in attendance upon a session of the legislature of the state, as a member thereof, but not necessarily in case of such absence of a partner of the attorney who has had full control and conduct of the case.¹⁹ The court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.²⁰ The cause having come on for trial, one of the parties, not being ready for such trial, may move the court, upon affidavit, for a continuance on any one of the following grounds: 1. Absence of witnesses or witness; 2. For any other reason which would, if the case were forced to trial, be subversive of the ends of justice—e. g. sickness of counsel, or of the parties, or a party, to the action, etc.

Courts usually require, and ordinarily should require, a showing to be made by affidavits, in order to continue causes for the term, when such continuance is objected to by either party; but when a state of affairs exists that is notorious, and about which there could be no conflict (e. g. the destruction by fire of so much of the city where the court was held as to render it impossible to find a suitable room in which the court could meet), the court is authorized of its own motion to continue the causes for the term.²¹

The granting or refusing a continuance is in the sound discretion of the court, and not subject to review, except in cases of gross abuse of that discretion;²² and it is not abuse where no

¹⁹ *Barker etc. v. Murman*, 20 Colo. App. 354, 78 Pac. 1071.

²⁰ Cal. Code Civ. Proc., § 595; Ariz. Civ. Code, par. 1383; Idaho Rev. Codes, § 4372; Mont. Rev. Codes, § 7036; Nev. Comp. Laws, § 3255; Or. B. & C. Codes, § 115; Utah Rev. Stats. § 3133; Wash. Bal. Codes § 4977; Wyo. Rev. Stats., § 4297.

²¹ *Ex parte Larkin*, 11 Nev. 90.

²² *Frank v. Brady*, 8 Cal. 47; *Musgrove v. Perkins*, 9 Cal. 211; *Pilot Rock Creek Canal Co. v. Chapman*,

11 Cal. 161; *People v. Gaunt*, 23 Cal. 156; *Griffin v. Polhemus*, 20 Cal. 180; *Hastings v. Hastings*, 31 Cal. 95; *Harper v. Lamping*, 33 Cal. 641; *Carey v. Philadelphia etc. Petroleum Co.*, 33 Cal. 694; *People v. Wade*, 118 Cal. 673, 50 Pac. 841; *Freleigh v. State*, 8 Mo. 606; *Scogin v. Huds-peth*, 3 Mo. 123; *Chamber v. Lane*, 5 Mo. 289; *Beatty v. Sylvester*, 3 Nev. 228; *Choate v. Bullion Min. Co.*, 1 Nev. 73; *Ogden v. Payne*, 5 Cow. 15; *Barker v. Haskell*, 9 Cush. 218; *Leg-*

legal showing is made.²³ And this discretion may be exercised at any stage of the proceedings, on such terms as are just.²⁴ Courts are extremely liberal in granting adjournments.²⁵ It is error to refuse a continuance when a good cause is shown.²⁶ An affidavit showing the continued illness of the defendant, and that he cannot attend the trial or have his deposition taken without serious risk to his life, entitles him to a continuance.²⁷ But even then, where the action of the court in refusing a continuance approaches an arbitrary exercise of discretion, the proper course of the party is to move for a new trial.²⁸ And the only way of presenting an order refusing a continuance for review is by bill of exceptions.²⁹ A continuance relating back may be entered at any time to effect the purposes of justice.³⁰

The codes generally contain special provisions as to continuances in justices' courts.³¹ No notice of an application for continuance is usually given; the application is generally made when the cause comes on for trial. Sometimes, however, the application is made before the day of trial, so that no preparation for trial need be made. Affidavits for a continuance on the ground of absence of witnesses should be made by the defendant himself, or by some one else who has direct knowledge of the facts.³² Upon the overruling of a demurrer, a justice may grant a continuance of two days' time for the defendant to answer.³³ A justice granting the request of a defendant for a continuance

gett v. Boyd, 3 Wend. 376; Congar v. Galena etc. R. R. Co., 17 Wis. 477; Gaines v. White, 1 S. Dak. 434, 47 N. W. 524; Life Ins. Co. v. Gisborne, 5 Utah, 319, 15 Pac. 253; Dawson v. Coston, 18 Colo. 493, 33 Pac. 189; Kneebone v. Kneebone, 83 Cal. 645, 23 Pac. 1031; Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Berger v. Harrison, 1 Overt. 483; Baumberger v. Arff, 96 Cal. 261, 31 Pac. 53; Young v. Patton, 9 Or. 195; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925; Catlin v. Harris, 7 Wash. 542, 35 Pac. 385; Zelinsky v. Price, 8 Wash. 256, 36 Pac. 28; Doll v. Stewart, 30 Colo. 320, 70 Pac. 326.

²³ In re Lovern, 137 Cal. 680, 70 Pac. 783; Purse v. Purcell, 43 Colo. 50, 95 Pac. 291.

²⁴ Okla. Civ. Code, § 328; Mc-

Mahan v. Norick, 12 Okla. 125, 69 Pac. 1047.

²⁵ Turner v. Morrison, 11 Cal. 21.

²⁶ Moore v. McCulloch, 6 Mo. 444; Tunstall v. Hamilton, 8 Mo. 500.

²⁷ Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976.

²⁸ Pilot etc. Co. v. Chapman, 11 Cal. 161.

²⁹ Jacks v. Buell, 47 Cal. 162; People v. Ashnauer, 47 Cal. 98; Interstate Land etc. Co. v. Patton, 21 Colo. 503, 42 Pac. 673.

³⁰ Sheppard v. Wilson, 6 How. 260, 12 L. Ed. 430.

³¹ Cal. Code Civ. Proc., §§ 873, 877.

³² People v. Jenkins, 56 Cal. 4.

³³ Hall v. Kerrigan, 135 Cal. 4, 66 Pac. 868; Cal. Code Civ. Proc., §§ 872, 874.

upon the ground that his attorney would be engaged in another court, if error against the plaintiff, is merely error as to jurisdiction, and does not make void a judgment for plaintiff.³⁴

§ 1134. Contents of affidavit.—Where the continuance is asked for on the ground of the absence of a witness, the affidavit must show: 1. That the evidence designed to be obtained is material; 2. That the evidence designed to be obtained is not cumulative, or that affiant cannot prove the same matters by other witnesses;³⁵ 3. That he cannot safely proceed to trial without his evidence;³⁶ 4. The affidavit should show that there is a reasonable prospect of obtaining the testimony at some future time;³⁷ an affidavit which states that the applicant knows of no witnesses in the state by whom the material facts can be proved is insufficient;³⁸ 5. That due diligence has been used to procure the witness,³⁹ and the character of that diligence,⁴⁰ and also that the witness cannot be readily reached by attachment;⁴¹ and the court may also require the moving party to state on affidavit the evidence which he expects to obtain;⁴² 6. That application is not made for delay merely;⁴³ 7. That a party has a good and substantial cause of action or defense on the merits.⁴⁴ Where an affidavit for a continuance was filed, the court should not permit it to be strengthened by other affidavits of the same person.⁴⁵

³⁴ *Disque v. Herrington*, 139 Cal. 1, 72 Pac. 336.

³⁵ *People v. Quincy*, 8 Cal. 89; *People v. Jenkins*, 56 Cal. 4; *Pierce v. Payne*, 14 Cal. 419; *People v. Gaunt*, 23 Cal. 156; *Pope v. Dalton*, 31 Cal. 218. Compare *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933.

³⁶ *Harrell v. Durrance*, 9 Fla. 490.

³⁷ *Richardson v. People*, 31 Ill. 170; *Harper v. Lamping*, 33 Cal. 641; *People v. Ashnauer*, 47 Cal. 98; *People v. Cleveland*, 49 Cal. 577; *State v. Rosemurgey*, 9 Nev. 308.

³⁸ *Thompson v. Lord*, 14 Iowa, 591.

³⁹ Cal. Code Civ. Proc., § 595; Ariz. Civ. Code, pars. 1383, 1386; Idaho Rev. Codes, § 4372; Mont. Rev. Codes, § 7036; Nev. Comp. Laws, § 3255; Or. B. & C. Codes, § 115; Utah Rev. Stats., § 3133; Wash. Bal. Codes, § 4977; Wyo. Rev. Stats.,

§ 4279; *Kuhland v. Sedwick*, 17 Cal. 123; *People v. Williams*, 24 Cal. 31; *People v. Jenkins*, 56 Cal. 4; *Stone v. Chicago etc. R. R. Co.*, 3 S. Dak. 330, 53 N. W. 189; *Kelly v. Saunders*, 35 Mo. 200; *Miles v. Danforth*, 32 Ill. 59; *Mugg v. Graves*, 22 Ind. 236.

⁴⁰ *People v. Thompson*, 4 Cal. 240.

⁴¹ *People v. Weaver*, 47 Cal. 106; *State v. Gray*, 19 Nev. 212, 8 Pac. 456.

⁴² Cal. Code Civ. Proc., § 595; *Bruton v. State*, 21 Tex. 337; *Winslow v. Bradley*, 15 Wis. 394.

⁴³ *People v. Thompson*, 4 Cal. 238.

⁴⁴ *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

⁴⁵ *State v. Buckner*, 25 Mo. 167. As to necessity of affidavit, see *Stewart v. Sutherland*, 93 Cal. 270, 28 Pac. 947; *McGrath v. Tallent*, 7 Utah, 256, 26 Pac. 574.

An affidavit for a continuance on account of the absence of a party, under section 594 of the California Code of Civil Procedure, need not show the materiality of the evidence expected to be obtained.⁴⁶

The affidavit upon which the application is founded must state all the facts required in the statute to be stated.⁴⁷ It must state particular facts, as distinguished from legal conclusions.⁴⁸ A motion based on the absence of a witness whose knowledge of the facts he was desired to relate was purely hearsay is properly denied;⁴⁹ and the materiality of the testimony of an absent witness must be made to clearly appear.⁵⁰ The affidavit is fatally defective when it fails to show that there are not other persons by whom the defendant could prove the same facts that he expected to prove by the absent witness.⁵¹ Where a party opposing a continuance asked for on the ground of the absence of a material witness admits that the witness, if present, would testify as stated in the moving affidavit, the trial court, under the Oklahoma statute,⁵² commits no error in refusing the continuance;⁵³ and under the California statute the trial court must refuse such continuance.⁵⁴

§ 1135. Continuance, when refused.—A continuance will not be granted solely to allow a party to obtain evidence on a point rendered immaterial by his own answer.⁵⁵ Continuance will not be granted to the prejudice of the opposite party when the applicant has been guilty of negligence.⁵⁶ A party who takes no steps to obtain the deposition of a witness whom he knows to be a seafaring man is not entitled to a continuance for absence of such witness;⁵⁷ or in some instances, where a deposition has not

⁴⁶ *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636. Contra, see *McMahan v. Norick*, 12 Okla. 125, 69 Pac. 1047.

⁴⁷ *Kent v. Favor*, 3 N. Mex. 218 (347), note 220, 5 Pac. 470.

⁴⁸ *Deemer v. Falkenburg*, 4 N. Mex. 57 (149), 12 Pac. 717.

⁴⁹ *Longnecker v. Shields*, 1 Colo. App. 264, 28 Pac. 659.

⁵⁰ *Dawson v. Coston*, 18 Colo. 493, 33 Pac. 189.

⁵¹ *State v. Marshall*, 19 Nev. 240, 8 Pac. 672. As to instances of sufficient affidavits, see *Hewes v. Andrews*, 12 Colo. 161, 20 Pac. 338;

Danielson v. Gude, 11 Colo. 87, 17 Pac. 283; *State v. Gray*, 19 Nev. 212, 8 Pac. 456.

⁵² Okla. Stats., § 4449.

⁵³ *Chandler v. Colcord*, 1 Okla. 268, 32 Pac. 330; *Hartford Fire Ins. Co. v. Hammond*, 41 Colo. 323, 92 Pac. 686.

⁵⁴ Cal. Code Civ. Proc., § 595; *Hartford Fire Ins. Co. v. Hammond*, 41 Colo. 323, 92 Pac. 686.

⁵⁵ *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

⁵⁶ *Dulany v. Boston*, 2 Har. (Del.) 350.

⁵⁷ *Deanes v. Scriba*, 2 Cal. 415.

yet been returned.⁵⁸ So where a party neglects to subpœna a witness, relying on his promise to attend,⁵⁹ and where the opposite party admits that the witness will testify as stated by the affiant.⁶⁰ Where the absent witness was a fugitive from justice, and there was no probability of his presence at the next term, and his deposition taken at examination might have been used by the party applying for a continuance, there was no error in refusing the application.⁶¹ Nor will the court abuse its discretion in refusing a continuance where the facts shown on the application cast suspicion on the good faith of the applicant.⁶² It is not error to refuse a continuance on account of absence of a witness, when it does not appear that the attendance of the witness can be procured in a reasonable time,⁶³ nor to refuse a continuance on the grounds of surprise.⁶⁴

§ 1136. Election contests.—A county judge, at chambers, has no power to grant a continuance in an election contest, where trial was set at a future day.⁶⁵ In such contests, however, the court may, of its own motion adjourn the special session for several days, on account of prior engagements rendering the adjournment necessary, and the court does not lose jurisdiction thereby.⁶⁶

§ 1137. Grounds for continuance.—The absence of evidence is a ground for continuance, the same in actions of an equitable as in those of a legal character.⁶⁷ But a continuance for absence of witnesses will not be granted where only two days have intervened between issuance of subpœna and application for continuance, and the witnesses reside in a remote part of the county.⁶⁸ Nor where the affidavit states that subpœnas for the absent witnesses had been placed in the sheriff's hands four days before the application, but that he had been unable to find the

⁵⁸ *Abrook v. Ellis*, 6 Cal. App. 451, 92 Pac. 396.

⁵⁹ *Freeland v. Howell*, Anth. N. P. 272.

⁶⁰ *Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328.

⁶¹ *People v. Cleveland*, 49 Cal. 577.

⁶² *People v. Mortimer*, 46 Cal. 114.

⁶³ *People v. Lewis*, 64 Cal. 401, 1 Pac. 490. See *Dawson v. Coston*, 18 Colo. 493, 33 Pac. 189.

⁶⁴ *Merrill v. O'Brien*, 48 Wash. 415, 93 Pac. 917.

⁶⁵ *Norwood v. Kenfield*, 34 Cal. 329.

⁶⁶ *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947.

⁶⁷ *Howard v. Freeman*, 3 Abb. Pr. (N. S.) 292. See *Robertson v. Woolley*, 6 Wash. 156, 32 Pac. 1060; *Dupont v. McAdow*, 6 Mont. 226, 235, 9 Pac. 925.

⁶⁸ *Parker v. Campbell*, 21 Tex. 763.

witnesses.⁶⁹ Newly discovered evidence is also a ground for continuance.⁷⁰ So is surprise a ground for continuance,⁷¹ as by withdrawal of demurrer, and a replication filed in its stead,⁷² or where a pleading is amended in a matter of substance.⁷³ So on reapportionment of causes.⁷⁴ Absence of counsel on account of sickness, where other competent counsel cannot be had, is a good ground for continuance.⁷⁵ So where counsel is absent on account of sickness in his family, and the party knows nothing of it until the morning of the trial, the court should at least continue the cause until other counsel can familiarize themselves with the facts.⁷⁶ The attendance of a member of the legislature on its sessions may be a ground for a continuance of a cause in which he is a defendant.⁷⁷ But it has been held in California that the voluntary absence of a defendant on important business is no ground for a continuance;⁷⁸ and likewise in case of absence of an owner of an undivided part of real estate which is the subject of condemnation proceedings.⁷⁹

Where in a suit against partners, on a joint claim against them, it appeared that one had been declared bankrupt, but had not yet obtained his discharge, and the case was continued as to him, it was held, on motion for continuance by the other partner, that the cause could not proceed as to him until the disposition of the bankrupt proceedings against his copartner.⁸⁰

§ 1138. Instances where grounds insufficient.—Voluntary absence of defendant on important business is no ground for continuance;⁸¹ nor is mistaken advice of counsel to his client not to prepare for trial.⁸² Voluntary absence of attorney is no cause for continuance;⁸³ and a party to an action has no abso-

⁶⁹ *Jacks v. Buell*, 47 Cal. 162.

⁷⁰ *Berry v. Metzler*, 7 Cal. 418;
Alleorn v. Rafferty, 4 J. J. Marsh, 220.

⁷¹ *Ross v. Austill*, 2 Cal. 183;
People v. Holden, 28 Cal. 124; *Schell-*
hous v. Ball, 29 Cal. 608; cited in
Doyle v. Sturla, 38 Cal. 456.

⁷² *Risher v. Thomas*, 1 Mo. 739.

⁷³ *Tunstall v. Hamilton*, 8 Mo. 500;
Tourtlot v. Tourtelot, 4 Mass. 506.

⁷⁴ *Elliott v. Cadwallader*, 14 Iowa,
67.

⁷⁵ *People v. Logan*, 4 Cal. 188;
Eltzroth v. Ryan, 91 Cal. 584, 27 Pac.
932.

⁷⁶ *Thompson v. Thornton*, 41 Cal.
626.

⁷⁷ *Johnson v. Offutt*, 4 Mete. (Ky.)
19.

⁷⁸ *Wilkinson v. Parrott*, 32 Cal. 102.

⁷⁹ *Portland etc. Ry. v. Ladd*, 47
Wash. 88, 91 Pac. 573.

⁸⁰ *Tinkum v. O'Neale*, 5 Nev. 93.

⁸¹ *Wilkinson v. Parrott*, 32 Cal.
102. As to continuance granted on
account of illness of plaintiff, see
Jaffe v. Lilienthal, 101 Cal. 275, 35
Pac. 636.

⁸² *Musgrove v. Perkins*, 9 Cal. 211.

⁸³ *Haight v. Green*, 19 Cal. 113;

lute right to a continuance because of the absence of his attorney, who is engaged in the trial of a case in another court, but it is within the sound discretion of the trial court to grant or refuse the continuance.⁸⁴ When through the inadvertence of a party he is unable to produce evidence which is in his own possession, no continuance will be granted.⁸⁵ The absence of a transient witness whom the party had no opportunity of examining before the trial is no excuse for putting off the trial. It is no ground for a continuance that a material witness for the applicant is in another county in this state, where the applicant has taken no steps to procure his deposition, because he saw the witness several weeks before, and the witness promised to be present at the trial;⁸⁶ nor that the applicant was informed by his attorneys, several weeks before the term, that the case could not be tried at that term, and that such attorneys reside at a great distance, and are not present, and their attendance cannot be procured.⁸⁷ The fact that a case has been continued before may be taken into consideration.⁸⁸

§ 1139. Insufficient statement.—In an application for continuance, the allegation that a party has used all the diligence in his power is not sufficient; it should be shown to the court of what such diligence consisted, whether by exhausting the process of the court or otherwise.⁸⁹ For the same reason, if a party states, on information and belief, that he can procure the personal attendance of a witness from a distant foreign country, he should set forth the reasons for the belief and the nature of his information, that the court may decide whether or not there is a reasonable ground to believe that the witness will attend.⁹⁰ Inconvenience to prepare for hearing is not a good ground for postponement of the argument.⁹¹ But parties will not be forced to trial without a reasonable opportunity to prepare therefor, and the court would abuse its discretion in refusing a contin-

Adams v. Adams, 1 Duval, 167. See Skagit Ry. etc. Co. v. Cole, 2 Wash. 57, 25 Pac. 1077; Catlin v. Harris, 7 Wash. 542, 35 Pac. 385; Zelinsky v. Price, 8 Wash. 256, 36 Pac. 28.

⁸⁴ Baumberger v. Arff, 96 Cal. 261, 31 Pac. 53; People v. Collins, 75 Cal. 411, 17 Pac. 430. See Brooks v. Johnson, 122 Cal. 572, 55 Pac. 423.

⁸⁵ Kuhland v. Sedgwick, 17 Cal. 123.

⁸⁶ Lightner v. Menzel, 35 Cal. 452.

⁸⁷ Id.

⁸⁸ Mogollon etc. Co. v. Stout, (N. Mex.), 91 Pac. 724.

⁸⁹ People v. Thompson, 4 Cal. 241; Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.

⁹⁰ People v. Francis, 38 Cal. 183.

⁹¹ Bank of Salina v. Alvord, 32 N. Y. 684.

uance, or in refusing to set aside a judgment taken because of hasty action in setting a case for trial at an unreasonably early day, whereby a party has been unable to be present or to prepare for trial.⁹² Where the affidavit for continuance failed to show the materiality of the testimony of the absent witness, but it appeared that the court in deciding the motion assumed that it did, and no objections were made on that ground by the opposite party, it was held that the objection could not be made for the first time on appeal.⁹³

A statement is insufficient where it does not show that the defendant could not have proved the facts by other witnesses.⁹⁴

§ 1140. Stipulation for continuance.—A continuance may be granted on consent of parties, reduced to a written stipulation therefor; but an agreement of counsel for the continuance of a cause not reduced to writing will not be regarded by the court.⁹⁵ In justices' courts the court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.⁹⁶ A defendant dangerously ill may be required, as a condition of postponing the trial, to stipulate that his death before the next circuit shall not abate the cause.⁹⁷

§ 1141. Preventing a continuance.—If the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.⁹⁸ The affidavit thereupon becomes evidence, but not conclusive proof of its contents.⁹⁹ The admissions of a party wishing to avoid a continuance must be broad enough to cover all the material facts to which the absent witness would testify, as alleged in the affidavit for a continuance.¹⁰⁰ The admission of counter-affidavits, on a motion for a continuance, is in the sound discretion of the court.¹⁰¹ Where a continuance was granted for seven days in an

⁹² *Dusy v. Prudom*, 95 Cal. 646, 30 Pac. 798.

⁹³ *State v. Chapman*, 6 Nev. 320.

⁹⁴ *People v. Lang*, 142 Cal. 482, 76 Pac. 232.

⁹⁵ *Peralta v. Marica*, 3 Cal. 187.

⁹⁶ Cal. Code Civ. Proc., § 875.

⁹⁷ *Ames v. Webber*, 10 Wend. 575.

⁹⁸ Cal. Code Civ. Proc., § 595;

Boggs v. Merced Min. Co., 14 Cal. 358; *O'Neil v. New York etc. Min. Co.*, 3 Nev. 141.

⁹⁹ *Id.*

¹⁰⁰ *Peck v. Lovett*, 41 Cal. 521.

¹⁰¹ *Riggs v. Fenton*, 3 Mo. 28; *Anonymous*, 3 Day, (Conn.) 308, Fed. Cas. No. 434. See *Kneebone v. Kneebone*, 83 Cal. 645, 23 Pac. 1031.

election contest, against the objections of respondent, and without affidavits, it was held that it operated as a discontinuance of the proceeding.¹⁰²

§ 1142. **Waiver of rights.**—Where the plaintiff to an action, with full knowledge of his right to proceed to trial only at his own option against the defendants served, and of the fact that no service had been made upon one of the defendants, who had left the state, and that no issue had been joined as to him, first agreed with the defendants served, without reservation, that the issue between him and them should be set for trial at a particular day, then asked and obtained a continuance, for the reason solely that his witnesses were not present, and in consideration of such continuance by consent agreed of record that the case should be set for trial and be tried on a particular day, it was held that this state of facts clearly constituted a waiver by plaintiff of his right to delay the trial until said other defendant had been served or issue joined in respect to him.¹⁰³ Pending the trial of an action against two defendants, the court granted a continuance as to one of them, and the plaintiff, without objection, proceeded with the trial against the other, in whose favor a judgment was subsequently rendered, and it was held that the plaintiff had waived the right to object to the irregularity at the trial by reason of the continuance.¹⁰⁴

§ 1143. **Costs.**—In general, taxable costs are the only terms, the payment of which should be imposed as a condition of putting off a trial,¹⁰⁵ and only costs incurred with reference to the particular circuit.¹⁰⁶ And when, after postponement on defendant's application, the cause went over again because of the judge's illness, he was not properly chargeable with costs of the circuit.¹⁰⁷ It is so where the cause goes over at the circuit because plaintiff is not ready.¹⁰⁸

¹⁰² Keller v. Chapman, 34 Cal. 635.

¹⁰³ Meagher v. Cagliardo, 35 Cal. 602.

¹⁰⁴ Myers v. McDonald, 68 Cal. 162, 8 Pac. 809.

¹⁰⁵ Hall v. Dwinell, 10 Wend. 628; Tatton v. Blackwell, 2 Overt. 114, Fed. Cas. No. 10831. See Tacoma Nat. Bank v. Peet, 9 Wash. 222, 37

Pac. 426; State v. Second Judicial Dist. Court, 10 Mont. 456, 26 Pac. 182; Eltzroth v. Ryan, 91 Cal. 584, 27 Pac. 932.

¹⁰⁶ Morell v. Gould, 5 Hill, 553.

¹⁰⁷ Hanford v. McNair, 2 Wend. 286; Bagley v. Ostrom, 5 Hill, 516.

¹⁰⁸ Jackson v. Breese, 6 Cow. 42.

TRIAL—FORMS.

§ 1144. Demand for inspection and copy.

Form No. 380.

[TITLE.]

Take notice, that C. D., the defendant above named, hereby demands of the plaintiff above named an inspection and copy, or permission to take copy, of that certain deed [or, other instrument or book, describing the same with such particularity as to enable the other party to distinguish it], which said [name instrument or book] is in the possession and under control of the plaintiff, and contains evidence relating to the merits of the defense in this action.

[DATE.]

C. D.

To A. B., Esq., Plaintiff, and E. F., Esq., his Attorney.

§ 1145. Stipulation to admit documents.

Form No. 381.

[TITLE.]

It is hereby stipulated and agreed, that the documents hereunder described [and to which we have respectively set our names on the first and last pages thereof] shall and may be admitted and read and used as evidence at the trial of this cause; and that such of the said documents as are described as copies or extracts shall be deemed and taken to be, and shall be used as, true copies or extracts, without further proving the same; and that such copies or extracts shall and may be read in evidence as primary and the best evidence, and not as secondary evidence; and that the original documents shall not be required to be produced, or any evidence as to the same, or of the proper custody thereof, or as to the non-production of the same; and no objection shall be taken to the reading as evidence the documents so marked, saving all just exceptions to the admissibility of the originals as evidence.

The following are the documents above referred to: [Describing them, and referring to a figure or letter indorsed.]

[DATE.]

[SIGNATURES.]

§ 1146. Notice to produce at trial.

Form No. 382.

[TITLE.]

Take notice, that you are hereby required to produce, on the trial of this cause, [a certain paper. Here describe the paper sought; or, if there are several, say:] the following described papers:

1. A deed bearing date of or about the . . . day of . . . , 19.., and executed or purporting to be executed, between M. N. and O. P., and to convey a farm in the town of . . .

2. All books of account kept by M. N. in his business at . . . , from the . . . day of . . . , 19.., to the . . . day of . . . , 19.., and containing entries relating to dealings between M. N. and O. P.

Also all other documents, letters, books, papers, and writings whatsoever, in your control, containing any entry, memorandum, or other matter in any wise relating to the matters in question in this cause.

And you are hereby notified that in case of your failure to produce the said [describing the papers] the defendant will introduce secondary evidence of their contents on the trial of this action.

[DATE.]

G. H., Attorney for Defendant.

[ADDRESS.]

[The most accurate description possible should be given of all documents desired.]

§ 1147. In justice court—Notice of trial of transferred action.

Form No. 383.

[TITLE.]

To A. B., the plaintiff in the above entitled action, and C. D., the defendant in said action:

You will please take notice, that the said action, transferred to the above-entitled court from the . . . court of the . . . township, in . . . , county of . . . , is set for trial before me, at my court-room, in said . . . township, in said . . . county, the . . . day of . . . , 19.., at . . . o'clock..M.

[DATE.]

J. P., Justice of the Peace of said . . . township.

§ 1148. Notice of trial and note of issue.

Form No. 384.

[TITLE OF COURT AND CAUSE.]

Please take notice, that the above entitled action will be brought to trial at the . . . term of the aforesaid court, to be held at the courthouse in the . . . of . . . , in the said county of . . . , on the . . . day of . . . next, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Dated . . . , 19..

Yours etc.,

E. F., Plaintiff's Attorney.

To G. H., Attorney for Defendant.

[Admission of service of above:] Service of a copy of above notice admitted this . . . day of . . . , 19..

G. H., Defendant's Attorney.

[The note of issue is usually attached to the notice of trial as follows:]

NOTE OF ISSUE IN THE ABOVE-ENTITLED CAUSE.

E. F., Plaintiff's Attorney.

G. H., Defendant's Attorney.

Issue of fact [or, law] for jury [or, court]. Joined . . . , 19..

Filed by E. F., Plaintiff's Attorney, . . . , 19..

M. N., Clerk.

§ 1149. Affidavit for continuance because of absence of witnesses.

Form No. 385.

[TITLE OF COURT AND CAUSE.]

[VENUE.]

C. D., being first duly sworn, says that he is the defendant in the above-entitled action; that issue was joined therein on the . . . day of . . . , 19.., and that this defendant has a valid defense in whole in said action [or, in part, specifying which part].

That this affiant has fully and fairly stated the case to G. H., Esq., his counsel herein, who resides at . . . , in said county, and that upon the statement thus made he is advised by said counsel that he has a valid and substantial defense to said action and to the whole thereof [or, to some specific part thereof, stating what part].*

That affiant has used due diligence to prepare for the trial of this action at the present term; that he caused a subpoena to be issued

herein on the . . . day of . . . , 19.., for service on L. M. and O. P. [or, otherwise, state what efforts were made to procure the attendance of the witnesses]; that the sheriff of said county, to whom said subpoena was on that day delivered, informs this affiant that said M. N. and said O. P. are now absent from this state and somewhere in . . . , state of . . . , having left this state about . . . , 19..; that their residence in this state is the town of . . . , county of . . . , and defendant has made inquiry in the neighborhood of their residence, and is informed that they are temporarily absent, but not expected to return for about . . . months.**

That said M. N. and O. P. are necessary and material witnesses, without whose testimony he cannot safely proceed to trial; and that no other evidence is at hand, nor witness nor witnesses in attendance or known to him, whose testimony could have been procured in time, upon whom he can safely rely to prove the particular facts that he expects to prove, and believes can be proved, by such absent witnesses above named, to maintain the issue in respect thereto on his part.

That after fully and fairly stating to his said counsel the facts which he expects to prove by said absent witnesses, he is advised by his said counsel, and verily believes, that he cannot safely go to trial without the testimony of each of them.

That neither of said witnesses is absent by this affiant's consent, connivance, or procurement; that they left without his knowledge; and soon after the joining of issue herein, each of them told this affiant personally that he expected to be in . . . county when the . . . term of this court should be held, and for that reason this affiant took no steps to procure their depositions to be used on the trial hereof.

Affiant further says that he expects to prove by said M. N. the following facts, viz.: [here state facts]; and by said O. P. the following facts: [state same].

That the grounds of his expectation that he can prove such facts by said witnesses are as follows: [State grounds; as, for instance, that each of said witnesses has stated to affiant that they could and would testify to said facts, or otherwise according to the fact.]

Affiant further says that if a continuance of the trial of this action [or, a postponement of the trial until . . . , 19..] be granted he will be able, as he believes and intends, to procure the attendance of said witnesses [or, will take the depositions of said witnesses for use on the trial].

[JURAT.]

C. D.

§ 1150. **The same—For unexpected absence or illness of witness.**

Form No. 386.

[Proceed as in last preceding form, substituting between (*) and (**) the following:]

That affiant has used due diligence to prepare for the trial of this action at the present term; that he expected to call as a witness on said trial one M. N., and that, two weeks before the first day of the present term affiant went to the residence of said witness, in the town of . . . , in the county of . . . , for the purpose of subpoenaing him to attend as a witness in said action, at said circuit; that he there learned that said witness had unexpectedly left home the day before, in order to go to the state of . . . , and intended to remain there about two months; and deponent further says, he had no knowledge that said witness was going to be absent from home, until he learned it when he went to subpoena said witness, as aforesaid.

[Or, That one M. N., who resides at . . . , was, on the . . . day of . . . , duly subpoenaed to attend the trial of this action; but that since the service of the said subpoena he has become seriously ill, and is now wholly unable to attend this court, or be present at the trial of this action in its order on the calendar. But deponent has been informed by R. S., the physician attending the said witness, and verily believes, that the said witness will be able to attend this court by the time of the next circuit, appointed to be held at, etc.]

[Make such incidental changes in the other statements of the preceding form as are necessary.]

§ 1151. **Affidavit for continuance because of absence of documentary evidence.**

Form No. 387.

[TITLE OF COURT AND CAUSE.]

[VENUE.]

C. D., being first duly sworn, says that he is the defendant in the above-entitled action; that issue was joined therein on the . . . day of . . . , 19.. ; and that this defendant has a valid defense in whole in said action [or, in part, specifying which part].

That this affiant has fully and fairly stated the case to G. H., Esq., his counsel herein, who resides at . . . , in said county, and that upon the statement thus made he is advised by said counsel that he has a valid and substantial defense to said action, and the whole thereof [or, to some specific part thereof, stating what part].*

That there are in existence certain books [or, documents, describing them—e. g. consisting of the business account-books kept by the plaintiff in his business during the year 19..] without examination and production of which upon the trial affiant cannot safely proceed to the trial of this cause, as he is advised and verily believes, after fully and fairly stating to his said counsel the facts which he expects to prove by said books [or, documents].

That said books [or, documents] are now, as he is informed and verily believes, [state where and in whose custody they are believed to be]; that they are not absent by the affiant's procurement, consent, or connivance; that up to the . . . day of . . . , 19.., said books were [state where], and could have been produced here upon the trial of this case, and affiant relied upon such fact, and was not informed of their removal, nor did he learn thereof until the . . . day of . . . , 19.., when it was too late to secure their return; that said books [or, documents] contain entries made by the plaintiff showing credits for money paid by defendant to the plaintiff upon the cause of action stated in the complaint [or, otherwise, state the nature and contents of the books or documents]; and that affiant expects to prove thereby [here state the facts, to be proven fully]; that the grounds of his expectation that he can prove such facts by said books are as follows: [Here state grounds.]

That the affiant has used his best exertions to procure the presence of said books upon the trial; that he [here state what efforts were used, as by giving notice to produce or otherwise, or, if the opposing party gave assurance of their production, state the fact.]

That if a continuance of the trial of this cause be granted, affiant will be able to produce said books at the next term of this court, or will be able to prove their contents by the taking of depositions.

[JURAT.]

A. B.

§ 1152. Affidavit for continuance because of sickness of sole counsel.

Form No. 388.

[Proceed as in last preceding form to the (*).] That affiant has used due diligence to prepare for the trial of this case at the present term. [State diligence used.] That G. H., Esq., was and is his sole counsel in the case, and is the only attorney conversant with the facts of the case, and that said G. H. was fully prepared and was relied upon by affiant to try said case at this term, but that on or about the . . . day of . . . , 19.. , said G. H. was taken seriously ill, and has been ever since that time, and now is, very ill, and most of the time is in a delirious condition, and that all conversation with him upon business matters has been prohibited by the physician in charge of the case.

That said G. H. has possession of all of the papers in said case, including [here state, if there are any, important documents and their nature], and that it is, and has been, impossible for any other attorney to become cognizant of the facts of said case and to prepare for trial thereof at this term, because of the condition of the said G. H., and because of the complexity of the case and the many questions involved. That said case involves [here state facts at length, showing any peculiar difficulty or complexity in the case and other material facts tending to show impossibility of another attorney being able to prepare for the trial].

That said G. H. is now improving in health, and that affiant fully believes that if a postponement of the trial of this case be granted, said G. H. will be able to try the same at the next term, and that if this should be impossible, affiant will be able to procure, and will procure, another attorney to try said cause.

[JURAT.]

C. D.

[Add corroborating affidavit by physician.]

§ 1153. Motion for continuance.

Form No. 389.

[TITLE OF ACTION.]

Now comes the defendant in the above-entitled action and moves the court to continue the trial thereof to the next term of this court [or, to some stated time later in the term], upon the affidavit of C. D., attached hereto and made a part hereof.

[Attach affidavit.]

. . . , Attorney for Defendant.

§ 1154. Order continuing or postponing trial.

Form No. 390.

[TITLE.]

On reading and filing the affidavit of C. D., and on motion of O. P., of counsel for . . . , and L. M., of counsel for . . . , [or, no one appearing] in opposition:

Ordered, that the trial of this action be postponed until the . . . instant, on the payment within three days from date of ten dollars costs [or, to the . . . term of this court, on the payment of costs of the present term, to be taxed instanter]; and [here state other terms, if any, imposed; such as, on the defendant's consenting that the testimony of M. N. be taken conditionally before S. T., referee, on . . . days' notice].

[DATE.]

By the Court:

J. K., Judge.

CHAPTER XLVI.

TRIAL BY THE COURT.

§ 1155. **In general.**—Either party may bring an issue to trial, or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code.¹ Waiver of jury trial must appear affirmatively, and not by implication. And notwithstanding the waiver, the court may direct an issue of fact to be tried by a jury.² A jury may sit and hear plaintiff's testimony, and, motion for nonsuit being made, be discharged on stipulation that if the motion is denied the court may proceed without a jury, and the court then is the sole judge of the facts, as though no jury had been called.³

Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions:⁴ 1. By failing to appear at the trial. So in replevin, when the action is called;⁵ and filing an answer does not operate as an appearance at the trial.⁶ 2. By written consent, in person or by attorney, filed

¹ Cal. Code Civ. Proc., § 594.

² *Smith v. Pollock*, 2 Cal. 92. See, also, *Russell v. Elliott*, 2 Cal. 245; *Exline v. Smith*, 5 Cal. 112. But see Cal. Code Civ. Proc., § 631; *Doll v. Anderson*, 27 Cal. 248; *Fleming v. Wilson*, 39 Wash. 106, 80 Pac. 1104.

³ *McDougall v. McDougall*, 135 Cal. 316, 67 Pac. 778.

⁴ Cal. Code Civ. Proc., § 631. See *Farwell v. Murray*, 104 Cal. 467, 33 Pac. 199.

⁵ *Waltham v. Carson*, 10 Cal. 178. In ejectment, see *Doll v. Feller*, 16 Cal. 433. Generally, see *Gillespie v. Benson*, 18 Cal. 409.

⁶ *Zane v. Crowe*, 4 Cal. 112.

with the clerk. 3. By oral consent in open court, entered on the minutes.⁷ Equitable cases are properly triable by the court, and the trial of issues of fact by a jury cannot be claimed as of right, but rests in the discretion of the court;⁸ and in chancery cases parties are not entitled to a trial by jury.⁹ And in such cases the court may disregard the verdict of a jury.¹⁰ In a suit between partners for a dissolution, accounting, etc., where there are questions of fact which might properly be tried by a jury, yet if the cause is actually tried by the court, and all the testimony in, and the cause finally submitted to the court for its determination, it is then too late to order a trial by jury. It is the duty of the judge to decide the questions submitted, and it is the right of the parties respectively to have such decision.¹¹ But it is no error for a judge to hear arguments at chambers after a cause has been submitted to him, and thereupon decide the case.¹² In Missouri, proceedings against a constable for delinquency must be heard by the court.¹³ In a case for specific performance and damages, where specific performance cannot be adjudged, the case may be retained and sent to a jury to award damages.¹⁴ And so in a case to reform a policy and recover for a loss.¹⁵ Both legal and equitable relief may be sought in the same action, but when plaintiffs move a trial at a special term, and defendants demand a jury trial, the court should direct the cause to be tried by the jury.¹⁶ So relief was refused and complaint dismissed where plaintiff elected to sue as in equity, and then, on failure at trial, wished the case retained and tried as at law.¹⁷ On mixed issues involving a demand for

⁷ Cal. Code Civ. Proc., § 631.

⁸ *Moffat v. Moffat*, 10 Bosw. 468; *Moffat v. Mount*, 17 Abb. Pr. 4; *McCarty v. Edwards*, 24 How. Pr. 236; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490.

⁹ *Walker v. Sedgwick*, 5 Cal. 192; *Cahoon v. Levy*, 5 Cal. 294; *Koppikus v. State Capitol Commissioners*, 16 Cal. 248.

¹⁰ *Goode v. Smith*, 13 Cal. 84; *Knapp v. Day*, 4 Colo. App. 21, 34 Pac. 1008; *Kirtley v. Marshall etc. Mining Co.*, 8 Colo. 279, 6 Pac. 920.

¹¹ *O'Brien v. Bowes*, 4 Bosw. 657.

¹² *City of San Jose v. Shaw*, 45 Cal. 178.

¹³ *Hart v. Robinett*, 5 Mo. 11; *Hart v. Spence*, 5 Mo. 17.

¹⁴ *Barlow v. Scott*, 24 N. Y. 40; *Stevenson v. Buxton*, 37 Barb. 13, 15 Abb. Pr. 352. See, also, *See v. Partridge*, 2 Duer, 463.

¹⁵ *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357, 12 Abb. Pr. 414, 21 How. Pr. 296; reversing 10 Abb. Pr. 34; *Van Valen v. Lapham*, 13 How. Pr. 240; overruling *Van Beck v. Village of Rondout*, 15 Abb. Pr. 48.

¹⁶ *Davis v. Morris*, 36 N. Y. 569.

¹⁷ *Craig v. Hyde*, 24 How. Pr. 313.

equitable relief or damages, the case may be retained and sent to a jury after failure to establish a former demand, in a trial by the court.¹⁸

§ 1156. **Waiver of jury.**—A jury can only be waived in one of the modes prescribed by the statute.¹⁹ Though a jury trial may have been demanded by the defendant before the trial, it is waived by his failure to appear at the trial, and the court may dispense with a jury in such case.²⁰ The right is not waived by neglecting to demand a jury at the time the case is called to be set for trial, notwithstanding a rule of court that a jury shall then be demanded.²¹ But where a case has been set down by consent of counsel for trial, and afterwards comes on regularly for trial before the court without a jury, and the trial actually begins, it is a waiver of a jury trial.²² The recital of the waiver of a jury trial in the findings cannot prevail against a showing in the bill of exceptions that a jury trial was demanded and denied.²³ If a jury has been waived, and a trial had before a referee, the waiver holds good for a retrial of the cause after a reversal on appeal.²⁴ Though a jury has been waived in a law case, the lower court may, in its discretion, call a jury.²⁵

§ 1157. **Equity cases.**—In the trial of equity cases the court may, on its own motion, invoke the aid of a jury to determine specific questions of fact, but such findings are simply advisory.²⁶ It is within the discretion of the court to submit both legal and equitable issues to the jury at the same time.²⁷ But the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction.²⁸ In such cases the court may pass

¹⁸ *Genet v. Howland*, 45 Barb. 560, 30 How. Pr. 360.

¹⁹ *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119.

²⁰ *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312. Continuance of trial at defendant's request no waiver. See *Farwell v. Murray*, 104 Cal. 464, 38 Pac. 199. Application for mandamus, waiver of right of jury, see *Territory v. County of Bernalillo*, 4 N. Mex. 204, 16 Pac. 855.

²¹ *Biggs v. Lloyd*, 70 Cal. 447, 11 Pac. 831.

²² *Polack v. Gurnee*, 66 Cal. 266, 5 Pac. 229, 610.

²³ *Downing v. Le Du*, 82 Cal. 471, 23 Pac. 209.

²⁴ *Park v. Mighell*, 7 Wash. 304, 35 Pac. 63. Waiver of jury—presumption upon appeal. See *Montgomery v. Sayre*, 91 Cal. 206, 27 Pac. 648.

²⁵ *Fleming v. Wilson*, 39 Wash. 106, 80 Pac. 1104.

²⁶ *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641.

²⁷ *Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37.

²⁸ *Pacific Railway Co. v. Wade*, 91 Cal. 449, 25 Am. St. Rep. 201, 27 Pac. 768, 13 L. R. A. 754.

upon all legal issues incidental to the equitable relief sought.²⁹ The court may call a jury to try such specific questions of fact as may be submitted to them, reserving to itself the power to make its own findings upon consideration of the evidence and the verdict.³⁰ If an action is tried on the theory that it is for damages for a nuisance, and abatement thereof is not decreed, it cannot be objected that judgment was based wholly upon the verdict.³¹ An action to foreclose the lien of a street assessment is in equity, and a party is not entitled to a jury trial.³² So of an action to foreclose a mechanic's lien,³³ and an action for an accounting between partners.³⁴ Nor is a plaintiff entitled to a jury trial in an equitable action for an injunction to restrain the diversion of water and to abate a dam and ditch as a nuisance, although there is joined therewith a claim for damages suffered in consequence of past diversion of water.³⁵ The Oregon statute³⁶ relating to practice in equity suits was intended to apply only to ordinary suits, and not to cases where the trial court is merely called upon to inquire into and adjust a collateral matter not affecting the merits.³⁷ The court does not acquire the right to pass upon a legal defense without a jury trial by virtue of being first called upon to dispose of an equitable defense. And if the trial of the equitable defense does not obviate the necessity of a trial of the issues of law, they must be tried in the same manner as if no equitable defense had been interposed.³⁸

§ 1158. **Argument by counsel.**—Where a case is tried by the court, and it is satisfied as to the evidence and the law, it is not compelled to listen to argument.³⁹

§ 1159. **Evidence.**—Injunction suits being tried *de novo* on appeal, the admission of incompetent evidence by the trial court is not reversible error, since such evidence will be disregarded

²⁹ Downing v. Le Du, 82 Cal. 471, 23 Pac. 202.

³⁰ Saint v. Guerrero, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335.

³¹ Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70.

³² Santa Cruz etc. Pavement Co. v. Bowie, 104 Cal. 286, 37 Pac. 934.

³³ Installment etc. Loan Co. v. Wentworth, 1 Wash. 467, 25 Pac. 298.

³⁴ Hamar v. Peterson, 9 Wash. 152, 37 Pac. 309.

³⁵ Churchill v. Baumann, 104 Cal. 369, 30 Pac. 93, 38 Pac. 43.

³⁶ Sess. Laws 1885, p. 69.

³⁷ Martin v. Martin, 14 Or. 165, 12 Pac. 234.

³⁸ Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119.

³⁹ Barnes v. Benham, 13 Okla. 582, 75 Pac. 1130.

by the appellate court.⁴⁰ Nonsuit should not be granted if the evidence is sufficient to support a verdict for the plaintiff, whether the trial is by court or by jury.⁴¹ On a motion for judgment in an equity suit, plaintiff is not entitled to have any inference that may be drawn from the evidence drawn in his favor, as in an action at law.⁴² A refusal of nonsuit is proper, if defendant's testimony afterward supplies the omission.⁴³

§ 1160. Findings by the court—Time to file.—Upon the trial of a question of fact by the court, its decision must be given in writing, and filed with the clerk, within thirty days after the cause is submitted for decision.⁴⁴ The trial of a cause by the court is not concluded until the decision is filed with the clerk.⁴⁵ And there is no decision by the court till it has made written findings, regardless of its oral statements as to how it would decide.⁴⁶ The code section is directory as to the time required for the written decision to be filed;⁴⁷ and no penalty is imposed upon the court for failure to act in time.⁴⁸ The statute is applicable to cases both at law and in equity,⁴⁹ but does not apply in cases of nonsuit.⁵⁰ If the judge should discover a clerical mistake in his findings, or that he had inadvertently committed an error, he should correct it at the same term, before the entry of judgment, while the proceeding is still *in fieri*, and in such a manner as not to deprive the party of an opportunity to move for a new trial, or as to abridge the time for motion for new trial, or to cause him to lose any other right thereby, and a new trial should not be granted on that ground.⁵¹ A judge who tried the case without a jury did not

⁴⁰ *Hastings v. Anacortes Packing Co.*, 29 Wash. 224, 69 Pac. 776.

⁴¹ *Freese v. Hibernia Sav. etc. Soc.*, 139 Cal. 392, 73 Pac. 172.

⁴² *Streicher v. Murray*, 36 Mont. 45, 92 Pac. 36.

⁴³ *Trickey v. Clark*, 50 Or. 516, 93 Pac. 457; *Missouri Pac. Ry. v. Bentley* (Kan.), 93 Pac. 150.

⁴⁴ Cal. Code Civ. Proc., § 632; *McKeon v. McDermott*, 22 Cal. 667, 83 Am. Dec. 86.

⁴⁵ *Connolly v. Ashworth*, 98 Cal. 205, 33 Pac. 60. See *San Joaquin Land etc. Co. v. West*, 99 Cal. 345, 33 Pac. 928.

⁴⁶ *Russell v. B. Schade Brewing Co.*, 49 Wash. 362, 95 Pac. 327.

⁴⁷ *McQuillan v. Donahue*, 49 Cal. 157; *People v. Dodge*, 5 How. Pr. 47; *Lewis v. Jones*, 13 Abb. Pr. 427.

⁴⁸ *Wyatt v. Arnot*, 7 Cal. App. 221, 94 Pac. 86.

⁴⁹ *Lyons v. Lyons*, 18 Cal. 447. See, also, *Duff v. Fisher*, 15 Cal. 375; *Stewart v. Slater*, 6 Duer, 83, 102; *Burger v. Baker*, 4 Abb. Pr. 11. Contra, *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003.

⁵⁰ *Gilson R. M. Co. v. Gilson*, 47 Cal. 597.

⁵¹ *Prince v. Lynch*, 38 Cal. 531; 99 Am. Dec. 427. And see *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217.

file his findings of the facts until after the judgment was entered; it was held not to be error.⁵² But a judge cannot change his findings of facts in a material particular after the entry of judgment on the findings and the adjournment of the term.⁵³

§ 1161. Findings on contract.—In an action on contract, the question of waiver being within the issue, and the facts being all before the referee, it was held that his finding on the question should be sustained, although the question was not distinctly raised by the pleadings.⁵⁴ In an action to recover judgment against a municipal corporation for work done on contracts, and warrants issued therefor, if the court finds that the warrants issued were issued after the accounts under the contract were audited, and were issued in consideration thereof, it is a sufficient finding that the warrants were drawn for the amount due on the contracts.⁵⁵ Where the defendant's liability depends entirely upon the fact of his indebtedness to a third party, the fact of his indebtedness is the only fact to be found.⁵⁶ It is not necessary to find the items of debit and credit, but just the balance due.⁵⁷ When judgment is for defendant it is not necessary to find as to the legality of an assignment of the claim to plaintiff.⁵⁸

§ 1162. The same—Conversion.—The legal effect of findings for the defendant, on the question of the plaintiff's right to the property, was to entitle the defendants from whom the property was taken to its restoration.⁵⁹ A finding that hay, alleged to have been converted, was worth twenty dollars a ton, without finding the number of tons converted, does not entitle plaintiff to a judgment.⁶⁰

§ 1163. The same—Ejectment.—If the court, in ejectment, finds that the defendant has no right or title to the premises, or to the possession thereof, and plaintiff is a tenant in common in the premises with the estate of a deceased cotenant, and the

⁵² *Vermule v. Shaw*, 4 Cal. 214; cited in *Keller v. Sutrick*, 22 Cal. 473.

⁵³ *Carpentier v. Gardiner*, 29 Cal. 160; *Los Angeles v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556.

⁵⁴ *Van Buskirk v. Stow*, 42 Barb. 9.

⁵⁵ *Argenti v. San Francisco*, 30 Cal. 458.

⁵⁶ *Smith v. Coe*, 29 N. Y. 666.

⁵⁷ *Jacobs v. Ludermann*, 137 Cal. 176, 69 Pac. 965.

⁵⁸ *Lewis v. First Nat. Bank*, 46 Or. 182, 78 Pac. 990.

⁵⁹ *Waldman v. Broder*, 10 Cal. 378.

⁶⁰ *Troy v. Clarke*, 30 Cal. 419.

parties stipulated during the trial, as a substitute for evidence on this point, that the defendant entered under a deed from the administrator of the deceased cotenant, and by his permission, the finding is contrary to the evidence.⁶¹ When title is found in one party, the court is not required to find the facts constituting the other party's claim of title, but, if requested, the better practice would be to make such finding.⁶² A finding in an action of ejectment that the plaintiff is the owner of the land in controversy is a sufficient finding that the defendants are not the owners.⁶³ A finding that the court finds in defendant's favor on all the issues of fact, and that all the allegations of his cross-complaint are true, is not sufficient to support a judgment quieting defendant's title, for full findings of fact should be made.⁶⁴ Where the court finds simply that the defendant was in possession at the date of the action, and that he wrongfully withheld the possession of the same from the plaintiff, it must be presumed at least in favor of the judgment that this holding was in subordination to the legal title.⁶⁵ The findings should state explicitly whether defendant was affected with notice of the fraud of those through whom he claimed title, where notice of such fraud is material.⁶⁶ Where a party is in possession of an inclosed portion of a tract, claiming the whole under a deed, it is error in the court to find a constructive possession to the land outside of the inclosure where the grantor in the deed had not actual possession of the whole.⁶⁷ Where the right to use land as an alleyway is based upon a plea of estoppel, the court should find thereon.⁶⁸

§ 1164. **Facts, how found.**—Where an answer does not deny the allegations of the complaint, but sets up new matter as a defense, a finding that the facts stated in the complaint are true is not a finding upon all the issues. The court should find upon the new matter.⁶⁹ And until a finding is made, judgment

⁶¹ *Carpentier v. Small*, 35 Cal. 346.

⁶² *Burke v. Table Mountain Water Co.*, 12 Cal. 403; *Meador v. Parsons*, 19 Cal. 294; *Merrill v. Chapman*, 34 Cal. 251.

⁶³ *Coates v. Cleaves*, 92 Cal. 427, 28 Pac. 580. In ejectment, failure to find as ground for reversal. See *Christy v. Spring Valley Water Works*, 84 Cal. 541, 24 Pac. 307; *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098.

⁶⁴ *Shattuck v. Costello*, 8 Ariz. 22, 68 Pac. 529.

⁶⁵ *Sharp v. Daughney*, 33 Cal. 505; *Chouquette v. Barada*, 23 Mo. 331.

⁶⁶ *Chouteau v. Nuckolls*, 20 Mo. 442.

⁶⁷ *Walsh v. Hill*, 38 Cal. 481.

⁶⁸ *Banning v. Kreiter*, 153 Cal. 33, 94 Pac. 246.

⁶⁹ *People v. Forbes*, 51 Cal. 628; *Phipps v. Harlan*, 53 Cal. 87; *Lack-*

may not properly be entered;⁷⁰ also, such finding must be sufficient to sustain the judgment.⁷¹ An omission to find upon a counterclaim is error.⁷² A finding which states only general conclusions, leaving it doubtful what particular facts were established, is defective, and a refusal to amend it on application is error.⁷³ The finding of facts must be within the issues raised by the pleadings;⁷⁴ and must cover all the issues,⁷⁵ whether evidence upon an issue is introduced or not.⁷⁶ Findings may refer to the pleadings, but the reference should be direct, and so as to leave no doubt.⁷⁷ Where facts are so obscurely found, or are so blended with legal conclusions as to render it doubtful whether the facts are only hypothetically stated, it will be disregarded as a finding of fact.⁷⁸ Only the ultimate facts should be found, and not the evidence.⁷⁹

§ 1165. Facts left to inference.—To justify the supreme court in inferring a material fact not expressed in the findings, from others which are expressly found, it must appear that the fact to be inferred follows inevitably from the facts found; that upon every conceivable theory of the case, the non-existence of the fact to be inferred is inconsistent with the facts found.⁸⁰ A finding that the owner of premises had knowledge of certain improvements, upon which a mechanic's lien is based, implies such knowledge as is specified by the code to uphold such judgments.⁸¹ The facts found and the conclusions of law must be separately stated.⁸² The object of the section of the code relating to findings⁸³ is to do away with the doctrine of implied findings as

mann v. Kearney, 142 Cal. 112, 75 Pac. 668.

⁷⁰ *Dieterle v. Bekin*, 143 Cal. 683, 77 Pac. 664.

⁷¹ *Jennings v. Frazier*, 46 Or. 470, 80 Pac. 1011.

⁷² *Baggs v. Smith*, 53 Cal. 88.

⁷³ *Polhemus v. Carpenter*, 42 Cal. 375; *Ladd v. Tully*, 51 Cal. 277.

⁷⁴ *Morenhout v. Barron*, 42 Cal. 591; *Devoe v. Devoe*, 51 Cal. 543; *Allison v. Darton*, 24 Mo. 343; *Farrar v. Lyon*, 19 Mo. 122.

⁷⁵ *Bosquett v. Crane*, 51 Cal. 505; *Rice v. Inskeep*, 34 Cal. 225; *Downing v. Bourlier*, 21 Mo. 149.

⁷⁶ *Speagle v. Leese*, 51 Cal. 415.

⁷⁷ *McEwen v. Johnson*, 7 Cal. 258;

Breeze v. Doyle, 19 Cal. 101. See, also, *Kelley v. McKibben*, 53 Cal. 13.

⁷⁸ *Figg v. Mayo*, 39 Cal. 262.

⁷⁹ *Pico v. Cuyas*, 47 Cal. 174. But see *Coveny v. Hale*, 49 Cal. 552.

⁸⁰ *Emmal v. Webb*, 36 Cal. 197.

⁸¹ *Pacific Lumber Co. v. Wilson*, 6 Cal. App. 561, 92 Pac. 654; Cal. Code Civ. Proc., § 1192.

⁸² Cal. Code Civ. Proc., § 633.

⁸³ Cal. Code Civ. Proc., §§ 632, 633; Idaho Rev. Codes, §§ 4406, 4407; Mont. Rev. Codes, §§ 6763, 6764; Nev. Comp. Laws, § 3277; Or. B. & C. Codes, § 406; Utah Rev. Stats., §§ 3169-3177; Wash. Bal. Codes, § 5029; Wyo. Rev. Stats., § 3660.

based on the former statute, and to separate, for the facility of investigation, questions of fact and law.⁸⁴ If the facts are found, it must affirmatively appear that they support the judgment.⁸⁵ If the priority to the right to use certain water is not put in issue, the court may properly refuse to find on the same.⁸⁶

§ 1166. Findings conclusive.—The finding of a court will not be disturbed, unless the evidence was such that if the question at issue had been submitted to a jury, and they had rendered a verdict in accordance with the finding, the court would have set it aside as contrary to evidence.⁸⁷ The application of the rule that findings will not be disturbed on appeal, when there is a manifest conflict in the evidence, depends in no measure upon the question whether any of the witnesses are interested in the event of the suit. The credit to be given to their testimony, however attacked, must be determined in the court below.⁸⁸

If no motion is made for a new trial, the finding of the court and verdict of the jury are conclusive as to the facts.⁸⁹ Or where they are not excepted to.⁹⁰

Where the evidence is substantially conflicting upon any particular issue, a finding thereon will not be disturbed on the ground of the insufficiency of the evidence to justify it.⁹¹ But where there is no substantial conflict in the evidence and the findings are against the weight of the evidence, the judgment founded on such findings will be reversed.⁹²

⁸⁴ Dowd v. Clarke, 51 Cal. 262. For decisions under the former statute, see Shelby v. Houston, 38 Cal. 410, and cases cited, 321.

⁸⁵ Northern Pacific R. R. Co. v. Reynolds, 50 Cal. 90. It will be presumed upon appeal that the inference made by the trial court was one that will uphold rather than defeat the judgment. Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 256; Gould v. Eaton, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319.

⁸⁶ Kent v. Richardson, 8 Idaho, 750, 71 Pac. 117.

⁸⁷ Moore v. Murdock, 26 Cal. 514.

⁸⁸ Putnam v. Lamphier, 36 Cal. 151; consult "Appeal."

⁸⁹ Brown v. Tolles, 7 Cal. 399; Garwood v. Simpson, 8 Cal. 108; Duff v.

Fisher, 15 Cal. 379; Gagliardo v. Hoberlin, 18 Cal. 395; Pico v. Cuyas, 47 Cal. 174.

⁹⁰ Gay v. Moss, 34 Cal. 125. But see Cal. Code Civ. Proc., § 647.

⁹¹ Hoyt v. Selby Smelting Co., 90 Cal. 339, 27 Pac. 288. To same effect, Borderre v. Den, 106 Cal. 594, 39 Pac. 946; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866; Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Myers v. Tibbals, 72 Cal. 278, 13 Pac. 695; Ingalls v. Austin, 8 Mont. 333, 20 Pac. 637; Welland v. Williams, 21 Nev. 230, 29 Pac. 403; Mouat v. Hilderbrand, 15 Colo. 382, 24 Pac. 1042; Heilbron v. Kings River etc. Canal Co., 76 Cal. 11, 17 Pac. 933.

⁹² Buttz v. Colton, 6 Dak. 306, 43 N. W. 717.

§ 1167. **Findings contrary to admissions in the pleadings.**—A finding contrary to facts admitted in the pleadings must be disregarded;⁹³ and the judgment must follow such admissions.⁹⁴ But it is not objectionable because unsupported by any allegation of the pleadings, if it is a conclusion from other facts found and pleaded.⁹⁵

§ 1168. **Finding contrary to stipulation.**—If the finding of a fact on a material point is contrary to a stipulation of the parties made in the course of the trial as a substitute for evidence, a new trial will be granted, on the ground that the finding is contrary to the fact as stipulated, and therefore unsupported by the evidence.⁹⁶ Findings on facts that are stipulated in open court are unnecessary.⁹⁷

§ 1169. **Findings are not necessary** when the facts are admitted or not denied in the pleadings;⁹⁸ or when judgment is rendered on the pleadings;⁹⁹ or in case of nonsuit.¹⁰⁰ If illegal evidence is admitted on the trial, it is not error for the court to refuse to find a fact proved by such evidence.¹⁰¹ If the judgment is supported by findings supported by the evidence, it is immaterial that there are other findings which the evidence does not support.¹⁰²

Where the parties stipulate in writing as to what the facts are, and file such stipulation in the answer, it is in all substantial respects the equivalent of admitting them in the pleadings. Such agreed statement takes the place and serves all the purposes of

⁹³ *Bradbury v. Cronise*, 46 Cal. 287.

⁹⁴ *McDonald v. Mission Valley Homestead Assoc.*, 51 Cal. 210. See, also, *Traverso v. Tate*, 82 Cal. 170, 22 Pac. 1082; *Silvey v. Neary*, 59 Cal. 97; *White v. Douglass*, 71 Cal. 115, 11 Pac. 860; *Campe v. Lassen*, 67 Cal. 139, 7 Pac. 430; *Estate of Doyle*, 73 Cal. 564, 15 Pac. 125; *Hendy Machine Works v. Pacific Cable Construction Co.*, 99 Cal. 421, 33 Pac. 1084.

⁹⁵ *Hunt v. Davis*, 135 Cal. 31, 66 Pac. 957.

⁹⁶ *Carpentier v. Small*, 35 Cal. 346.

⁹⁷ *Boyd v. Liefer*, 144 Cal. 336, 77 Pac. 953.

⁹⁸ *Swift v. Muygridge*, 8 Cal. 445; *Fox v. Fox*, 25 Cal. 587; *Burnett v.*

Stearns, 33 Cal. 468; *Downer v. Sexton*, 17 Wis. 29; *Carlisle v. Mulhern*, 19 Mo. 56; *Gruhn v. Stanley*, 92 Cal. 86, 28 Pac. 56; *Johnson v. Vance*, 86 Cal. 128, 24 Pac. 863; *Drinkhouse v. Spring Valley Water Co.*, 87 Cal. 253, 25 Pac. 420; *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. 883; *State v. Rocky Mountain Tel. Co.*, 27 Mont. 394, 71 Pac. 311; *Jennings v. Frazier*, 46 Or. 470, 80 Pac. 1011.

⁹⁹ *Taylor v. Palmer*, 31 Cal. 242; *Nosler v. Haynes*, 2 Nev. 56.

¹⁰⁰ *Gilson R. M. Co. v. Gilson*, 47 Cal. 597.

¹⁰¹ *Hutchings v. Castle*, 48 Cal. 152.

¹⁰² *McKibbin v. McKibbin*, 139 Cal. 448, 73 Pac. 143.

a formal finding by the court, and no other or more formal findings are required.¹⁰³ And it is well settled that findings need not be made upon immaterial issues.¹⁰⁴ If the facts found sustain the judgment, it is not necessary to go further and find upon other issues.¹⁰⁵ No findings are necessary on the allegations of a cross-complaint to which a demurrer has been sustained and no amendment made.¹⁰⁶

§ 1170. **Fraud.**—A special finding on the question of fraud should always be taken.¹⁰⁷ Where an infant files a bill to set aside a decree for fraud in fact in procuring it, and for fraud because the decree does not reserve to the infant a day in court after coming of age to contest it, and the court finds against the infant on his charge of fraud in fact, the finding is conclusive of the whole case, unless there is a very clear mistake of the court as to the fact of fraud.¹⁰⁸ In an action against an attorney to set aside certain conveyances of property made to him by his client, on the ground of fraud practiced by the attorney in their procurement, and inadequacy of consideration, if to the contrary it be found that said consideration was fair and adequate, and that the client was willing to sell the property, then the further finding by the court that there was no fraud practiced by the attorney becomes immaterial for all purposes of the appeal by plaintiff.¹⁰⁹ In an action against a sheriff for wrongfully taking personal property, if he sets up that he took the same by virtue of an attachment, and that the goods were the property

¹⁰³ *Muller v. Rowell*, 110 Cal. 318, 42 Pac. 804; *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364.

¹⁰⁴ *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183; *Diefendorff v. Hopkins*, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; *Groome v. Ogden City*, 10 Utah, 54, 37 Pac. 90; *Johnson v. Vance*, 86 Cal. 128, 24 Pac. 863.

¹⁰⁵ *Malone v. Del Norte County*, 77 Cal. 217, 19 Pac. 422; *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589; *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; *Posachane Water Co. v. Standart*, 97 Cal. 476, 32 Pac. 532; *Tage v. Alberts*, 2 Idaho, 271, 13 Pac. 19; *Maloney, Bosch*, 104 Cal. 680, 38 Pac.

516; *Morrison v. Stone*, 103 Cal. 94, 37 Pac. 142; *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937; *Merrill v. Merrill*, 102 Cal. 317, 36 Pac. 675. See, also, *Ortega v. Cordero*, 88 Cal. 221, 26 Pac. 80; *Drinkhouse v. Spring Valley Water Co.*, 87 Cal. 253, 25 Pac. 420; *Merrill v. Clark*, 103 Cal. 367, 37 Pac. 238.

¹⁰⁶ *Kendall v. Waters*, 68 Cal. 26, 8 Pac. 510. See *Lion v. McClory*, 106 Cal. 623, 40 Pac. 12.

¹⁰⁷ *Davis v. Robinson*, 10 Cal. 411; *Gillan v. Metcalf*, 7 Cal. 137.

¹⁰⁸ *Regla v. Martin*, 19 Cal. 463; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712.

¹⁰⁹ *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644.

of the defendant in the attachment, and that he fraudulently sold them to this plaintiff, the court must find as to the issue of fraud thus raised.¹¹⁰ In such actions, findings showing the situation of the parties and the circumstances under which the alleged fraud was committed are responsive to the issues, and not objectionable as being outside thereof.¹¹¹

§ 1171. General and special findings.—When the court sits as a jury in the trial of a cause, it must in all cases find the facts specially.¹¹² If discrepancy exists between the special and general findings in a case, the special findings must control.¹¹³ A general finding is sufficient if the answer is merely a general denial. But the general findings lose none of their certainty because certain specific findings are made in addition.¹¹⁴ Findings stating: 1. That the material allegations in plaintiff's complaint and replication are true; 2. That the material allegations in defendant's answer are not true,—are insufficient in not specifying distinctly the allegations which are material.¹¹⁵ So, also, a finding "that all the issues of fact raised by the pleadings are hereby found and decided in favor of the plaintiffs and against the defendant," is indefinite and insufficient.¹¹⁶ It has been held, however, that a general finding by the court that "all the allegations and averments in plaintiff's complaint are true, and that all in the answer are untrue," is sufficient and conclusive of all the material issues made by said pleadings.¹¹⁷

§ 1172. Findings—Trial by court without jury.—In an action tried by the court without the intervention of a jury, findings must be made on all the material issues.¹¹⁸ The findings

¹¹⁰ *Harris v. Burns*, 51 Cal. 528.

¹¹¹ *Tage v. Alberts*, 2 Idaho, 271, 13 Pac. 19.

¹¹² *Breeze v. Doyle*, 19 Cal. 101; *Quinlan v. Calvert*, 31 Mont. 115, 77 Pac. 428; *Mont. Code Civ. Proc.*, § 1112.

¹¹³ *Lees v. Clark*, 20 Cal. 387; *Hidden v. Jordan*, 28 Cal. 301; *Geer v. Sibley*, 83 Cal. 1, 23 Pac. 220; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836; *Warder v. Enslen*, 73 Cal. 291, 14 Pac. 874; *Gates v. Chicago etc. Ry. Co.*, 2 S. Dak. 422, 50 N. W. 907.

¹¹⁴ *Chatfield v. Continental Eldg.*

etc. Assoc., 6 Cal. App. 665, 92 Pac. 1040.

¹¹⁵ *Breeze v. Doyle*, 19 Cal. 101.

¹¹⁶ *Johnson v. Squires*, 53 Cal. 37.

¹¹⁷ *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30; *Downer v. Sexton*, 17 Wis. 29. See, also, *Dougherty v. Ward*, 89 Cal. 81, 26 Pac. 638.

¹¹⁸ *Drainage District v. Crow*, 20 Or. 535, 26 Pac. 845; *Jameson v. Coldwell*, 25 Or. 199, 35 Pac. 245; *Savings & Loan Soc. v. Thorne*, 67 Cal. 53, 7 Pac. 36; *Bennett v. Pardini*, 63 Cal. 154; *Gull River Lumber Co. v. School District*, 1 N. Dak. 500,

should cover all the material issues, and not merely such as may be sufficient to support the judgment.¹¹⁹ It is not sufficient to say that it is impossible to make the finding. If no sufficient evidence be introduced, the finding should be against the party upon whom was the burden of proof.¹²⁰ But the failure of the trial court to find upon all the material issues raised by the pleadings is not prejudicial error, where the court finds upon an issue the determination of which controls the judgment, and where a finding in favor of the appellants upon every other issue would not justify a contrary judgment.¹²¹ Where the ultimate facts in issue are found by the court, a contradictory finding as to a probative fact involved therein has no effect.¹²² But when a material finding of fact is unsupported by the evidence, and is contradictory to other findings, the failure to make the finding in accordance with the evidence necessitates a new trial.¹²³

§ 1173. Jurisdiction.—If the findings of the court be that defendant was duly served with process, it is sufficient to establish the fact of jurisdiction on that ground.¹²⁴ A finding that defendant was not bound by certain foreclosure proceedings because the appearance made by attorneys for defendant was unauthorized, yet that defendant had ratified such appearance by certain acts, will not support judgment against defendant, because the question of verification was not raised by the issues.¹²⁵

§ 1174. Membership in company.—Where one defendant pleads that he is not a member of the company sued, and the court finds that the allegations of the complaint are true, and that he is a member of the company, as to plaintiff, the finding is sufficient.¹²⁶

48 N. W. 427; *Richardson v. City of Eureka*, 110 Cal. 441, 42 Pac. 965.

¹¹⁹ *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710.

¹²⁰ *Leviston v. Ryan*, 75 Cal. 293, 17 Pac. 239; *Monterey Co. v. Cushing*, 83 Cal. 510, 23 Pac. 700. See *Demartin v. Demartin*, 85 Cal. 71, 24 Pac. 594.

¹²¹ *Winhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557. See *Tage v. Alberts*, 2 Idaho, 271, 13 Pac. 19; *Joslyn v. Smith*, 2 N. Dak. 53, 49 N. W. 382, to the effect that a judgment will not

be reversed for want of a finding upon a particular issue, where it is apparent that the omission in no way prejudiced the appellant. See, also, *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738.

¹²² *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. 183.

¹²³ *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490.

¹²⁴ *Lick v. Stockdale*, 18 Cal. 219.

¹²⁵ *Male v. Schaut*, 41 Or. 425, 69 Pac. 137.

¹²⁶ *Parke v. Hinds*, 14 Cal. 415.

§ 1175. **Money deposit.**—The finding of the court that money was deposited with one, to be held by him on deposit, and in trust for a party, is not open to the objection that it does not specify the kind of deposit.¹²⁷

§ 1176. **Note.**—Where the declaration was upon a note, and the court found that the note was never given, but that the indebtedness was for merchandise sold, it was held that the finding was against the averment, and could not support the judgment.¹²⁸ In a suit on an insurance policy pledged to secure a note, now outlawed, a finding to the effect that the note is barred by the statute of limitations is immaterial, since the pledge could still be held.¹²⁹ A finding that a certain balance is due and owing from the defendant to the plaintiff upon the note in suit states merely a conclusion of law, and is not a finding of fact covering the issue of non-payment.¹³⁰ Finding as to law of another state, sufficiency of;¹³¹ in action for accounting of trust funds;¹³² in action for materials furnished and labor performed, insufficiency of;¹³³ in action of partition, judgment reversed;¹³⁴ as to value in action of claim and delivery,¹³⁵ are proper findings of facts.

§ 1177. **Note and mortgage.**—That “it appears from the note and mortgage sued on that there was due plaintiff, at the date of the commencement of this suit, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of two thousand dollars,” is a sufficient finding of the execution and delivery of the note and mortgage.¹³⁶

§ 1178. **Practice on findings.**—The court should first ask counsel on both sides if they desire findings, and if they do, reserve its judgment, and direct each side to prepare and submit such questions of fact as they desire to have found.¹³⁷ And the party requiring a finding should specify the point upon which

¹²⁷ *Schroeder v. Jahns*, 27 Cal. 274.

¹²⁸ *Lewis v. Myers*, 3 Cal. 475.

¹²⁹ *Puckhaber v. Henry*, 152 Cal. 419, 125 Am. St. Rep. 75, 93 Pac. 114.

¹³⁰ *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227. But see *Myers v. McDonald*, 68 Cal. 162, 8 Pac. 809.

¹³¹ *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743.

¹³² *Spencer v. Duncan*, 107 Cal. 423, 40 Pac. 549.

¹³³ *Warren v. Robinson*, 71 Cal. 380, 12 Pac. 265.

¹³⁴ *Reinhart v. Lugo*, 75 Cal. 639, 18 Pac. 112.

¹³⁵ *Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48.

¹³⁶ *Holmes v. West*, 17 Cal. 623.

¹³⁷ *Tewksbury v. Magraff*, 33 Cal.

he desires it.¹³⁸ The court may file written findings, whether requested or not.¹³⁹ It is the right of the judge of the court to sign and file his findings, whether drafted by himself or another, without notice to the attorneys of the parties; and in doing so, his sole duty is to see that they are proper, and in conformity with his view of the facts and law of the case.¹⁴⁰ Neither evidence, argument, nor comment has any legitimate place in findings of fact or law.¹⁴¹ The trial judge may himself prepare the findings, and is not required to adopt those prepared by counsel.¹⁴² If the complaint be sufficient, a finding by reference to it is sufficient.¹⁴³

In some states, if a party desires findings, he must request them at the close of the evidence and argument;¹⁴⁴ and a request made after the filing of findings and conclusions of law is made too late.¹⁴⁵ But if the court states that it will make findings, the parties are relieved from making a request, and a submission of written findings has the effect of requesting written findings on the material issue.¹⁴⁶ A finding desired on issues made by the evidence, outside the pleadings, should be asked for.¹⁴⁷

§ 1179. Inconsistent findings.—Special findings prevail over the general, if they conflict.¹⁴⁸ An agreed statement of facts has the effect of special findings, and a conclusion of law contradictory to the agreement will vitiate the judgment based thereon.¹⁴⁹ If the court finds no fraud, and that a deed was taken to satisfy

237; *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. 704.

¹³⁸ *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124.

¹³⁹ *Gay v. Moss*, 34 Cal. 125.

¹⁴⁰ *Hathaway v. Ryan*, 35 Cal. 188.

¹⁴¹ *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Coveny v. Hale*, 49 Cal. 552; *Coglan v. Beard*, 65 Cal. 58, 2 Pac. 737. Evidential facts have no proper place in the findings. *Ornbaum v. His Creditors*, 61 Cal. 455; *Boskowitz v. Nickel*, 97 Cal. 19, 31 Pac. 732; *Blessing v. Sias*, 7 Mont. 103, 14 Pac. 663.

¹⁴² *Barnhart v. Fulkerth*, 73 Cal. 526, 15 Pac. 89. As to omission of judge's signature, see *National Tube Works Co. v. City of Chamberlain*, 5 Dak. 54, 37 N. W. 761.

¹⁴³ *Gwinn v. Hamilton*, 75 Cal. 265, 17 Pac. 212.

¹⁴⁴ Mont. Rev. Codes, § 6766; Wyo. Rev. Stats., § 3660.

¹⁴⁵ *Schilling v. Curran*, 30 Mont. 370, 76 Pac. 998; *Bordeau v. Bordeau*, 32 Mont. 159, 80 Pac. 6; *First Nat. Bank v. Citizen State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925, 70 Pac. 726.

¹⁴⁶ *Quinlan v. Calvert*, 31 Mont. 115, 77 Pac. 428.

¹⁴⁷ *Jennings v. Frazier*, 46 Or. 470, 80 Pac. 1011; *Reade v. Pacific Coast etc.*, 40 Or. 60, 66 Pac. 443.

¹⁴⁸ *McCormick v. National Surety Co.*, 134 Cal. 510, 66 Pac. 741.

¹⁴⁹ *Birney v. Warren*, 28 Mont. 64, 72 Pac. 293.

an old debt, an additional finding that the transaction was not in the course of ordinary business is a conclusion of law incorrectly drawn from the facts and inconsistent therewith.¹⁵⁰

The total amount found, on sufficient evidence, to have been expended on certain land, is not affected by an erroneous finding as to the price per acre.¹⁵¹

§ 1180. Presumptions.—That the findings were supported by the evidence,¹⁵² and that evidence was competent and sufficient.¹⁵³ But where there is no issue tendered in the pleadings upon a material matter, the court or jury will not be presumed to have found on such matter.¹⁵⁴ Where there is no finding of facts incorporated in the case, the presumption is that the decision thereon was correct.¹⁵⁵

A finding that certain words in a contract were attempted to be erased does not imply that they were erased.¹⁵⁶

§ 1181. Separate statement in findings.—In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.¹⁵⁷ A finding in foreclosure of mechanic's lien, that no written contract was made, on the grounds that the contract which was written, signed, and recorded, was void, cannot be sustained, because the facts found—to-wit, that such a contract had been attempted—and the conclusions of law should both be stated.¹⁵⁸ A recital in the decree that the material allegations of the complaint are sustained by the testimony cannot be substituted for a separate finding.¹⁵⁹ The findings and conclusions need not be under separate covers, but must be under separate

¹⁵⁰ *White v. Wise*, 134 Cal. 613, 66 Pac. 959.

¹⁵¹ *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154.

¹⁵² *Owen v. Morton*, 24 Cal. 377; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186.

¹⁵³ *Sears v. Dixon*, 33 Cal. 326; *Kendall v. Waters*, 68 Cal. 26, 8 Pac. 510; *Story v. Black*, 5 Mont. 26, 51 Am. Rep. 37, 1 Pac. 1; *Speet v. Speet*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137.

¹⁵⁴ *Gifford v. Carvill*, 29 Cal. 589; *Bernal v. Gleim*, 33 Cal. 668.

¹⁵⁵ *Viele v. Troy etc. R. R. Co.*, 20 N. Y. 184; *Matthews v. Mayor of New York*, 14 Abb. Pr. 214. Consult "Appeal," post chap. LXIX.

¹⁵⁶ *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767.

¹⁵⁷ Cal. Code Civ. Proc., § 633; Wash. Bal. Codes, § 5029.

¹⁵⁸ *California Iron Const. Co. v. Bradbury*, 138 Cal. 328, 71 Pac. 346; affirmed, 138 Cal. 333, 71 Pac. 617.

¹⁵⁹ *Musselman v. Musselman*, 140 Cal. 197, 73 Pac. 824.

titles,¹⁶⁰ unless the case is tried solely on equitable questions.¹⁶¹ Facts must be found and set forth separately from the conclusions of law.¹⁶²

§ 1182. **Sufficient statement.**—A finding of facts which is a mere recital of evidence, and does not conclusively establish the fact in issue, is not sufficient.¹⁶³ And the findings should warrant the conclusions of law and judgment thereon.¹⁶⁴ The facts, and not the evidence, should be set out.¹⁶⁵ If probative facts are found from which the court can declare that the ultimate facts necessarily result, the finding is sufficient.¹⁶⁶ It is not necessary that findings should be in the exact language of the pleadings, or in any particular form.¹⁶⁷ Facts found should not be mingled with argument.¹⁶⁸ An opinion is not a finding;¹⁶⁹ but conclusions from facts are.¹⁷⁰ The opinions of the court, the reasons of the judge, or the evidence form no part of the findings.¹⁷¹ Where the fact found by the judge, and the very one, in his opinion, upon which the case turns, is wholly unsupported by evidence, the appellate court will not treat such finding as surplusage in

¹⁶⁰ *Shepherd v. Gove*, 26 Wash. 452, 67 Pac. 256.

¹⁶¹ *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572.

¹⁶² *Bryan v. Maume*, 28 Cal. 238; *Church v. Erben*, 4 Sandf. 691; *Peck v. Yorks*, 14 How. Pr. 416; *Ragan v. McCoy*, 26 Mo. 166; *Sutter v. Streit*, 21 Mo. 157. See, also, *Sharp v. Wright*, 35 Barb. 236; *Foot v. Murphy*, 72 Cal. 104, 13 Pac. 163; *Burton v. Burton*, 79 Cal. 490, 21 Pac. 847; *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419; *Fisk v. Patton*, 7 Utah, 399, 27 Pac. 1.

¹⁶³ *Coveny v. Hale*, 49 Cal. 552; *Thomas v. Sprague*, 12 Mich. 120.

¹⁶⁴ *Pearce v. Burns*, 22 Mo. 577; *Pearce v. Roberts*, 22 Mo. 582; *State v. Ruggles*, 23 Mo. 339. See, also, *Tomlinson v. Mayor of New York*, 23 How. Pr. 452; *Rogers v. Beard*, 20 How. Pr. 98.

¹⁶⁵ *Heredink v. Holten*, 16 Cal. 103; *Kalkman v. Baylis*, 23 Cal. 303; *Javens v. Harris*, 20 Mo. 262; *Murdock v. Finney*, 21 Mo. 138; *Sutter v. Streit*, 21 Mo. 157.

¹⁶⁶ *Alhambra etc. Water Co. v.*

Richardson, 72 Cal. 598, 14 Pac. 379. See *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576. Compare *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Gill v. Driver*, 90 Cal. 72, 27 Pac. 64.

¹⁶⁷ *Millard v. Supreme Council etc. Legion of Honor*, 81 Cal. 340, 22 Pac. 864; *Clary v. Hazlitt*, 67 Cal. 286, 7 Pac. 701. Consult, also, as to sufficiency of findings, *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Boskowitz v. Nickel*, 97 Cal. 19, 31 Pac. 732; *Kane v. Rippey*, 22 Or. 299, 29 Pac. 1005; *Thompson v. Russell*, 1 Okla. 225, 32 Pac. 56.

¹⁶⁸ *Bryan v. Maume*, 28 Cal. 238; *Jones v. Block*, 30 Cal. 227.

¹⁶⁹ *McClory v. McClory*, 38 Cal. 575; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134, 7 Am. St. Rep. 129, 16 Pac. 753; *Board etc. of Yuma County v. Lovell*, 20 Colo. 80, 36 Pac. 878.

¹⁷⁰ *Sears v. Dixon*, 33 Cal. 326.

¹⁷¹ *James v. Williams*, 31 Cal. 311; *Mills v. Thursby*, 12 How. Pr. 417; *Thomas v. Tanner*, 14 How. Pr. 426; *Magie v. Baker*, 14 N. Y. 435.

order to sustain the judgment on other findings, especially if the weight of testimony is against the other findings.¹⁷² The allegations of the complaint, being denied, and no proof thereon for either party being offered, it should be dismissed.¹⁷³

§ 1183. Sufficiency, test of.—The true test of the sufficiency of the findings is this: Would they answer if presented by a jury in the form of a special verdict?¹⁷⁴ Findings are sufficient when they cover all the issues made by the pleadings, whether supported by the evidence or not.¹⁷⁵ It is sufficient if the findings are not repugnant to or inconsistent with the judgment.¹⁷⁶

If findings support the judgment and conform to the theory of the prevailing party, they are sufficient; findings on the rejected theory being only necessary when requested for the purpose of reviewing the judgment. Findings of the court are equivalent to a special verdict of a jury, and must be as broad as the material issues.¹⁷⁷ As to allegations of a verified complaint, not sufficiently denied, no findings thereon are necessary.¹⁷⁸

§ 1184. Waiver of error.—If a motion for nonsuit is denied at close of plaintiff's evidence, defendant waives his motion by introducing evidence, unless the motion is renewed at the close of the evidence.¹⁷⁹

§ 1185. Waiver of findings.—Findings of fact may be waived by the several parties to an issue of fact—1. By failing to appear at the trial; 2. By consent in writing, filed with the clerk; 3. By oral consent in open court, entered in the minutes.¹⁸⁰ On appeal,

¹⁷² Lockhart v. Mackie, 2 Nev. 294.

¹⁷³ Idaho Placer Min. Co. v. Green,

14 Idaho 294, 94 Pac. 161.

¹⁷⁴ Breeze v. Doyle, 19 Cal. 101.

¹⁷⁵ Rice v. Inskeep, 34 Cal. 225; Garvey v. Lashells, 151 Cal. 526, 91 Pac. 498; Carstenbrook v. Wedderein, 5 Cal. App. 603, 91 Pac. 117; Everett v. Jones, 32 Utah, 489, 91 Pac. 360.

¹⁷⁶ Sears v. Dixon, 33 Cal. 326; James v. Williams, 31 Cal. 211. See, also, Walker v. Brem, 67 Cal. 599, 8 Pac. 320; Withers v. Jacks, 79 Cal. 297, 12 Am. St. Rep. 143, 21 Pac. 824; Goodnow v. Griswold, 68 Cal. 599, 9 Pac. 837; Osment v. McElrath, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac.

731; Winhaus v. Bootz, 92 Cal. 617, 28 Pac. 557; Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094.

¹⁷⁷ Freeman v. Trummer, 50 Or. 287, 91 Pac. 1077.

¹⁷⁸ Roussin v. Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123.

¹⁷⁹ Barrow v. B. R. Lewis Lumber Co., 14 Idaho, 698, 95 Pac. 682.

¹⁸⁰ Cal. Code Civ. Proc., § 634. As to waiver of findings, see Sav. etc. Soc. v. Thorne, 67 Cal. 53, 7 Pac. 36; Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860; Western Lumber Co. v. Phillips, 94 Cal. 54, 29 Pac. 328; McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Fincher v. Malcolmson, 96

the party who asserts as error the failure of the court below to file findings of fact must make it affirmatively appear, by bill of exceptions or other appropriate method, that no waiver of findings had occurred, or the intendments must go to support the judgment.¹⁸¹ Where, however, findings are filed, but which do not include all the issues of fact involved in the case, no presumption of a waiver of findings can be indulged.¹⁸² A finding on a fact, though material to the issues, cannot be demanded, unless it appears from the testimony that it was involved.¹⁸³ Findings are not needed in case of judgment upon pleadings or for failure to answer.¹⁸⁴ And in any case the findings must support the judgment.¹⁸⁵

§ 1186. **Amendment of findings.**—The court, upon discovering an obvious mistake in favor of plaintiff in a conclusion of law, which it had overlooked, may, with plaintiff's consent, amend the same.¹⁸⁶ There is no decision by the court till written findings are made, regardless of oral statements as to how it would decide.¹⁸⁷

§ 1186a. **Exceptions to findings.**—It is proper to attack the court's findings of facts by specifications of insufficiency of the evidence to sustain them.¹⁸⁸ A general exception to all of them is not sufficient,¹⁸⁹ but separate exceptions designating the findings excepted to by numbers are sufficient without specifications of the grounds.¹⁹⁰

§ 1187. **Findings—How construed.**—Findings cannot be detached from each other and considered piecemeal. They must be read as a whole, and not merely according to their numerical division.¹⁹¹ They are to be liberally construed in support of a

Cal. 38, 30 Pac. 835; *Eltzroth v. Ryan*, 91 Cal. 584, 27 Pac. 932; *Gordon v. Donahue*, 79 Cal. 501, 21 Pac. 970.

¹⁸¹ *Mulcahy v. Glazier*, 51 Cal. 626; *Smith v. Lawrence*, 53 Cal. 34.

¹⁸² *People v. Forbes*, 51 Cal. 628; *Majors v. Cowell*, 51 Cal. 478.

¹⁸³ *Buckers Irr. etc. Co. v. Farmers etc. Co.*, 31 Colo. 62, 72 Pac. 49.

¹⁸⁴ *Sutherlin v. Bloomer*, 50 Or. 398, 93 Pac. 135.

¹⁸⁵ *Bosquett v. Crane*, 51 Cal. 505.

¹⁸⁶ *Merrill v. Miller*, 28 Mont. 134, 72 Pac. 423.

¹⁸⁷ *Russell v. B. Schade Brewing Co.*, 49 Wash. 362, 95 Pac. 327.

¹⁸⁸ *Kenworthy v. Mast*, 141 Cal. 268, 74 Pac. 841.

¹⁸⁹ *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815.

¹⁹⁰ *Burrows v. Kinsley*, 27 Wash. 694, 68 Pac. 332.

¹⁹¹ *Mott v. Ewing*, 90 Cal. 231, 27 Pac. 194; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658.

judgment.¹⁹² They should be reconciled and harmonized wherever possible, and should not be declared contradictory except where absolutely necessary.¹⁹³ If findings substantially cover the issues, the fact that they are clumsily drawn, and show upon their face an ambiguity due to erroneous capitalization and punctuation, will not be ground for reversal of the judgment.¹⁹⁴

A general finding, contained in the conclusions of law, that certain parties are the owners in fee, settles all questions of title not negatived by the special findings, and findings of ultimate facts will be treated as such, though contained in the conclusions of law.¹⁹⁵ A recital in the findings that they are made from "the admission of the pleadings and the evidence taken" imports verity and precludes inquiry.¹⁹⁶ The fact that a statement of an ultimate fact appears among the conclusions of law is no reason for reversing the judgment based thereon.¹⁹⁷

TRIAL BY COURT—FORMS.

§ 1188. Written stipulation waiving jury trial.

[TITLE.]

Form No. 391.

It is hereby stipulated by the parties that trial by jury be waived, and that the same be tried by the court [at the . . . term of the . . . court for . . . county, notice of trial being hereby waived].

[DATE.]

G. H., Plaintiff's Attorney.

J. K., Defendant's Attorney.

§ 1189. Finding by the court—General form.

[TITLE.]

Form No. 392.

This action coming on for trial at the . . . term of said court, and having been tried before the court [a jury trial having been

¹⁹² *Ames v. City of San Diego*, 101 Cal. 390, 35 Pac. 1005; *Breeze v. Brooks*, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 256.

¹⁹³ *Schultz v. McLean*, 93 Cal. 329, 28 Pac. 1053. See *Felton v. Le Briton*, 92 Cal. 457, 28 Pac. 490; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186.

¹⁹⁴ *Thompson v. Brannan*, 76 Cal. 618, 18 Pac. 783.

¹⁹⁵ *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712.

¹⁹⁶ *Martin v. Eagle Creek Dev. Co.*, 41 Or. 448, 69 Pac. 216.

¹⁹⁷ *Curtis v. Boquillas Land etc. Co.*, 9 Ariz. 62, 76 Pac. 612; affirmed (1906), *Herrick v. Boquillas Land etc. Co.*, 200 U. S. 96, 50 L. Ed. 388, 26 Sup. Ct. 192.

waived] on the . . . day of . . . , 19.., G. H., Esq., appearing for the plaintiff, and J. K., Esq., for the defendant; and after hearing the allegations and proofs of the parties, the arguments of counsel, and being advised in the premises, I hereby make and file the following findings of fact and conclusions of law constituting my decision in said action:

FINDINGS OF FACT.

- I. That [here state the facts found, separately and concisely].
- II. That, etc.

CONCLUSIONS OF LAW.

- I. That [here specify the same].
- Let judgment be entered accordingly.
[DATE.]
By the Court:

O. P., Judge.

§ 1190. Findings in action for divorce.

Form No. 393.

[TITLE.]

This cause having been heretofore, on the . . . day of . . . , 19 . . . , submitted to the court for decision upon the complaint of the plaintiff, and the answer and cross-complaint of the defendant herein filed, and the report of G. H., Esq., court commissioner of this court, to whom the said cause was referred to take and report in writing the testimony of the parties, by order entered the . . . day of . . . , 19 . . . , after hearing the arguments of counsel for the respective parties, and the court being fully advised, now finds the following facts:

I. The plaintiff and defendant were married, one with the other, at Washoe County, state of Nevada, on the . . . day of . . . , 19.., and cohabited together as husband and wife from thence until the . . . day of . . . , 19..

II. That both the plaintiff and defendant are *bona fide* residents of the state of . . . , and have so resided in this state for more than one year continuously next before the commencement of this action and the filing of the complaint herein; and that at the time of the commencement of this action the said plaintiff was a *bona fide* resident of the . . . county of . . .

III. That the plaintiff and defendant have two children, issue of said marriage, viz. T. U., aged . . . years, and V. W., aged . . . years.

IV. That between the . . . day of . . . , 19 . . . , and the . . . day of . . . , 19 . . . , at a lodging-house, . . . street, in the city of . . . , the plaintiff, A. B., committed adultery with one . . . , and lived during said time in adulterous intercourse with him. That on the . . . day of . . . , 19 . . . , or thereabouts, the plaintiff, A. B., lived in a house of prostitution, No. . . . street, in said . . . county of . . . , said house being kept by one . . . , and then and there repeatedly committed adultery with divers persons, and earned a livelihood by habits of prostitution.

V. That the plaintiff and defendant have not cohabited with each other since the . . . day of . . . , 19 That each and every of said acts of adultery was committed without the consent, connivance, privity, or procurement of the defendant, and that the defendant has not cohabited with the plaintiff since his discovery of said adultery.

VI. That the plaintiff is, and has been for a long time past, an abandoned woman, addicted to the use of intoxicating drinks, and that she is a person by character, disposition, conduct, temper, and passions wholly unfit to have the care, custody, or management of children.

VII. That the property mentioned and described in the complaint is community property, and is of the value of . . . dollars.

As conclusions of law from the foregoing facts, the court finds:

I. That the defendant is entitled to a decree of this court dissolving the bonds of matrimony heretofore existing between plaintiff and defendant, decreeing the plaintiff and defendant each to be freed and absolutely released from the bonds of matrimony, and all the obligations thereof.

II. That the defendant, C. D., is entitled to be awarded the sole charge, control, and custody of the children, issue of said marriage.

[DATE.]

L. M., Judge.

§ 1191. Findings in action to quiet title.

Form No. 394.

[TITLE.]

This cause having been called regularly for trial before the court (a jury trial having been expressly waived by stipulation in

writing of the respective parties appearing therein) [or, as the case may be], E. F. appeared as attorney for the plaintiff, and G. H. appeared as attorney for defendant. And the court having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

I. That the plaintiff entered into actual possession of all the land, and premises described in the complaint, on or about the . . . day of . . . , 19.., claiming it in his own right; and the said plaintiff has, ever since the date last aforesaid, occupied, used, and cultivated said land, having and keeping the same surrounded by a substantial inclosure, using and claiming the same, in his own right, from that date to the present time, adversely to all the world, and especially as against the defendants.

II. That neither one of the defendants mentioned in the complaint, nor any grantor or predecessor of any of said defendants, has been in the possession of any part of said premises since the . . . day of . . . , 19..; and that the plaintiff first entered upon said premises justly and lawfully, and not as a trespasser as against the rights of any or either of said defendants, or of those under or through whom they claim.

III. That the whole of the land described in the complaint lies within the city and county of San Francisco, and within the limits of what is usually and properly known as and called the Van Ness ordinance.

IV. That all the allegations and averments of the plaintiff's complaint are true, and all the denials and allegations of the defendant's answer are untrue.

As conclusions of law from the foregoing facts, the court now hereby finds and decides:

I. That the plaintiff is the owner in fee simple and entitled to the possession of all the lots, tracts, and parcels of land, as the same are described in his complaint on file herein, as against the defendants all and severally, and all persons claiming or to claim the same, or any part of said land, under them, the said defendants, or either of them, and that neither one of said defendants has any right, title, or interest in or to said land, or any part thereof.

II. That the plaintiff is entitled to a decree, as prayed for in his complaint, to quiet his title to said land, against said defendants, and each of them, and all persons claiming or to claim the same, or any part thereof, under or through the said defendants, or either of them.

III. That the plaintiff is entitled to a judgment for costs, to be taxed herein against only the defendants who have answered herein contesting plaintiff's rights in said premises; and as to the other defendants who have not answered, or who have answered disclaiming, costs are not to be taxed.

And judgment is hereby ordered to be entered accordingly.

[DATE.]

[SIGNATURE.]

§ 1192. Findings in an action on a promissory note.

Form No. 395.

[Commencement as in last preceding form.]

FINDINGS OF FACT.

I. That at the time of making the note hereinafter mentioned, the plaintiff, and one C. D. were partners in business, under the firm name of A. B. & Co.

II. That on the . . . day of . . . , 19 . . . , at . . . , the defendant made his promissory note in writing, dated on that day, and thereby promised to pay to the plaintiff and C. D., under said firm name, . . . dollars, in . . . months after said date.

III. That no part thereof has been paid.

IV. That on the . . . day of . . . , 19 . . . , at . . . , said C. D. died, leaving the plaintiff sole surviving partner of said firm.

CONCLUSIONS OF LAW.

I. That the cause of action against the defendant survived to the plaintiff on the death of C. D.

II. That the defendant is indebted to the plaintiff on said note for . . . dollars.

Let judgment be entered for the plaintiff in the sum of . . . dollars, with costs.

[DATE.]

M. N., Judge.

§ 1193. Request for findings.

Form No. 396.

[TITLE.]

Now comes the plaintiff [or, defendant] herein, and hereby requests the court to make the following findings of facts and conclusions of law in this action:

[Here set forth the separate findings desired, in the same manner as in a finding by the court.]

§ 1194. Exceptions to the findings.

Form No. 397.

[TITLE.]

Now comes the plaintiff [or, defendant] and excepts to the findings of the court heretofore made and filed in this action as follows:

I. He excepts to the first finding of fact therein contained [or, to that part of the first finding of fact therein contained which reads as follows: state the part excepted to].

II. He excepts to [state second separate fact excepted to, and so on].

III. He excepts to said decision because it fails to find [here state any fact omitted which should have been found].

IV. He excepts to the refusal of the court to find the following facts as requested [here set forth any findings requested and refused].

[DATE.]

G. H., Attorney for . . .

§ 1195. Notice of filing of the decision.

Form No. 398.

[TITLE.]

Take notice, that the within [or, the foregoing] is a copy of the decision of Mr. Justice M. N. in this action, tried before him without a jury, and of his findings of fact and conclusions of law herein, and that the same was filed in the office of the clerk of the . . . court of . . . county, on the . . . day of . . . , 19 . . .

To J. K., . . . Attorney.

G. H., . . . Attorney.

CHAPTER XLVII.

TRIAL BY JURY.

§ 1196. **In general.**—Either party may bring the issue to trial or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require.¹ Either party may demand a jury to try the issues, as the right of trial by jury shall be secured to all, and remain inviolate forever.² A jury trial may be denied, if demand therefor is not made as required by statute.³ The court has much discretion where the statute has not been fully complied with.⁴ The right to trial by jury is absolute, and cannot be interfered with.⁵ The right to a jury trial is not determined by the form of the action, but by the nature of the rights involved. An action to recover damages for trespass upon land being an action at law, in which the parties thereto are entitled to a trial by jury, the fact that the plaintiff also asks for an injunction does not take away his right to have all the legal issues of fact tried by a jury.⁶ Trial by jury may be had to enforce payment of money out of a particular fund,⁷ or to compel an administrator to give up property.⁸ But an action to cancel a deed, being equitable in nature, may be tried by the court, in its discretion, over the

¹ Cal. Code Civ. Proc., § 594.

² Cal. Const., art. i, § 3; Cal. Code Civ. Proc., § 738; *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140; *Sherman v. Randolph*, 13 Okla. 224, 74 Pac. 102.

³ *In re Heaton's Estate*, 139 Cal. 236, 73 Pac. 186; Cal. Code Civ. Proc., §§ 1312, 1716, 1717.

⁴ *Wood v. Rio Grande etc. Ry. Co.*, 28 Utah, 351, 79 Pac. 182; *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209; *Lemon v. Ward*, 3 Ariz. 219, 73 Pac. 443.

⁵ *Greason v. Keteltas*, 17 N. Y. 491; *Sharp v. Mayor of New York*, 18 How. Pr. 213, 9 Abb. Pr. 426; *Lewis v. Varnum*, 12 Abb. Pr. 305;

People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; *Pacific Railway Co. v. Wade*, 91 Cal. 449, 25 Am. St. Rep. 201, 27 Pac. 768, 13 L. R. A. 754.

⁶ *Hughes v. Dunlap*, 91 Cal. 385, 27 Pac. 642. Jury trial in action to recover real property. *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66. In an action for divorce. *Pleyte v. Pleyte*, 1 Colo. App. 70, 28 Pac. 23. As to the propriety of a trial by jury where there is an issue of fraud, see *Freeman v. Atlantic Mut. Ins. Co.*, 13 Abb. Pr. 124.

⁷ *In re Gorkow's Estate*, 28 Wash. 65, 68 Pac. 174.

⁸ *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107.

objection of the plaintiff.⁹ Where the sheriff is a party to the action, the court may order the cause tried by a special jury to be summoned by the coroner; and there being no coroner, an elisor may be appointed for that purpose.¹⁰ The statute vests the ordering of a trial by jury in the discretion of the court.¹¹ In Oregon, the court, having discharged the regular panel jurors in attendance, cannot order another panel and compel the defendant to go to trial unwillingly.¹²

§ 1197. **Impaneling jury.**—The action being called for trial, the jury will be drawn and impaneled in the manner prescribed by statute.¹³ It shall consist of twelve persons, unless the parties consent to a less number; and such consent must be entered by the clerk in the minutes of the trial, and cannot be inferred from the mere absence of the party.¹⁴ In California, three fourths of the jury are competent to render a verdict.¹⁵ In Colorado, such a statute has been held to be invalid.¹⁶ A jury, within the meaning of the federal constitution, is a jury constituted as it was at common law, of twelve persons.¹⁷

Upon demand of either party for a jury trial, the court will order a venire to issue. The time provided by the statute in which the jury shall be returned by the sheriff is directory.¹⁸ If a party waits until the trial is entered upon before applying for a jury trial, it is a waiver of his right.¹⁹ The first act done

⁹ *Kyle v. Shore*, 18 Colo. App. 355, 71 Pac. 895.

¹⁰ *Pacheco v. Hunsacker*, 14 Cal. 120.

¹¹ *Id.* As to appointment of elisor, see *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341; *People v. Irwin*, 77 Cal. 494, 20 Pac. 56; *People v. Yeaton*, 75 Cal. 415, 17 Pac. 544.

¹² *Mousseau v. Veeder*, 2 Or. 113.

¹³ Cal. Code Civ. Proc., § 600; Or. B. & C. Codes, § 114; Wash. Bal. Codes, § 4978; Idaho Rev. Codes, § 4378; Mont. Rev. Codes, § 6731; Ariz. Laws, § 161.

¹⁴ *Gillespie v. Benson*, 18 Cal. 410; *United States v. Insurgents of Penn.*, 2 Dall. 335, 1 L. Ed. 404; *Bonaparte v. Camden etc. R. R. Co.*, Baldw. 205, Fed. Cas. No. 1617; Cal. Code Civ. Proc., § 194. Presumption as to con-

sent. *Hitchcock v. Caruthers*, 82 Cal. 523, 23 Pac. 48.

¹⁵ Code Civ. Proc., § 613. So in Utah. *Hess v. White*, 9 Utah, 61, 33 Pac. 243; 24 L. R. A. 277; *Publishing Co. v. Fisher Co.*, 10 Utah, 147, 37 Pac. 259. Otherwise in Oklahoma. *Bradford v. Territory*, 1 Okla. 366, 34 Pac. 66.

¹⁶ Colo. Sess. Laws, 1899, p. 244, ciii; *Clough v. McKay*, 31 Colo. 300, 73 Pac. 30.

¹⁷ *Queenan v. Territory*, 11 Okla. 261, 71 Pac. 218; affirmed, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175.

¹⁸ *Mowry v. Starbuck*, 4 Cal. 274; *People v. Ferris*, 1 Abb. Pr. (N. S.) 193.

¹⁹ *McKeon v. See*, 4 Robt. 449; *Barlow v. Scott*, 24 N. Y. 40.

by the clerk is to take the panel returned by the sheriff, so far as they have appeared, and have not been excused by the court, and copy the names upon separate ballots, which he then puts in a box provided for that purpose. When a case is called for trial by jury, he is to draw twelve names from the box, and call them off as he draws them.²⁰ The persons so drawn and called are to take their seats in the jury-box. If there are not twelve ballots in the box, the sheriff, under the direction of the court, is to summon from the body of the county, and not from bystanders, so many qualified persons as may be required to complete the jury.²¹ When the jury-box is full, and not before, counsel are to proceed to examine them touching their qualifications. Each party may examine the whole twelve before making any peremptory challenges, and if any are excused for cause, the deficiency must be supplied by calling other jurors, who may be examined in like manner until there are twelve who are adjudged by the court to be competent; and thereupon each party may challenge peremptorily, but he cannot be required to do so before.²² The essential difference between the civil and criminal practice is that in the former none are to be sworn to try the case until the jury is complete, while in the latter those accepted may be sworn to try the case before the jury is finally completed.²³ The provisions of the statutes are generally directory, and a substantial compliance with the requirements is sufficient.²⁴

§ 1198. Qualifications of jurors.—No one shall be qualified to act as a juror unless he be—1. A citizen of the United States, an elector of the county in which he is returned, whether his name be on the great register or not, and a resident of the township at least three months before being selected and returned.²⁵ Residence depends upon intention as well as fact, and mere inhabitancy for a short period, against the intention of acquiring

²⁰ Cal. Code Civ. Proc., § 600.

²¹ Cal. Code Civ. Proc., § 227.

²² Taylor v. Western Pacific R. R. Co., 45 Cal. 330; People v. Scoggins, 37 Cal. 680.

²³ People v. Scoggins, *supra*. Drawing of jurors under Washington practice, see Wash. Code, § 339. When special venire may issue under Montana practice, see Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925. See, also,

Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330.

²⁴ Sharp v. United States, 13 Okla. 522, 76 Pac. 177.

²⁵ Cal. Code Civ. Proc., § 198. See, also, Cal. Pol. Code, §§ 1083, 1084. It is proper to excuse from the jury a person who is not a citizen of the United States and who has never declared his intention to become such. Babcock v. People, 13 Colo. 515.

a domicile, would not make a resident.²⁷ A citizen of California, who has resided in the county fourteen days, and then been absent some months from the state, with the intention of returning to reside in the county, and has returned and resided in the county some fourteen days, is a competent juror.²⁸ 2. In possession of his natural faculties.²⁹ 3. One who has sufficient knowledge of the language in which the proceedings of the courts are had.³⁰ 4. Assessed on the last assessment-roll of his township or county, on real or personal property, or both, belonging to him.³¹ A person is not competent to act as a juror who does not possess the above qualifications, or who has been convicted of a felony or misdemeanor involving moral turpitude.³² There is no difference made between an alien and one convicted of a felony, but such conviction has no effect for disqualification beyond the state in which the judgment is rendered, unless the statute so provides in express terms.³³ Acts disqualifying civil and judicial officers of the state confer a mere privilege upon such officers.³⁴ The jury having been called are sworn to answer questions relative to their qualifications as jurors to hear the particular case then on trial. They are then questioned by counsel of either side as to their knowledge of the parties or the facts of the case, or as to whether they have formed or expressed an opinion of the merits of the cause, or upon any other question touching their fitness or fairness as jurors, not only to show that there exists proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether he will make a peremptory challenge.³⁵

§ 1199. Objections to the panel.—Objections to the panel may be interposed for an irregularity in the formation of the jury, which goes to the merits of the trial or leads to the inference of improper influence upon their conduct.³⁶ In Oregon, no chal-

²⁷ *People v. Peralta*, 4 Cal. 175. See Pol. Code, § 52.

²⁸ *People v. Stonecipher*, 6 Cal. 405; Cal. Const., art. xi, § 19.

²⁹ Cal. Code Civ. Proc., § 40.

³⁰ *Id.* See *People v. Arceo*, 32 Cal. 40.

³¹ Cal. Code Civ. Proc., § 40; *People v. Thompson*, 34 Cal. 671; *Valton v. National Loan Fund Ins. Co.*, 17 Abb. Pr., 268.

³² Cal. Code Civ. Proc., § 199. As to when persons shall be exempt from liability to serve as a juror, see Cal. Code Civ. Proc., § 200.

³³ *Queenan v. Territory*, 11 Okla. 261, 71 Pac. 218; affirmed 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175.

³⁴ *State v. Lewis*, 31 Wash. 75, 71 Pac. 778.

³⁵ *Watson v. Whitney*, 23 Cal. 376.

³⁶ *Thrall v. Smiley*, 9 Cal. 529.

lenge to the panel is allowed.³⁷ No objection being taken to the manner of impaneling a jury, it is waived.³⁸ In Nevada, a challenge to the panel of trial jurors must be in writing, specifically stating the grounds of challenge or facts on which the challenge is based.³⁹ In New York, upon the challenge of the array, the practice is, that if the facts are denied, the court appoints triers, and if they pronounce the cause of challenge unfounded, the trial proceeds. If the facts are admitted, the court passes upon their sufficiency, and either quashes the array or overrules the challenge.⁴⁰ No regular panel having been drawn and summoned, the court ordered thirty-six jurors to be summoned, twenty-seven of whom appearing, the court caused their names to be put in a box, from which twelve were drawn to constitute a trial panel. It was held not to be ground for challenge to the whole panel.⁴¹ But where the clerk drew seventy-two names out of the box, and selected thirty-six of them, it was a good ground of challenge to the array.⁴² A party cannot complain because a part of the panel is serving as jurors in another case, and there is less than a full panel from which to select a jury.⁴³ That a jury has just tried a case involving the liability of defendant for a similar cause of action does not render it incompetent;⁴⁴ but if the venire is executed and returned by any other person than the sheriff,⁴⁵ or if the sheriff who served the venire was a party to the action,⁴⁶ or if the clerk is partial or selects the jury instead of drawing it by lot, it does render the jury incompetent.⁴⁷ But an objection on the ground that the jury was summoned by order of the court, after the commencement of the term, is no ground of challenge to the panel.⁴⁸ A jury drawn while the court was in session, in the presence of the court and its officers, must be held to have been drawn in open court, whether it was done in the room where the court usually sits or in another.⁴⁹ The object is to

³⁷ Laws Or., § 179.

³⁸ *Dayharsh v. Enos*, 5 N. Y. 531; *Mayor of New York v. Mason*, 1 Abb. Pr. 352; *Hardenburgh v. Cray*, 15 How. Pr. 307; *Queenan v. Territory*, 11 Okla. 261, 71 Pac. 218; affirmed, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175.

³⁹ *State v. Millain*, 3 Nev. 411. See *State v. Gray*, 19 Nev. 212, 8 Pac. 456.

⁴⁰ *Gardner v. Turner*, 9 Johns. 260.

⁴¹ *People v. Stuart*, 4 Cal. 218.

⁴² *Gardner v. Turner*, 9 Johns. 260.

⁴³ *Connor v. Salt Lake City*, 28 Utah, 248, 78 Pac. 479.

⁴⁴ *Algiers v. Steamer Maria*, 14 Cal. 168.

⁴⁵ *Cooper v. Bissell*, 16 Johns. 146.

⁴⁶ *Wood v. Rowan*, 5 Johns. 133.

⁴⁷ *Pringle v. Huse*, 1 Cow. 432; *Gardner v. Turner*, 9 Johns. 260.

⁴⁸ *People v. Rodriguez*, 10 Cal. 59.

⁴⁹ *State v. Millain*, 3 Nev. 411.

secure honest and intelligent men for the jury, and the order or time in which they are served is of no consequence.⁵⁰ A variance between the true name of a juror and that placed on the jury list is immaterial, if it satisfactorily appears that the person attending is the one really selected.⁵¹ Nor that the name of a juror was not on the venire return by the sheriff.⁵² In New York, it is no ground of challenge to the array that the clerk who drew the jury was at the time attorney in the cause.⁵³ Nor that juries for two courts were drawn from the box at the same time, the two sets of names being kept distinct.⁵⁴

§ 1200. **Challenge to juror.**—After questioning the jurors, counsel may challenge, either peremptorily or for cause. Each party shall be entitled to four peremptory challenges, and no reason need be given for the exercise of this right.⁵⁵ In Oregon and Washington, only three peremptory challenges are allowed.⁵⁶ Either party may exercise his right of peremptory challenge at any time after examination, but neither party can be required to exercise it prior to this stage of the proceedings.⁵⁷ The objection should be taken before the juror is sworn, but the court may, for cause, permit it to be thereafter and before the jury is completed.⁵⁸ And when there are several parties on either side, they shall join in a challenge before it can be made.⁵⁹ Where only one peremptory challenge is shown to have been used, it is presumed the other three were not used.⁶⁰ If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.⁶¹ It is proper practice to leave twelve jurors in the box before requiring the parties to exercise their peremptory challenges, and then to call another juror whenever a peremptory challenge

⁵⁰ Thrall v. Smiley, 9 Cal. 529.

⁵¹ State v. McNamara, 3 Nev. 71.

⁵² Thrall v. Smiley, 9 Cal. 529.

⁵³ Wakeman v. Sprague, 7 Cow. 720.

⁵⁴ Crane v. Dygert, 4 Wend. 675.

⁵⁵ Cal. Code Civ. Proc., § 601; Idaho Rev. Codes, § 4379; Ariz. Laws, § 163.

⁵⁶ Or. B. & C. Codes, § 125; Wash. Bal. Codes, § 4979.

⁵⁷ People v. Scoggins, 37 Cal. 680;

Taylor v. Western Pacific R. R. Co., 45 Cal. 330.

⁵⁸ People v. Boren, 139 Cal. 210, 72 Pac. 899.

⁵⁹ Cal. Code Civ. Proc., § 601; Cochran v. United States, 14 Okla. 108, 76 Pac. 672.

⁶⁰ Fleeson v. Savage Silver Min. Co., 3 Nev. 157.

⁶¹ Cal. Code Civ. Proc., § 601. As to right of challenge and its exercise, see, generally, Walter v. People, 32 N. Y. 147.

shall have been exercised.⁶² Then the parties are to challenge alternately, and if one of them does not exercise his right of challenge in his turn, after the other party has expressed his satisfaction with the full panel, he cannot afterward be allowed another peremptory challenge.⁶³ In California, a general challenge of a juror for cause, without specifying the particular grounds, is insufficient; it is not sufficient to say, "I challenge for cause," and then stop.⁶⁴

§ 1201. Grounds of challenge.—A challenge for cause, in California, may be made on one or more of the following grounds: 1. A want of any of the qualifications prescribed by the code to render a person competent as a juror; 2. Consanguinity, or affinity, within the fourth degree, to any party or to any officer of a corporation which is a party;⁶⁵ the degree of kindred is established by the number of generations, and each generation is called a degree;⁶⁶ in the direct line there are as many degrees as there are generations;⁶⁷ in the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relation; in such computation the decedent is excluded, the relation included, and the ancestor counted but once; thus brothers are related in the second degree, uncle and nephew in the third degree, and cousins-german in the fourth, and so on.⁶⁸ 3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or to an officer of a corporation which is a party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party;⁶⁹ a tenant of either of the parties to the suit is incompetent;⁷⁰ a tenant renting on the shares is not disqualified as a partner.⁷¹ 4. Former service as juror or witness on a previous trial, between

⁶² *Sileox v. Lang*, 78 Cal. 118, 20 Pac. 297.

⁶³ *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

⁶⁴ *Paige v. O'Neal*, 12 Cal. 483.

⁶⁵ Cal. Code Civ. Proc., § 602, as amended 1907.

⁶⁶ Cal. Code Civ. Proc., § 1389.

⁶⁷ Cal. Code Civ. Proc., § 1392.

⁶⁸ Cal. Code Civ. Proc., § 1393. As to incompetency of jurors from re-

lationship or interest, see *Young v. Marine Ins. Co.*, 1 Cranch C. C. 452, Fed. Cas. No. 18163; *Common Council of Alexandria v. Brockett*, 1 Cranch C. C. 505, Fed. Cas. No. 181; *Orme v. Pratt*, 4 Cranch C. C. 124, Fed. Cas. No. 10578.

⁶⁹ Cal. Code Civ. Proc., § 602.

⁷⁰ *Hathaway v. Helmer*, 25 Barb. 29.

⁷¹ *Arnold v. Produce Fruit Co.*, 141 Cal. 738, 75 Pac. 326.

the same parties, for the same cause of action. 5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation. Jurors must be wholly disinterested.⁷² That a person called as a juror is acquainted with the attorney of one of the parties to the suit, who had been employed at one time to do certain legal business, is not sufficient ground upon which to base a challenge for cause.⁷³ 6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or of some of them. The former provision, as found in section 162 of the California Practice Act, has been materially changed by striking out the words "formed or expressed," and adding the words "founded upon knowledge of its material facts, or of some of them." Under the present California code, in order to disqualify, there must be a present unqualified opinion, founded upon knowledge of material facts. Simply "knowing and being aware of the circumstances connected with the affair" is not sufficient grounds.⁷⁴ The opinion, to disqualify one as a juror, must be an abiding bias of the mind, based upon the substantial facts in the case, in the existence of which he believes,⁷⁵ but an actual knowledge of the condition of a sidewalk in question, derived from personal observation, is.⁷⁶ A juror having said that "if the reports of the neighbors were correct, the defendant was wrong, and the plaintiff was right," it was held not sufficient ground for challenge.⁷⁷ It is only an unqualified opinion in the mind of the juror that disqualifies.⁷⁸ 7. The existence of a state of

⁷² Wood v. Stoddard, 2 Johns. 194.

⁷³ Fairbanks v. Irwin, 15 Colo. 366, 25 Pac. 701. Challenge for cause properly sustained. See Denver etc. R. R. Co. v. Driscoll, 12 Colo. 520, 13 Am. St. Rep. 243, 21 Pac. 708.

⁷⁴ Lawrence v. Collier, 1 Cal. 38. See, also, Collins v. Burns, 16 Colo. 7, 26 Pac. 145; State v. Sheerin, 12 Mont. 539, 33 Am. St. Rep. 600, 31 Pac. 543.

⁷⁵ Haugen v. Chicago etc. R. R. Co., 3 S. Dak. 394, 53 N. W. 769. To the same effect, see People v. Cochran, 61 Cal. 548; McHugh v. State, 42 Ohio St. 154; Dolan v. State, 40 Ark. 454; State v. Meyer, 58 Vt. 457, 3

Atl. 195; Murphy v. State, 15 Neb. 383, 19 N. W. 489; Spies v. Illinois, 123 U. S. 131, 31 L. Ed. 80, 8 Sup. Ct. 22. As to dismissal of juror for cause after completion of panel, see Lawlor v. Linforth, 72 Cal. 205, 13 Pac. 496.

⁷⁶ Johnson v. Park City, 27 Utah, 420, 76 Pac. 216.

⁷⁷ Durell v. Mosher, 8 Johns. 445.

⁷⁸ State v. Millain, 3 Nev. 409. See People v. Symonds, 22 Cal. 348; People v. King, 27 Cal. 512, 87 Am. Dec. 95; People v. Murphy, 45 Cal. 141; People v. Johnston, 46 Cal. 78; People v. Weil, 40 Cal. 268; Pine v. Callahan, 8 Idaho, 684, 71 Pac. 473.

mind in the juror evincing enmity against or bias to or against either party.⁷⁹ Bias or prejudice of any kind is good ground for challenge under the seventh subdivision.⁸⁰ In a suit against a city, the fact that a juror did clerical work for the city,⁸¹ or that the juror is a client of counsel on the adverse side, is not ground for implied bias.⁸² Prejudice, being a state of mind more frequently founded in passion than in reason, may exist with or without a cause, and in the eye of the law has no degrees.⁸³ Actual bias may be taken for the existence of such a state of mind that he cannot try the issue impartially.⁸⁴ To ask a person whether he is prejudiced or not against a party, and, if so, whether that prejudice is of such a character as would lead him to deny the party a fair trial, is the simplest method of ascertaining the state of his mind.⁸⁵ A mason or a royal arch mason is not disqualified from sitting on a jury where another mason of the same degree is a party.⁸⁶ 8. Being a party to an action pending for trial in the court for which he is drawn, and which action is set for trial before the panel of which he is a member.⁸⁷

§ 1202. **Challenge, how tried.**—Challenges for cause must be tried by the court, and witnesses may be examined. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.⁸⁸ The burden of proof is upon the one interposing the challenge, even in criminal actions.⁸⁹ In New York, the challenge for favor or bias may be tried by the triers;⁹⁰ but for having expressed an opinion upon the merits

⁷⁹ Cal. Code Civ. Proc., § 602, subd. 7; Idaho Rev. Codes, § 4380; Laws Ariz., § 164.

⁸⁰ *People v. Reyes*, 5 Cal. 347; *Smith v. Floyd*, 18 Barb. 522; *Chouteau v. Pierre*, 9 Mo. 3.

⁸¹ *Swope v. City of Seattle*, 36 Wash. 113, 78 Pac. 607.

⁸² *McCorkle v. Mallory*, 30 Wash. 632, 71 Pac. 186.

⁸³ *People v. Reyes*, 5 Cal. 347

⁸⁴ Or. B. & C. Codes, § 123; *People v. Honeyman*, 3 Denio, 124; *Quill v. Southern Pacific Co.*, 140 Cal. 268, 73 Pac. 991; *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115; *People v. Wells*, 100 Cal. 227, 34 Pac. 718. Challenge, how taken. Or. B. & C. Codes, §§ 126, 127.

⁸⁵ *People v. Reyes*, 5 Cal. 347. The

law contemplates that the minds of jurors shall be free from such impressions of the merits as amount to a conviction or prejudgment of the case. *Denver etc. R. R. Co. v. Moynahan*, 8 Colo. 56, 5 Pac. 811.

⁸⁶ *Purple v. Horton*, 13 Wend. 9, 27 Am. Dec. 167.

⁸⁷ Cal Code Civ. Proc., § 602, subd. 8, as amended 1907.

⁸⁸ Cal. Code Civ. Proc., § 603; *Pringle v. Huse*, 1 Cow. 432; *Mechanics & Farmers' Bank v. Smith*, 19 Johns. 115.

⁸⁹ *State v. Jones*, 32 Mont. 442, 80 Pac. 1095.

⁹⁰ *Pringle v. Huse*, 1 Cow. 432; *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *Smith v. Floyd*, 18 Barb. 522.

of the action, it must be tried by the court.⁹¹ Within reasonable limits, counsel have a right to put questions to jurors upon their *voir dire*, not only for the purpose of ascertaining whether grounds exist for challenges for cause, but also for the purpose of intelligently exercising their peremptory challenges. Beyond this, the matter of examination rests almost entirely in the discretion of the trial judge.⁹² When a judge, by consent of parties, acts as trier upon the challenge of a juror, his rejection of evidence is final, and cannot be reviewed on appeal.⁹³ The decision of the court is a decision as to fact, not law, and the supreme court would not, except in the clearest case, interfere with its decision.⁹⁴ If a juror is challenged for cause and that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise the inference that the challenging party is thereby injured.⁹⁵ A party who accepts a juror, knowing him to be disqualified, waives the objection.⁹⁶

§ 1203. **Jury sworn.**—The challenges having been exhausted, or exercised to the satisfaction of the parties, the jury is sworn that they, each of them, will well and truly try the matter in issue, and a true verdict render according to the evidence.⁹⁷ Where, before the trial of an action of *assumpsit*, brought against three persons, two of the defendants confess judgment, but the damages have not been assessed, it is proper to swear the jury as to the remaining defendant.⁹⁸

If, after the impaneling of the jury, and before verdict, a juror becomes unable to perform his duty, he may be discharged, and with consent of the parties the remaining jurors may try the case, or another juror be sworn, or a new jury impaneled and the trial begin anew.⁹⁹

⁹¹ Pringle v. Huse, 1 Cow. 432.

⁹² Tarpey v. Madsen, 26 Utah, 294, 73 Pac. 411; Union Pacific Ry. Co. v. Jones, 21 Colo. 340, 40 Pac. 891. In practice, great latitude is and generally ought to be indulged. State v. Chapman, 1 S. Dak. 414, 47 N. W. 411, 10 L. R. A. 432. See Territory v. Lopez, 3 N. Mex. 104 (156), 2 Pac. 364.

⁹³ Costigan v. Cuyler, 21 N. Y. 134.

⁹⁴ Trenor v. Central Pacific R. R.

Co., 50 Cal. 230. See, also, Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; Babcock v. People, 13 Colo. 515, 22 Pac. 817; Haugen v. Chicago etc. R. Co., 3 S. Dak. 394, 53 N. W. 769; Collins v. Burns, 16 Colo. 7, 26 Pac. 145.

⁹⁵ Fleeson v. Savage Silver Min. Co., 3 Nev. 157.

⁹⁶ People v. Stonecipher, 6 Cal. 411.

⁹⁷ Cal. Code Civ. Proc., § 604.

⁹⁸ Noble v. Laley, 50 Pa. St. 281.

⁹⁹ Cal. Code Civ. Proc., § 615.

The separation of the jurors in a civil action, before being instructed and placed in custody of an officer to consider the verdict, is not of itself ground for reversal.¹⁰⁰

§ 1204. Evidence adduced.—The jury having been sworn to try the case, counsel for plaintiff states briefly the issue and his case, and then introduces his proofs, upon the close of which defendant states the nature of his defense, set-off, or counterclaim, as the case may be, and proceeds with his proofs. Defendant may have the case reopened to introduce evidence in support of issues raised by an amended complaint, filed pursuant to section 470 of the Code of Civil Procedure.¹⁰¹ The objection as to competency, relevancy, and materiality does not raise the point of hearsay.¹⁰² Evidence of an incompetent witness is competent when admitted without objection.¹⁰³

§ 1204a. Matters of judicial notice.—In all cases courts take judicial notice of certain facts. In California, these are enumerated in the Code of Civil Procedure, and are the following: "1. The true signification of all English words and phrases, and of all legal expressions; 2. Whatever is established by law; 3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States; 4. The seals of all the courts of this state and of the United States; 5. The accession to office, and the official signatures and seals of office, of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States; 6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States; 7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public; 8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference."¹⁰⁴ The court is to declare such knowledge to the jury, who are bound to accept it.¹⁰⁵

¹⁰⁰ *In re Abel's Estate* (Nev.), 93 Pac. 227.

¹⁰¹ *Hedstrom v. Union Trust Co.*, 7 Cal. App. 278, 94 Pac. 386.

¹⁰² *Dillard v. Olalla Min. Co. (Or.)*, 94 Pac. 966.

¹⁰³ *Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 453.

¹⁰⁴ Cal. Code Civ. Proc., § 1875.

¹⁰⁵ Cal. Code Civ. Proc., § 2102. For other matters prescribed or defined by the California Code of Civil Procedure,

Matters of which a court takes judicial notice are uniform and fixed, and do not depend upon uncertain testimony.¹⁰⁶ They take judicial notice of the true meaning of all legal expressions, including all the terms used in the constitution or in acts of the legislature;¹⁰⁷ and, generally speaking, they will take judicial notice of whatever is established by law.^{107a} The laws of Spain and Mexico which were in force in California prior to its conquest will be judicially noticed.¹⁰⁸

§ 1205. Privileged communications—Attorney and client.—Confidential communications made by a client to an attorney respecting the business he is employed to transact are privileged, and the attorney cannot be compelled to disclose them; but the matter must be communicated to the attorney professionally and in the usual course of business. But statements made by the client to other persons at the time, or by other persons to him, are not privileged, and the attorney is bound to disclose them the same as any other witness.¹⁰⁹ A client cannot be compelled to disclose communications which his attorney cannot be permitted to disclose.¹¹⁰ However, such privilege may be waived.¹¹¹ An attorney cannot disclose such matters as a basis for an opinion that a client is of unsound mind, but he may testify as to his general opinion based upon facts not coming to him because his professional advice had been sought.¹¹²

If, pending the relation of client and attorney, the client communicates to the attorney a fact foreign to the object for which

consult the same, under the titles Evidence; Witnesses; Writings, Public and Private; Estoppels; Presumptions; Rules of Examination; Effect of Evidence; Evidence in Particular Cases; etc. See, also, *Grennan v. McGregor*, 78 Cal. 258, 20 Pac. 559; *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000; *City of Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197.

¹⁰⁶ *Hunter v. New York etc. R. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81.

¹⁰⁷ *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393. See *People v. Harrison*, 107 Cal. 541, 40 Pac. 956; *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511, 54 N. W. 404, 21 L. R. A.

328; *Goodwin v. Scheerer*, 106 Cal. 690, 40 Pac. 18.

^{107a} *People v. Etting*, 99 Cal. 577, 34 Pac. 237.

¹⁰⁸ *Ohm v. City etc. of San Francisco*, 92 Cal. 437, 28 Pac. 580.

¹⁰⁹ *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114; Cal. Code Civ. Proc., § 1181, subd. 2, as amended by act of March 23, 1893; *Hager v. Shindler*, 29 Cal. 47. See *Story's Eq. Pl.* 601; *Gove v. Harris*, 8 Eng. L. & Eq. 149.

¹¹⁰ *Verdelli v. Gray's etc. Commercial Co.*, 115 Cal. 517, 47 Pac. 364.

¹¹¹ *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482.

¹¹² *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. 245.

the attorney was retained, the communication is not confidential.¹¹³ Employment as attorney must have been suggested or anticipated.¹¹⁴ If, after final judgment, he makes disclosures respecting subjects of the foregone employment, the communications are not privileged. If the attorney receives a deed of the client's property without consideration, and then, at the client's request, deeds the property to another person without consideration, these facts are not privileged communications, and the attorney may be required to disclose them as a witness in a suit by a creditor to cancel the deeds.¹¹⁵ The rule does not apply if the attorney is acting for both parties.¹¹⁶ The fact of employment is not confidential.¹¹⁷ Where the attorney, when examined as a witness, was unable to state whether an accused person had made certain admissions to him, or whether they were disclosed while the accused was under examination as a witness in his own behalf, the court should have excluded the testimony of its own motion. The accused should have had the benefit of the doubt.¹¹⁸ The privilege applies to the communication, and it is immaterial whether the client is or is not a party to the action in which the question arises, or whether the disclosure is sought from the client or from his legal adviser; and this privilege is not affected by the statutes making parties witnesses.¹¹⁹ A party having given evidence in chief on his own behalf, cannot, on cross-examination, be compelled to divulge statements made by him when consulting as a client an attorney-at-law, such communication being privileged as well when the client is a witness as when the attorney is a witness.¹²⁰ An attorney's secretary, stenographer, or clerk cannot be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.¹²¹ Where the accused in a criminal trial becomes a witness in his own behalf, he cannot be

¹¹³ Hager v. Shindler, 29 Cal. 48.

¹¹⁴ State v. Herbert, 63 Kan. 516, 66 Pac. 235.

¹¹⁵ Hager v. Shindler, 29 Cal. 48.

¹¹⁶ Harris v. Harris, 136 Cal. 379, 69 Pac. 23.

¹¹⁷ Security Loan & Trust Co. v. Estudillo, 134 Cal. 166, 66 Pac. 257; Stanley v. Stanley, 27 Wash. 570, 68 Pac. 187.

¹¹⁸ People v. Atkinson, 40 Cal. 285.

¹¹⁹ Montgomery v. Pickering, 116 Mass. 227; Brand v. Brand, 39 How. Pr. 193; Barker v. Kuhn, 38 Iowa, 395.

¹²⁰ Bigler v. Reyher, 43 Ind. 112; Hemenway v. Smith, 28 Vt. 701; Bobo v. Bryson, 21 Ark. 387, 76 Am. Dec. 406. To the contrary is *Inhabitants of Woburn v. Henshaw*, 101 Mass. 200, 3 Am. Rep. 333.

¹²¹ Cal. Code Civ. Proc., § 1881, subd. 2, as amended by act of March 23, 1893.

compelled on cross-examination to disclose confidential communications between himself and his attorneys.¹²²

§ 1206. **Husband and wife.**—A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to an action brought by husband or wife against another for alienation of affections or adultery by either husband or wife.¹²³ And it applies only to confidential communications during coverture, and not to facts obtained from ordinary observations; and a widow can testify as to the condition of her deceased husband when he was intoxicated.¹²⁴ While the wife cannot testify as to the contents of a letter written to her by defendant, while in jail, the jailor who reads all mail of the prisoners may testify as to the contents thereof.¹²⁵

§ 1207. **Physician.**—A licensed physician or surgeon cannot, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.¹²⁶ The rule as to privileged communications between patient and physician does not apply in criminal cases.¹²⁷ A physician practicing in another state, and not authorized to practice under the laws of the state where consulted, is not subject to the restriction.¹²⁸ Information necessary to enable the physician to prescribe for the patient is privileged, though such physician be sent and

¹²² *Duttenhofer v. State*, 34 Ohio St. 91, 32 Am. Rep. 362. As to privilege of professional communications, see *Weeks on Attorneys* (2d ed.), chap. 8.

¹²³ Cal. Code Civ. Proc., § 1881, subd. 1, as amended 1907. See *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229.

¹²⁴ *In re Van Alstine Estate*, 26 Utah, 193, 72 Pac. 942.

¹²⁵ *De Leon v. Territory*, 9 Ariz. 161, 80 Pac. 348.

¹²⁶ Cal. Code Civ. Proc., § 1881, subd. 4. See *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317. In *re Flint*, 100 Cal. 391, 34 Pac. 863; *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845; *Valensin v. Valensin*, 73 Cal. 106, 14 Pac. 397.

¹²⁷ *People v. Lane*, 101 Cal. 513, 36 Pac. 16.

¹²⁸ *Woodmen of the World v. Loehner*, 17 Colo. App. 247, 68 Pac. 136.

hired by the street-car company responsible for the injury.¹²⁹ The rule covers only such time as the relationship exists.¹³⁰

§ 1208. Priest.—A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.¹³¹

§ 1209. Public officer.—A public officer cannot be examined as a witness as to communications made to him in official confidence, when the public interests would suffer by the disclosure.¹³² But a judge or any juror may be a witness.¹³³

§ 1210. Witnesses in general.—Where the answer of a witness would tend to subject him to punishment for a felony, he is privileged from answering, on the ground solely that he is not compelled to incriminate himself.¹³⁴ The only case where a witness is privileged, on the ground that his answer would disgrace him, is when it is not pertinent to the issue.¹³⁵

§ 1211. Who may be witnesses.—In California, and generally throughout the United States, all persons, with few exceptions, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question.¹³⁶ The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination; 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are

¹²⁹ *Munz v. Salt Lake City R. Co.*, 25 Utah, 220, 70 Pac. 852; *Keast v. Santa Ysabel etc. Co.*, 136 Cal. 256, 68 Pac. 771.

¹³⁰ *Dubeich v. Grand Lodge, A. O. U. W.*, 33 Wash. 651, 74 Pac. 832.

¹³¹ Cal. Code Civ. Proc., § 1881, subd. 3. See *Est. of Toomes*, 54 Cal. 509, 35 Am. Rep. 83.

¹³² Cal. Code Civ. Proc., § 1881, subd. 5.

¹³³ Cal. Code Civ. Proc., § 1883.

¹³⁴ *Ex parte Rowe*, 7 Cal. 184.

¹³⁵ *Id.* See Cal. Code Civ. Proc., § 2065.

¹³⁶ Cal. Code Civ. Proc., § 1879; *Stevens v. Walton*, 17 Colo. App. 440, 68 Pac. 834.

examined, or of relating them truly; 3. Parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of the deceased.¹³⁷

§ 1212. **Children.**—There is no precise age within which children are excluded from giving testimony. Their competency is to be determined by the court, not by their age, but by the degree of their understanding and knowledge.¹³⁸ And if over ten years of age, the presumption is that they possess the requisite knowledge and understanding; but if under that age, the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction and in its presence, before they can be sworn.¹³⁹ Testimony of a child as young as six years may be taken.¹⁴⁰ Where a witness, being sworn, stated that he was fourteen years old and a Chileno, and did not know “the obligation of an oath,” whereupon the judge explained to him the nature of such obligation, and he was then permitted to testify, the other party objecting that he did not know the obligation of an oath, it was held that the witness was competent.¹⁴¹ But a deaf and dumb child, about nine years of age, who has no idea of an oath, and who cannot be made to understand questions asked him, is not competent.¹⁴²

§ 1213. **Parties to suits.**—The provision of the California Code of Civil Procedure, section 1880, subdivision 3, applies not only to parties who have, or are supposed to have, an interest adverse to the estate of the defendant, but by its terms renders all the nominal parties to the action incompetent.¹⁴³ This provision of the code has no application to a party claiming a family allowance.¹⁴⁴ In an action against an executor upon a claim against his testator, the deposition of the plaintiff cannot be received in evidence since the amendment to the

¹³⁷ Cal. Code Civ. Proc., § 1880.

¹³⁸ *People v. Bernal*, 10 Cal. 66.

¹³⁹ *Id.* See *In re Johnson*, 98 Cal. 549, 33 Pac. 460, 21 L. R. A. 380; *People v. Welsh*, 63 Cal. 167; *People v. Daily*, 135 Cal. 104, 67 Pac. 16.

¹⁴⁰ *People v. Swist*, 136 Cal. 520, 69 Pac. 223.

¹⁴¹ *Fuller v. Fuller*, 17 Cal. 605.

¹⁴² *Territory v. Duran*, 3 N. Mex. 134 (189), 3 Pac. 53.

¹⁴³ *Blood v. Fairbanks*, 50 Cal. 421. See *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897; *Uhlhorn v. Goodman*, 84 Cal. 185, 23 Pac. 1114; *Moore v. Schofield*, 96 Cal. 486, 31 Pac. 532.

¹⁴⁴ *Estate of McCausland*, 52 Cal. 568.

Code of Civil Procedure, which took effect July 1, 1874, even if the deposition was taken before said amendment was passed.¹⁴⁵ Under the Colorado statute, no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, is competent to testify therein of his own motion, or in his own behalf, when the adverse party sues or defends as the executor or administrator of a deceased person;¹⁴⁶ and this prohibition is the same in equity as at law.¹⁴⁷ But the executor or administrator is not prohibited from calling a party to the action to testify in behalf of the estate.¹⁴⁸

If it is not an action on a claim against the estate, the rule does not apply;¹⁴⁹ nor if it is an action by a principal against his deceased agent to set aside a deed procured from him by such agent's fraud;¹⁵⁰ nor if the action is to quiet title to community property as against the wife's estate.¹⁵¹ The mere fact that the witness has an interest in the outcome of the suit does not disqualify him;¹⁵² nor does the fact that, upon mismanagement of the case, costs might be charged up to the guardian *ad litem*, disqualify such guardian as a witness.¹⁵³

§ 1214. Partner surviving.—A surviving partner being sued for a partnership loan, of which the deceased partner only was cognizant, plaintiff is not competent as a witness in his own behalf.¹⁵⁴ A cashier of a bank is competent to testify in an action by the bank against decedent's estate.¹⁵⁵ As is, also, a

¹⁴⁵ Mitchell v. Haggenmeyer, 51 Cal. 108.

¹⁴⁶ Williams v. Carr, 4 Colo. App. 363, 36 Pac. 644. See Fetta v. Vandevier, 3 Colo. App. 419, 34 Pac. 168; approved, Vandevier v. Fetter, 20 Colo. 368, 38 Pac. 466; Jones v. Henshall, 3 Colo. App. 448, 34 Pac. 254; Carpenter v. Ware, 4 Colo. App. 458, 36 Pac. 298.

¹⁴⁷ Williams v. Carr, 4 Colo. App. 368, 36 Pac. 646. As to participation of court in the examination of a party testifying in his own behalf, see Baur v. Beall, 14 Colo. 383, 23 Pac. 345. Examination of parties as witnesses, concerning their feelings towards one another, as to, see Stewart v. Kindel, 15 Colo. 539, 25 Pac. 990.

¹⁴⁸ Chase v. Evoy, 51 Cal. 618. See Sedgwick v. Sedgwick, 52 Cal. 336; McGregor v. Donelly, 67 Cal. 149, 7 Pac. 422; Levy v. Dwight, 12 Colo. 101, 20 Pac. 12.

¹⁴⁹ Cunningham v. Stoner, 10 Idaho, 549, 79 Pac. 228.

¹⁵⁰ Calmon v. Parraille, 142 Cal. 638, 76 Pac. 486.

¹⁵¹ Bollinger v. Wright, 143 Cal. 292, 76 Pac. 1108.

¹⁵² Merriman v. Wickersham, 141 Cal. 567, 75 Pac. 180.

¹⁵³ In re Van Alstine Estate, 26 Utah, 193, 72 Pac. 942.

¹⁵⁴ Roney v. Buckland, 4 Nev. 45, Bay View Brew. Co. v. Grubb, 31 Wash. 34, 71 Pac. 553.

¹⁵⁵ City Savings Bank v. Enos, 135 Cal. 167, 67 Pac. 52.

stockholder or an officer of the corporation plaintiff.¹⁵⁶ In the discretion of the court, declarations of a partner may be received against both the partners, upon promise to prove a partnership relation.¹⁵⁷

§ 1215. **Religious belief.**—Under the California constitution, a witness is competent, without respect to his religious belief, or independent thereof.¹⁵⁸ A Chinaman who believes in the Chinese religion, but takes the ordinary form of oath without objection, and testifies that he regards it as binding, is, as far as concerns religious belief, a competent witness.¹⁵⁹

§ 1216. **Practice on evidence—Contradictory statements.**—Where a witness is subject to be impeached by proof of contradictory statements, the precise matter of these contradictions, and the time and place of the statements, must be brought to the knowledge of the witness on cross-examination. This rule applies equally to evidence of declaration or acts of hostility or of ill-feeling on the part of the witness.¹⁶⁰ But the witness may be impeached by evidence of acts and circumstances inconsistent with his testimony, without first laying a foundation, by questioning the witness on cross-examination.¹⁶¹ It is in the discretion of the court to admit such impeaching evidence, and the party offering such evidence must show error to his prejudice, by putting his exceptions to the ruling of the court in proper shape.¹⁶² If the deposition of a witness has been introduced on behalf of one party, the other may prove his confessions or declarations for the purpose of contradicting his deposition or impeaching his credit.¹⁶³ The party calling a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony.¹⁶⁴

¹⁵⁶ *Merriman v. Wickersham*, 141 Cal. 567, 75 Pac. 180.

¹⁵⁷ *Richardson v. Pierce* (N. Mex.), 93 Pac. 715.

¹⁵⁸ *Fuller v. Fuller*, 17 Cal. 605.

¹⁵⁹ *Territory v. Yee Shun*, 3 N. Mex. 82, (100), 2 Pac. 84.

¹⁶⁰ *Baker v. Joseph*, 16 Cal. 173.

¹⁶¹ *Barry v. People*, 29 Colo. 395, 68 Pac. 274.

¹⁶² *Baker v. Joseph*, 16 Cal. 173.

See *McDaniel v. Baca*, 2 Cal. 327, 56 Am. Dec. 339. As to impeachment of witness by proof of contradictory statements, see *San Diego etc. Co. v. Neale*, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604; *Empire etc. Co. v. Bonanza etc. Co.*, 67 Cal. 406, 7 Pac. 810; *Krewson v. Purdom*, 13 Or. 563.

¹⁶³ *Fox v. Fox*, 25 Cal. 587.

¹⁶⁴ Cal. Code Civ. Proc., §§ 2049, 2052. See, also, *Patterson v. Key-*

§ 1217. **Cross-examination.**—Courts are apt to take too narrow a view of the rights of cross-examination, confining it to the subject-matter of the examination in chief. Undoubtedly, the cross-examination cannot go beyond that matter, but it ought to be allowed a very free range within it. The witness may be sifted as to every fact touching the matters to which he testifies, so that his temper, leanings, relations to the parties and cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his character, his means of knowledge, his general and particular acquaintance with the subject-matter, may be fully tested.¹⁶⁵ The opposite party may cross-examine a witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.¹⁶⁶ The discretion of the trial court in allowing questions to be put upon cross-examination should not be impugned except for abuse.¹⁶⁷ Where the defendant offers himself as a witness in his own behalf, his cross-examination is subject to the same rules as that of any other witness.¹⁶⁸ A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence.¹⁶⁹ And where a witness has been exhaustively cross-examined upon a particular point, it is not an abuse of discretion for the court to excuse him from further cross-examination, in the absence of any suggestion from the counsel conducting the examination that he wished to cross-examine the witness upon other points.¹⁷⁰

stone M. Co., 30 Cal. 360; Norwood v. Kenfield, 30 Cal. 398; People v. Chin Mook Sow, 51 Cal. 597; In re Kennedy, 104 Cal. 429, 38 Pac. 93; Tourtelotte v. Brown, 4 Colo. App. 377, 36 Pac. 73.

¹⁶⁵ Jackson v. Feather River & Gibsonville Water Co., 14 Cal. 18.

¹⁶⁶ Cal. Code Civ. Proc., § 2048. See, also, Harston's Practice, note to same section; People v. Chin Mook Sow, 51 Cal. 597; People v. Gallagher, 100 Cal. 466, 35 Pac. 80.

¹⁶⁷ City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224. See, also, Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50; Sayres v. Allen, 25 Or. 211, 35 Pac. 254; Ah Doon v. Smith, 25 Or.

89, 34 Pac. 1093; Carroll v. Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; Tourtelotte v. Brown, 1 Colo. App. 408, 29 Pac. 130; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269; Rosum v. Hodges, 1 S. Dak. 308, 47 N. W. 140, 9 L. R. A. 817; Holdridge v. Lee, 3 S. Dak. 134, 52 N. W. 265; Bassett v. Glass, 65 Kan. 500, 70 Pac. 336.

¹⁶⁸ People v. Hite, 8 Utah, 461, 33 Pac. 254. See Patrick v. Crowe, 15 Colo. 543, 25 Pac. 985.

¹⁶⁹ Tourtelotte v. Brown, 4 Colo. App. 377, 36 Pac. 73; People v. Jenkins, 56 Cal. 4.

¹⁷⁰ Sandell v. Sherman, 107 Cal. 391, 40 Pac. 493; San Miguel etc. Co.

Where the defendant's demurrer to a complaint for damages has been overruled, and he declines to plead further, but is permitted to cross-examine the plaintiff's witnesses on the question of damages, the refusal of the court to state the legal effect of the cross-examination is not reviewable error.¹⁷¹

§ 1218. **Discretion of court.**—It is in the discretion of the court to allow or refuse the introduction of further testimony after resting;¹⁷² or to allow a leading question to be put;¹⁷³ or to allow a witness to give an opinion;¹⁷⁴ or to grant an amendment at the trial.¹⁷⁵ The refusal of a court trying an issue without a jury to consider the testimony as conflicting, or to pass upon the credibility of witnesses, raises no questions reviewable.¹⁷⁶

§ 1219. **Books of account.**—If entries in a pass-book or account-book do not include the whole account, but only a summary, made at certain intervals, they are inadmissible, as not being original entries, and writings offered only to corroborate them should be rejected.¹⁷⁷ A warehouseman's receipt-book, containing stubs of receipts issued, is admissible as a book of original entry.¹⁷⁸ Entries in an account-book kept by one now deceased, which entries were made in performance of a duty enjoined by law, when the deceased was in a position to know, and were against his own interest, may be read in evidence.¹⁷⁹ Private memoranda, not a book account, may be used to refresh the memory of the witness, without being offered in evidence.¹⁸⁰

§ 1220. **Historical books.**—Works of history and science, written by persons indifferent between the parties, are *prima facie*

v. Bonner, 33 Colo. 207, 79 Pac. 1025; People v. Linares, 142 Cal. 17, 75 Pac. 308; People v. Rader, 136 Cal. 253, 68 Pac. 707.

¹⁷¹ Colorado etc. Ry. Co. v. Trevarthen, 1 Colo. App. 152, 27 Pac. 1012.

¹⁷² Meyer v. Goedel, 31 How. Pr. 456.

¹⁷³ Black v. Camden etc. R. R. Co., 45 Barb. 40; State v. Chee Gong, 17 Or. 635, 21 Pac. 882; Moran v. Abbey, 63 Cal. 56.

¹⁷⁴ Kimmer v. Wilson, 42 Colo. 180, 93 Pac. 1110.

¹⁷⁵ Binnard v. Spring, 42 Barb. 470.

As to the order of admission of relevant testimony, see Murphy v. Boker, 28 How. Pr. 251. As to imposing restrictions on undue latitude of cross-examination, see Third Great Western Turnpike Co. v. Loomis, 32 N. Y. 127, 88 Am. Dec. 311.

¹⁷⁶ Terry v. Wheeler, 25 N. Y. 520.

¹⁷⁷ Harmon v. Decker, 41 Or. 587, 93 Am. St. Rep. 748, 68 Pac. 11, 1111.

¹⁷⁸ Tobin v. Portland Flouring Mill Co., 41 Or. 269, 68 Pac. 743, 1108.

¹⁷⁹ Kent v. Richardson, 8 Idaho, 750, 71 Pac. 117.

¹⁸⁰ Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

evidence of facts of general notoriety;¹⁸¹ but such works and records and journals of the Mormon church are not admissible in Idaho to show the meaning of the term "sealing ordinance," as applied by the Mormons to the ceremony of marriage.¹⁸² Tables of life expectancy may be admitted without preliminary proof of authenticity and standard quality.¹⁸³

§ 1221. Deeds and contracts.—Corrections and interlineations which clearly appear to have been made before execution do not render a contract inadmissible.¹⁸⁴ Nor does a clerical mistake in the dates of a deed render it inadmissible.¹⁸⁵ Official county records of a release of mortgage may be introduced in evidence without accounting for the original.¹⁸⁶ The organization of a corporation is properly proved by a certified copy of its certificate of incorporation, made by the secretary of state, the legal keeper of such record.¹⁸⁷ In absence of proof to the contrary, a contract executed by the officers of a corporation, in reference to business within the scope of the company's business, may be admitted without direct proof of the authority of such officers to execute the same.¹⁸⁸

§ 1222. Letters, correspondence.—It is sufficient if the one who receives a letter in answer to a letter sent, in due course of mail, identifies it.¹⁸⁹ A letter, in the hands of plaintiff, containing the terms of agreement with defendant, may be introduced, upon proof of its having been sent to and received by defendant, even though it afterwards came back into the hands of plaintiff.¹⁹⁰

§ 1223. Public documents.—Printed rules delivered to a policeman as a part of the rules of the police department are competent evidence in an action to recover from the city for part of his

¹⁸¹ Utah Rev. Stats., § 3400; Cal. Code Civ. Proc., § 1936.

¹⁸² *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660.

¹⁸³ *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256, 68 Pac. 771.

¹⁸⁴ *Cowley v. United States Fidelity etc. Co.*, 29 Wash. 268, 69 Pac. 784.

¹⁸⁵ *Mosier v. Momsen*, 13 Okla. 41, 74 Pac. 905.

¹⁸⁶ *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712.

¹⁸⁷ Mont. Rev. Codes, § 3821; *Western Iron Works v. Montana Pulp etc. Co.*, 30 Mont. 550, 77 Pac. 413.

¹⁸⁸ *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297.

¹⁸⁹ *Huber Mfg. Co. v. Claudel*, 71 Kan. 441, 80 Pac. 960.

¹⁹⁰ *Cooney v. McKinney*, 25 Utah, 329, 71 Pac. 485.

salary, though such book of rules is not certified to.¹⁹¹ Entries made by a sheriff, in reference to levy of an attachment, made in regular course of business, though such entries are not required by law, is admissible as an original entry.¹⁹² If the original tax-list or roll is introduced, it need not be certified to as in case of a copy.¹⁹³ Public records of sister states other than of courts must be certified in accordance with the United States statute, and a sealed certificate of the record of an instrument of adoption, made by the keeper of such records in a foreign state, is inadmissible to prove that the instrument was recorded.¹⁹⁴ The original deed or declaration is admissible in place of a certified copy of the record of such instrument.¹⁹⁵ Parol evidence of a member of the council is not admissible to show the actual vote by which an ordinance in question was passed.¹⁹⁶ The same rule applies to legislative acts.¹⁹⁷

§ 1224. Court records.—The records and files of inferior courts are admissible.¹⁹⁸ But a summons purporting to have been issued by a justice, and not in any way authenticated, is inadmissible.¹⁹⁹ The opinion of the appellate court is not admissible in evidence to prove facts in issue.²⁰⁰ A judgment between the same parties is admissible as evidence of the right therein established, though such judgment is on rehearing before the supreme court.²⁰¹

The exemplification of a decree of divorce must contain all the proceedings, and must show on its face that jurisdiction was acquired;²⁰² of a record of a will must contain the proofs before the surrogate.²⁰³ The attestation of a foreign judgment must be signed by the clerk himself.²⁰⁴ A certificate of exemplification of

¹⁹¹ *Bringgold v. City of Spokane*, 27 Wash. 202, 67 Pac. 612.

¹⁹² *Hesser v. Rowley*, 139 Cal. 410, 73 Pac. 156.

¹⁹³ *State v. Nevada Cent. Ry. Co.*, 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042.

¹⁹⁴ *James v. James*, 35 Wash. 650, 77 Pac. 1080.

¹⁹⁵ *Smith v. Veysey*, 30 Wash. 18, 70 Pac. 94.

¹⁹⁶ *Gove v. Tacoma*, 34 Wash. 434, 76 Pac. 73.

¹⁹⁷ *Andrews v. People*, 33 Colo. 193, 108 Am. St. Rep. 76, 79 Pac. 1031.

¹⁹⁸ *Keenan v. Washington Liquor Co.*, 8 Idaho, 383, 69 Pac. 112.

¹⁹⁹ *Chapman v. Duffy*, 20 Colo. App. 471, 79 Pac. 746.

²⁰⁰ *Work Bros. v. Kinney*, 8 Idaho, 771, 71 Pac. 477.

²⁰¹ *Salt Lake etc. El. Co. v. Salt Lake City*, 25 Utah, 441, 71 Pac. 1067.

²⁰² *Lawrence's Case*, 18 Abb. Pr. 347.

²⁰³ *Hill v. Crockford*, 24 N. Y. 128.

²⁰⁴ *Morris v. Patchin*, 24 N. Y. 394, 82 Am. Dec. 311. As to authentication of a Canada judgment, see *Lazier v. Westcott*, 26 N. Y. 146, 82 Am.

a judgment rendered in another state, when attested by the clerk under the seal of the court, and when the presiding judge of the court certifies to that attestation as in due form of law, is sufficient, under the act of Congress of May 26, 1790, to sustain an action upon the judgment in another state.²⁰⁵ Where certain preliminary proof is necessary to the introduction of any kind of documentary evidence, the sufficiency of such proof is to be determined in the first instance by the trial judge, and his determination of the matter will not be disturbed, unless there has been an abuse of discretion.²⁰⁶

§ 1225. Impeachment of witness.—A witness may be impeached by the party against whom he is called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, and integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony. But conviction of a felony must be proved by the record; parol evidence of the fact is inadmissible.²⁰⁷ However, one accused of an offense and of a previous conviction may be asked by the prosecution if he has ever been convicted of a felony.²⁰⁸ A witness who is called to impeach another may answer that he would not believe such other witness on oath. This is the uniform practice in California.²⁰⁹ Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness. It must be restricted to her character for truth and veracity.²¹⁰

Dec. 404. Of a judgment of English Privy Council, see *Jarvis v. Sewall*, 40 Barb. 449. See as to admission of foreign charter, *per se*, *Brooks Paper Works v. Willett*, 19 Abb. Pr. 416.

²⁰⁵ *Thompson v. Manrow*, 1 Cal. 428; *Parke v. Williams*, 7 Cal. 249. Consult, also, Cal. Code Civ. Proc., §§ 1887, 1951; *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647; *Green v. Green*, 103 Cal. 108, 111, 37 Pac. 188.

²⁰⁶ *Webster v. San Pedro Lumber Co.*, 101 Cal. 326, 35 Pac. 871; *Bryce v. Joynt*, 63 Cal. 378, 49 Am. Rep. 94.

²⁰⁷ *People v. Schenick*, 65 Cal. 625, 4, Pac. 675; Cal. Code Civ. Proc., § 2051. See Cal. Code Civ. Proc.,

§ 2052; *People v. Reinhart*, 39 Cal. 449; *Newcomb v. Griswold*, 24 N. Y. 298; *People v. Murray*, 41 Cal. 67; *People v. Ah Who*, 49 Cal. 32; *People v. Parton*, 49 Cal. 632.

²⁰⁸ *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172.

²⁰⁹ *Stevens v. Irwin*, 12 Cal. 306. See, also, *People v. Tyler*, 35 Cal. 553.

²¹⁰ *People v. Yslas*, 27 Cal. 630. Consult, also, the following cases: *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256; *Evans v. De Lay*, 81 Cal. 103, 22 Pac. 408; *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Davies v. Oceanic Steam-*

A sound discretion will never sanction inquiries the sole object of which is to disgrace the witness, and not to test his credibility.²¹¹ A witness, whichever party calls him, cannot be impeached unless he has given testimony against the impeaching party.²¹² And a witness cannot be impeached by evidence showing him to be a person without religious belief.²¹³

§ 1226. Party not bound by statements.—A party is not bound by, or held to admit as true, statements made by his witnesses during the trial, because he does not deny or contradict them at the time.²¹⁴ If a party offers a witness to prove the sale of a mining claim, under which he claims, and the witness says the sale was in writing, the party is bound by the statement of the witness, and must produce the writing or account for its loss.²¹⁵ A party calling a witness is not precluded from proving, by another witness, the truth of any particular fact in direct contradiction to what the first witness may have testified.²¹⁶

§ 1227. Recalling witness.—If the ends of justice require, it is both the right and duty of a court to permit a witness to be recalled after a party has closed his case.²¹⁷ Where plaintiff had testified that she had not had previous trouble with her ankles, and one of her witnesses later, on cross-examination, testified of her having told of an accident to her ankle in early life, it is proper to allow plaintiff to be recalled to testify that it was the other ankle that was injured before.²¹⁸ The question is one left to the sound discretion of the court, and its action will not be

ship Co., 89 Cal. 280, 26 Pac. 827; Redington v. Pacific Postal Cable Co., 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432; State v. Manville, 8 Wash. 523, 36 Pac. 470; Wimer v. Smith, 22 Or. 469, 30 Pac. 416; State v. Hunsaker, 16 Or. 499, 19 Pac. 605; Steeples v. Newton, 7 Or. 110, 33 Am. Rep. 705. As to laying foundation, see United States v. Fuller, 4 N. Mex. 358, 20 Pac. 175; Young v. Brady, 94 Cal. 128, 29 Pac. 489; Clavey v. Lord, 87 Cal. 413, 25 Pac. 493; Krewson v. Purdom, 13 Or. 563, 11 Pac. 281; Sheppard v. Yocum, 10 Or. 402. As to impeachment by use of stenographer's notes, see Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621.

²¹¹ State v. Bacon, 13 Or. 143, 57 Am. St. Rep. 8, 9 Pac. 393.

²¹² People v. Mitchell, 94 Cal. 550, 29 Pac. 1106. See Langford v. Jones, 18 Or. 307, 326, 22 Pac. 1064.

²¹³ People v. Copesey, 71 Cal. 548, 12 Pac. 721.

²¹⁴ Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64.

²¹⁵ Patterson v. Keystone Min. Co., 30 Cal. 360.

²¹⁶ Norwood v. Kenfield, 30 Cal. 393.

²¹⁷ Fairchild v. California Stage Co., 13 Cal. 599; People v. Keith, 50 Cal. 139; Cal. Code Civ. Proc., § 2050.

²¹⁸ Bailey v. Seattle etc. Ry. Co., 32 Wash. 640, 73 Pac. 679.

disturbed unless a clear abuse of discretion is shown.²¹⁹ The refusal of the court to permit the recalling of a witness, after the evidence was closed, to contradict a statement drawn from another witness on cross-examination, is not erroneous.²²⁰ It is within the discretion of the court to permit further evidence, when it sets aside the verdict in an equity case.²²¹

§ 1228. Order of proof.—As a general rule, the mere order in which evidence may be introduced is very much in the discretion of the court, and will not be interfered with by the appellate court, except in cases of abuse of discretion.²²² Even the application of the rule that a defendant should not open the defense by a cross-examination of the plaintiff's witnesses, must rest largely in the sound discretion of the trial court.²²³ In the trial of an adverse mining suit, it is not error for the court to decline to direct counsel for the defendant as to the order in which he should produce certain of his proofs.²²⁴

§ 1229. Limiting number of witnesses.—The court may, in its discretion, limit the number of expert witnesses that may be called upon the trial.²²⁵ And it was held to be within the discretion of the trial court, in the particular case, to limit the respective parties in the number of witnesses as to any particular point to three upon a side.²²⁶

§ 1230. Refreshing memory of witness.—A witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly

²¹⁹ *Rea v. Wood*, 105 Cal. 314, 38 Pac. 899; *Briswalter v. Palomares*, 66 Cal. 259, 5 Pac. 226; *McGrath v. Wallace*, 85 Cal. 622, 24 Pac. 793.

²²⁰ *Layton v. Kirkendall*, 20 Colo. 236, 38 Pac. 55.

²²¹ *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 493. Evidence in rebuttal, discretion of court as to introduction of, see *Charles v. Varian*, 4 Colo. App. 227, 35 Pac. 672. Redirect examination of witness, as to scope of, see *Robinson v. Peru Plow etc. Co.*, 1 Okla. 140, 31 Pac. 988.

²²² *Bates v. Tower*, 103 Cal. 404,

37 Pac. 385; *Lee Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Bowman v. Ep-pinger*, 1 N. Dak. 121, 44 N. W. 1000.

²²³ *Hopkins v. Utah etc. Ry. Co.*, 2 Idaho, 300, 13 Pac. 343. But compare *Haines v. Snedigar*, 110 Cal. 18, 42 Pac. 462.

²²⁴ *Bushnell v. Crooke etc. Smelting Co.*, 12 Colo. 247, 21 Pac. 931.

²²⁵ *Huett v. Clark*, 4 Colo. App. 231, 35 Pac. 671.

²²⁶ *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363.

stated in the writing.²²⁷ It is accordingly held, that a bank depositor, testifying to the balance of account as a witness, may refresh his memory from the pass-book as to deposits made and amounts drawn out, where it appears that the entries of deposits were made in the presence of the witness and under his direction, and that the entries of the amount drawn out were made under his direction, and that he knew at the time that the balance stated was correct.²²⁸ A landlord having entered defendant's name on the hotel register for a certain date, may testify, after examining the register, that he was a guest on the date in question, though he has no independent recollection thereof.²²⁹ A witness may refresh his memory by reference to memoranda of the dates, weights, and prices entered by himself at the time certain sales were made.²³⁰

§ 1231. Argument of counsel.—Upon the close of the evidence, counsel for plaintiff opens the argument to the jury. Defendant replies, and plaintiff's counsel closes. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument.²³¹ The court may then charge the jury. The party who holds the affirmative and calls the first witness has the right to make the closing address.²³² If the party who holds the negative waives his right to make argument, the plaintiff cannot make a second speech.²³³ A court rule prohibiting an attorney who offers himself as a witness in the case from making argument to the jury, except by permission of the court, may act as a waiver of the right to argue.²³⁴ On argument on demurrer to one separate defense, another cannot be referred to to sustain it.²³⁵ The open-

²²⁷ Cal. Code Civ. Proc., § 2047. See *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Price v. Garland*, 3 N. Mex. 285, 290 (505), 6 Pac. 472.

²²⁸ *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

²²⁹ *State v. Douette*, 31 Wash. 6, 71 Pac. 556; *People v. McFarlane*, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245.

²³⁰ *Rohrig v. Pearson*, 15 Colo. 127, 24 Pac. 1083. As to memoranda not falling within the rule above stated, see *Bergman v. Shoudy*, 9 Wash. 331, 37 Pac. 453.

²³¹ Cal. Code Civ. Proc., § 607, subd. 5.

²³² *Elwell v. Chamberlin*, 31 N. Y. 611. As to allowing the right to close to either party, see *Fry v. Bennett*, 28 N. Y. 324.

²³³ *Seattle etc. R. Co. v. Roeder*, 30 Wash. 244, 94 Am. St. Rep. 864, 70 Pac. 498.

²³⁴ *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697.

²³⁵ *Jackson v. Van Slyke*, 44 Barb. 116, note. See *Fairbanks v. Irwin*, 15 Colo. 366, 20 Pac. 701; *Lynch v. Richter*, 10 Wash. 486, 39 Pac. 125.

ing of the cause, introduction of evidence, and summing up by counsel to the jury, or submitting of the cause to the court or referee, on written points and arguments, after the evidence is closed, are parts of the trial of an issue of fact, and the trial is not completed until the cause is finally submitted to the court, referee, or jury.²³⁶

Counsel have a right to discuss the case in all its bearings, and so long as they do not go outside of it and attempt to bring in other matters they cannot be restrained by the court.²³⁷ Subject to the general rule that counsel may not comment upon matters of fact that are not in evidence, trial courts should, in the exercise of a reasonable discretion, favor the freest and fullest discussion.²³⁸ It is improper upon the trial before the jury for counsel to refer to or in any manner animadvert upon the plaintiff's refusal to consent that her physician be examined. It is a privilege secured by law, and is not to be questioned.²³⁹ An argument which refers to the trial judge in language that is wholly unnecessary and grossly improper will not be allowed.²⁴⁰ Where counsel makes an improper argument to the jury during the temporary absence of the judge from his seat, but the judge after his return, upon the objection of the opposing counsel, compels him to desist therefrom, and subsequently instructs the jury to disregard such argument, no error can be founded thereon.²⁴¹ Misconduct in argument is prejudicial, notwithstanding a subsequent charge.²⁴² But in order to be prejudicial, the remarks must relate to material matters of fact, and not mere opinion.²⁴³ The trial court has power, in its discretion, to limit the argument of counsel, and its action in this respect is not the subject-matter of review, unless, possibly, in case of very evident and plain

²³⁶ *Mygatt v. Willcox*, 35 How. Pr. 410.

²³⁷ *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698.

²³⁸ *Cook v. Doud*, 14 Colo. 483, 23 Pac. 906. Also, to same effect, *Felt v. Cleghorn*, 2 Colo. App. 4, 29 Pac. 813; *Hill v. Colorado National Bank*, 2 Colo. App. 325, 30 Pac. 489.

²³⁹ *Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744.

²⁴⁰ *Diamond etc. Min. Co. v. Faulkner*, 17 Colo. 9, 28 Pac. 472; *Brownell v. McCormick*, 7 Mont. 13, 14 Pac. 651; *Green v. Elbert*, 137 U. S. 615,

34 L. Ed. 792, 11 Sup. Ct. 188. Reading extracts from law books to the jury, when permitted, see *Gilbertson v. Miller etc. Smelting Co.*, 4 Utah, 46, 5 Pac. 699; *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655.

²⁴¹ *Graves v. Smith*, 7 Wash. 14, 34 Pac. 213. See *Skagit etc. Lumber Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077.

²⁴² *Spencer v. Town of Arlington*, 49 Wash. 121, 94 Pac. 904.

²⁴³ *Clements v. Watson*, 7 Cal. App. 74, 93 Pac. 385.

abuse of such discretion.²⁴⁴ The consequences resulting from absences of the trial judge during the argument of a cause to the jury, may be such as to necessitate the granting of a new trial.²⁴⁵

§ 1232. **Opening statement.**—Counsel may read the pleadings to the jury,²⁴⁶ may state his theory of the law,²⁴⁷ and state the nature of his case and of the defense interposed, without anticipating all in the opening statement to the jury.²⁴⁸

§ 1233. **Reading law to jury.**—Since it is the judge's duty to declare the law to the jury, he may refuse to permit counsel to read supreme court decisions to them;²⁴⁹ for it has a tendency to confuse rather than to enlighten the jury.²⁵⁰ However, such reading is not ground for reversal, unless injury be shown therefrom.²⁵¹

§ 1234. **Instructions to jury.**—In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case, it must inform the jury that they are exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.²⁵² The instruction by the court should be a complete charge upon the legal questions to which it relates.²⁵³ Ordinarily, an extended charge to the jury is unnecessary. But when the question to be determined by the jury is complicated, and dependent upon a variety of circumstances and conditions, it is important that the jury should be guided in their deliberations by the learning and experience of the presiding judge.²⁵⁴

²⁴⁴ *Groth v. Kersting*, 4 Colo. App. 395, 36 Pac. 156. See *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363. As to construction of statute limiting time for argument of counsel, see *Hurst v. Burnside*, 12 Or. 520, 8 Pac. 888.

²⁴⁵ *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493.

²⁴⁶ *Waid v. Hobson*, 17 Colo. App. 54, 67 Pac. 176.

²⁴⁷ *San Miguel etc. Co. v. Bonner*, 33 Colo. 207, 79 Pac. 1025.

²⁴⁸ *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.

²⁴⁹ *Swope v. City of Seattle*, 36 Wash. 113, 78 Pac. 607.

²⁵⁰ *Filley v. Christopher*, 39 Wash. 22, 109 Am. St. Rep. 853, 80 Pac. 834.

²⁵¹ *Williams v. Spokane etc. Ry. Co.*, 39 Wash. 77, 80 Pac. 1100.

²⁵² Cal. Code Civ. Proc., § 608.

²⁵³ *Bradley v. Lee*, 38 Cal. 362.

²⁵⁴ *Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90.

If the court charge the jury erroneously upon a proposition of law which does not arise in the case either upon the pleadings or the evidence, and which could not affect the result, the error is not material, and will not cause a reversal of the judgment.²⁵⁵ Generally speaking, an erroneous instruction, which the record shows could cause no injury to the complaining party, is not ground for reversal.²⁵⁶ A mere misuse of the conjunctive "and" instead of the disjunctive "or" in a charge which has clearly and repeatedly correctly stated the law is harmless error, which will not warrant a reversal.²⁵⁷ Neither the refusal of an unnecessary instruction nor the giving of one not in prejudice of the interest of the complaining party will sustain an assignment of error.²⁵⁸ Comment on the facts by the judge during the progress of a jury trial is harmless error, when not prejudicial to the party complaining.²⁵⁹ But the court should not comment upon the weight of evidence or the credibility of any witness,²⁶⁰ nor should an instruction tend to explain any part of the evidence,²⁶¹ but may state the legal effect of facts, without intimating what they are.²⁶² This rule applies only to the disputed facts.²⁶³

A judge is bound to instruct a jury upon each proposition of law submitted to him by counsel bearing upon the evidence.²⁶⁴ But he is not bound, without the request of parties, to instruct the jury; and the latter are presumed to be acquainted with all the rules of law in regard to which the parties do not require

²⁵⁵ *Satterlee v. Bliss*, 36 Cal. 489.

²⁵⁶ *Los Angeles etc. Assoc. v. Los Angeles*, 103 Cal. 461, 37 Pac. 375; *National Bank v. Lempe*, 3 N. Dak. 154, 54 N. W. 919. See, also, *Witherby v. Thomas*, 55 Cal. 9; *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952; *Huges v. Wheeler*, 76 Cal. 230, 18 Pac. 386; *Carroll v. Centralia Water Co.*, 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; *Hoagland v. Cole*, 18 Colo. 426, 33 Pac. 151; *Patrick etc. Co. v. Skoman*, 1 Colo. App. 323, 29 Pac. 21; *McClellan v. Hurdle*, 3 Colo. App. 40, 33 Pac. 280; *Denver etc. R. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79; *Simonton v. Rohm*, 14 Colo. 51, 23 Pac. 86; *Fant v. Lyman*, 9 Mont. 61, 22 Pac. 120.

²⁵⁷ *O'Connor v. Langdon*, 3 Idaho, 61, 26 Pac. 659.

²⁵⁸ *Pinkerton v. Ledoux*, 3 N. Mex. 252 (403), 5 Pac. 721. See *Territory v. Baker*, 4 N. Mex. 117 (236), 13 Pac. 30. For instructions which are to be given on all proper occasions, see *Cal. Code Civ. Proc.*, § 2061.

²⁵⁹ *Earles v. Bigelow*, 7 Wash. 581, 35 Pac. 390.

²⁶⁰ *Kroetcher v. Empire Mills Co.*, 9 Idaho, 277, 74 Pac. 868.

²⁶¹ *French v. Seattle Tr. Co.*, 26 Wash. 264, 66 Pac. 404.

²⁶² *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580.

²⁶³ *Lownsdale v. Gray's Harbor Boom Co.*, 36 Wash. 198, 78 Pac. 904.

²⁶⁴ *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551. See *Williams v. Williams*, 20 Colo. 51, 69, 37 Pac. 614; *Hislop v. Moldenhauer*, 23 Or. 119, 31 Pac. 252.

them to be instructed, or the court does not instruct them.²⁶⁵ Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.²⁶⁶ If either party deem any instruction appropriate, he must offer it.²⁶⁷ Proposed instructions should not be read in the hearing of the jury before they are passed upon by the court.²⁶⁸

Whenever the knowledge of the court is by the code made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.²⁶⁹ Matters of general knowledge, such as the use of fenders upon street-cars, may be included in the charge, as though proved by evidence.²⁷⁰ If an equity case is treated as an ordinary action at law, and submitted to a jury as such, and the court considers itself bound and controlled by the verdict as in an action of law, each party has the same right with respect to instruction as if it were a case at law.²⁷¹ The court should give or refuse instructions as asked for, and though the phraseology may be modified to make it more intelligible, yet the sense must not be altered.²⁷² But where an instruction asked by defendant, if given entire, would have been erroneous, the court is not bound to separate the concluding clause and give that by itself, and may therefore refuse to give the instruction.²⁷³ A correct charge by the court upon a matter in issue cures a refusal by the court to give a correct charge upon the same point asked by one of the other parties.²⁷⁴ A rule of court requiring counsel to file and submit to the court any instructions they may offer before the argument is closed to the jury does not operate where the cause is submitted without

²⁶⁵ *Haupt v. Pohlmann*, 16 Abb. Pr. 301; *Marine Bank of N. Y. v. Clements*, 31 N. Y. 33; *Wilklow v. Lane*, 37 Barb. 244.

²⁶⁶ Cal. Code Civ. Proc., § 609.

²⁶⁷ *People v. Ah Wee*, 48 Cal. 239.

²⁶⁸ *Waldie v. Doll*, 29 Cal. 561.

²⁶⁹ Cal. Code Civ. Proc., § 2102.

²⁷⁰ *Spiking v. Consolidated Ry.*, 33 Utah, 313, 93 Pac. 838.

²⁷¹ *Van Vleet v. Olin*, 4 Nev. 95, 97 Am. Dec. 513.

²⁷² *Conrad v. Lindley*, 2 Cal. 174; *Jamson v. Quivey*, 5 Cal. 491; *Russell*

v. Amador, 3 Cal. 403; *People v. Davis*, 47 Cal. 93; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 23 How. Pr. 448.

²⁷³ *Smith v. Richmond*, 19 Cal. 477; *Mayor of New York v. Exchange Fire Ins. Co.*, 9 Bosw. 424; *People v. Davis*, 64 Cal. 440, 1 Pac. 889; *People v. Biddlecome*, 3 Utah, 208, 2 Pac. 194.

²⁷⁴ *Davis v. Perley*, 30 Cal. 630. See *Manning v. Dallas*, 73 Cal. 420, 15 Pac. 34; *Sappenfield v. Main St. etc. R. R. Co.*, 91 Cal. 48, 27 Pac. 590.

argument.²⁷⁵ If there is a rule requiring instructions to be handed to the judge by a certain time in the progress of the trial, it is not error for the court to refuse instructions not handed in in time;²⁷⁶ and if a request is not made for a direct instruction upon a point, complaint cannot be made of the court's failure to instruct thereon.²⁷⁷

§ 1235. **Taking case from jury.**—Where different minds might reasonably reach different conclusions from the evidence, a nonsuit should not be granted.²⁷⁸ An instruction may be given to eliminate the effect of incompetent testimony admitted without objection.²⁷⁹

§ 1236. **Instructions, how given.**—Instructions in civil and criminal cases should be drawn with reference to the case, as made by the evidence.²⁸⁰ An instruction of the court to the jury must be adapted to the facts of the case,²⁸¹ but need not embody the entire law of the case, if the charge as a whole fully covers it.²⁸² Instructions to a jury, asked by a party, which are not pertinent to any issue in the cause, should be refused, even though they embody correct abstract principles of law.²⁸³ No instructions should be given to a jury which are not predicated upon some theory logically deducible from at least some portion of the testimony.²⁸⁴ Instructions should not be unnecessarily repeated, thereby placing undue stress upon them.²⁸⁵ Where the answer was insufficient as a denial of the allegations in the complaint, and the court instructed the jury to find for plaintiff, it was held that the instruction was right, no evidence being re-

²⁷⁵ *Tinney v. Endicott*, 5 Cal. 102.

²⁷⁶ *Waldie v. Doll*, 29 Cal. 556.

²⁷⁷ *Trickey v. Clark*, 50 Or. 516, 93 Pac. 457.

²⁷⁸ *Pilmer v. Boise Tr. Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 94 Pac. 432, 15 L. R. A. (N. S.) 254; *Sherman v. Hicks* (N. Mex.), 94 Pac. 959; *Cockrell v. Schmitt*, 20 Okla. 207, 94 Pac. 521; *Cole v. Missouri etc. Ry. Co.*, 20 Okla. 227, 94 Pac. 540.

²⁷⁹ *Pereira v. Star Sand Co. (Or.)*, 94 Pac. 835.

²⁸⁰ *People v. Roberts*, 6 Cal. 217.

²⁸¹ *People v. Honshell*, 10 Cal. 87;

People v. Byrnes, 30 Cal. 206; *Thompson v. Lee*, 8 Cal. 275; *People v. Hurley*, 8 Cal. 390.

²⁸² *Wikstrom v. Preston Mills Co.*, 48 Wash. 164, 93 Pac. 213.

²⁸³ *Conlin v. San Francisco etc. R. Co.*, 36 Cal. 404; *People v. Byrnes*, 30 Cal. 206; *Capuro v. Builders' Ins. Co.*, 39 Cal. 123; *People v. Turley*, 50 Cal. 469.

²⁸⁴ *People v. Sanchez*, 24 Cal. 28. See *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132; *Renton v. Monnier*, 77 Cal. 449, 19 Pac. 820.

²⁸⁵ *Chicago etc. Ry. Co. v. Alexander*, 47 Wash. 131, 91 Pac. 926.

quired on the part of plaintiff.²⁸⁶ When certain allegations of fact in the complaint are admitted in the answer, an instruction by the court to the jury that the admitted facts will be taken by them as true, and that they will so find for plaintiff, is not an instruction to the jury to find a verdict in favor of the plaintiff, except as to the facts so admitted.²⁸⁷ It is not error for the judge, in stating the testimony of the jury, to read a memorandum of testimony taken by another person, instead of using his own minutes or making the statement from recollection.²⁸⁸ In stating the testimony, the safer course is to recite the language of the witness; but if the substance only is stated correctly, it is not error.²⁸⁹ Whether an instruction giving the general rule without qualification be proper or not, depends on the facts in proof, and the charge will be right or wrong according to the circumstances of the given case.²⁹⁰

§ 1237. Form and sufficiency of instructions—Generally.—The trial court may exercise a sound discretion as to the form and style in which instructions shall be given to the jury. It is not error for the court to omit numbering the instructions, unless requested to do so.²⁹¹ It may either give instructions in the form submitted by counsel, or may consider such requests as expressing the views of the respective parties, and use them in preparing a connected and harmonious charge to the jury, the latter being the preferable practice.²⁹² It is, however, held that when counsel propose a proper charge, if given at all by the court, it ought to be given to the jury in the form submitted.²⁹³ Voluminous instructions, in ordinary cases, are condemned as bad practice, especially where a few plain and simple propositions of law applicable to the facts will suffice.²⁹⁴ If instructions, in general

²⁸⁶ *Kuhland v. Sedgwick*, 17 Cal. 123.

²⁸⁷ *Blood v. Light*, 31 Cal. 115.

²⁸⁸ *People v. Boggs*, 20 Cal. 432.

²⁸⁹ *People v. Doyell*, 48 Cal. 91. See, also, on this subject, *People v. Dick*, 34 Cal. 663; *Pico v. Stevens*, 18 Cal. 377.

²⁹⁰ *People v. Arnold*, 15 Cal. 482.

²⁹¹ *McIver v. Williamson etc. Co.*, 19 Okla. 454, 92 Pac. 170, 13 L. R. A. (N. S.) 696.

²⁹² *Morrison v. McAtee*, 23 Or. 530, 32 Pac. 400; *Knathla v. Oregon etc.*

Ry. Co., 21 Or. 137, 27 Pac. 91; *Conlon v. Oregon etc. Ry. Co.*, 23 Or. 499, 32 Pac. 397. See *Reddon v. Union Pacific Ry. Co.*, 5 Utah, 344, 15 Pac. 262; *People v. Chadwick*, 7 Utah, 134, 25 Pac. 737.

²⁹³ *Gottstein v. Seattle Lumber Co.*, 7 Wash. 424, 35 Pac. 133.

²⁹⁴ *Weeklund v. Southern Oregon Co.*, 20 Or. 591, 27 Pac. 260; *Anderson v. North Pacific Lumber Co.*, 21 Or. 288, 28 Pac. 5. See *Marsh v. Cramer*, 16 Colo. 331, 26 Pac. 554; *Sutton v. Dana*, 15 Or. 98, 25 Pac. 90;

terms, state the law correctly, but a party desires more specific instructions, he should ask the court to instruct the jury specifically upon the point.²⁹⁵ Instructions are required to state only so much of the law as may be applicable and essential to the issues and facts of the case on trial. To this extent the charge must be correct and explicit, but if unexceptionable in these essentials it will not be ground for reversal that the instructions are not strictly correct as universal propositions of law.²⁹⁶ And inaccuracy of an instruction in stating the grounds of a rule of law is harmless, if it state the rule correctly in its substance.²⁹⁷ An instruction should not be given upon a point not in dispute.²⁹⁸ It should not direct the attention of the jury to a fact not in issue, and make the findings on that fact decisive against one of the parties.²⁹⁹ The court is not bound to instruct upon phrases of law or an hypothesis not involved in the case.³⁰⁰ An error in an instruction is not cured by the giving of a correct instruction,³⁰¹ except where it states the law correctly, and its only error is in being insufficient, ambiguous, or uncertain.³⁰² An instruction upon an assumed fact, as to which there is no evidence, is erroneous;³⁰³ and so where there is a substantial conflict in the evidence.³⁰⁴

Instructions should not be too general, nor should they be given in the abstract. And it is held that abstract propositions of law, not applicable to the facts of the case, are misleading

Improvement Co. v. Stead, 95 U. S. 166, 24 L. Ed. 403; *In re Keithley's Estate*, 134 Cal. 9, 66 Pac. 5.

²⁹⁵ *Griffiths v. Clift*, 4 Utah, 462, 11 Pac. 609; *Rice v. Whitmore*, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501.

²⁹⁶ *Denver etc. R. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142; *Curr v. Hundley*, 3 Colo. App. 54, 31 Pac. 939.

²⁹⁷ *Hill v. Finigan*, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494.

²⁹⁸ *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

²⁹⁹ *Marx v. Schwartz*, 14 Or. 177, 12 Pac. 253.

³⁰⁰ *Stevens v. San Francisco etc. R. R. Co.*, 100 Cal. 554, 35 Pac. 165; *Shattuck v. Smith*, 5 Or. 125; *Central*

Pacific Ry. v. Feldman, 152 Cal. 303, 92 Pac. 849.

³⁰¹ *Fogarty v. Southern Pacific Co.*, 151 Cal. 785, 91 Pac. 650.

³⁰² *Stratton etc. Co. v. Ellison*, 42 Colo. 498, 94 Pac. 33; *Hotchkiss etc. Co. v. Bruner*, 42 Colo. 305, 94 Pac. 331.

³⁰³ *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442; *Bowen v. Clarke*, 22 Or. 568, 29 Am. St. Rep. 626, 30 Pac. 430; *Patrick etc. Co. v. Skoman*, 1 Colo. App. 323, 29 Pac. 21. See *Frost v. Ainslie Lumber Co.*, 3 Wash. 241, 28 Pac. 354, 915; *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633; *Meyer v. Black*, 4 N. Mex. 190 (352), 16 Pac. 620; *Chicago etc. Ry. Co. v. Ferguson*, 3 Colo. App. 414, 33 Pac. 684.

³⁰⁴ *Llewellyn Steam etc. Co. v. Malter*, 76 Cal. 242, 18 Pac. 271.

and mischievous, and to present such in an instruction to a jury is reversible error.³⁰⁵ But when correct abstract propositions of law are given, and the instructions, considered together, advise the jury clearly and in the concrete, the abstract propositions do not necessarily vitiate the charge.³⁰⁶ If an instruction is hypothetical and pertinent, it is no ground of objection that a different theory may also find support in the evidence.³⁰⁷ Instructions assuming the existence of facts not controverted are proper.³⁰⁸ It is error to give to the jury inconsistent and contradictory instructions, and where instructions on a material point are contradictory the judgment will be reversed.³⁰⁹ But unless a party is prejudiced, or the jury is misled by apparently conflicting instructions, there is no ground for reversal.³¹⁰ An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in the case, and if it be argumentative in its character, it is properly refused.³¹¹ An instruction should be free from ambiguity, and it is error to give misleading instructions.³¹² But the giving of incomplete and ambiguous instructions is not error, unless the court has been requested to make its instructions more full and complete, and has refused.³¹³ The misuse of the word "testimony" instead of the word "evidence," in an instruction upon the subject of the preponderance of evidence, is not such an error as would probably mislead the jury.³¹⁴ It is not

³⁰⁵ *Pearson v. Dryden*, 28 Or. 350, 43 Pac. 166; *Coos Bay R. R. Co. v. Siglin*, 26 Or. 393, 38 Pac. 192; *Hilop v. Moldenhauer*, 23 Or. 119, 31 Pac. 252; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625, 30 Pac. 430. Compare *Comptoir etc. v. Dresbach*, 78 Cal. 15, 20 Pac. 28; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *People v. Devine*, 95 Cal. 227, 30 Pac. 378; *Deep Mining Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210; *Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48.

³⁰⁶ *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

³⁰⁷ *Wistrom v. Redlick Bros.*, 6 Cal. App. 671, 92 Pac. 1048.

³⁰⁸ *Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969. See *People v. Phillips*, 70 Cal. 61, 11 Pac. 493.

³⁰⁹ *Haight v. Vallet*, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897. See

Harrison v. Water Co., 65 Cal. 376, 4 Pac. 381; *Sappenfield v. Main St. etc. R. R. Co.*, 91 Cal. 48, 27 Pac. 590; *Morrison v. McAtee*, 23 Or. 530, 32 Pac. 400; *Davis v. Railroad Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; *Lufkins v. Collins*, 2 Idaho, 150 (135), 7 Pac. 95; *Vallens v. Tillman*, 103 Cal. 187, 37 Pac. 213.

³¹⁰ *Witherby v. Thomas*, 55 Cal. 9. See *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633.

³¹¹ *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799; *People v. McNamara*, 94 Cal. 509, 29 Pac. 953.

³¹² *Boucher v. Mulverhill*, 1 Mont. 306; *Huntoon v. Lloyd*, 7 Mont. 365, 16 Pac. 573.

³¹³ *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973; *McQuillan v. Seattle*, 13 Wash. 600, 43 Pac. 893.

³¹⁴ *Mann v. Higgins*, 83 Cal. 66, 23

error for the trial court, in charging the jury, to quote from decisions of courts in other cases, if the quotations correctly state the law.³¹⁵ But trial courts should not instruct juries by reading to them an opinion of another court. If they desire to adopt such an opinion as the law of the case, they should copy from it and deliver the portions applicable.³¹⁶

§ 1237a. **Instructions in writing.**—Where the statute requires instructions to be given in writing, the oral charge taken down by the stenographer, extended by him, and, as so extended, handed to the jury upon their retirement, does not constitute a compliance with the statute.³¹⁷ But where a party sits by and hears the trial judge give the jury parol instructions, and fails to object thereto at the time and upon that ground, he is conclusively presumed to have waived the error.³¹⁸ And when there is nothing in the record and no evidence *aliunde* to show that the court instructed the jury orally instead of in writing, as required by the statute, the presumption is in favor of the court's observance of the law.³¹⁹ The statute providing that modifications of instructions asked must not be by interlineation or erasure is merely directory, and an erasure not prejudicial to the party objecting thereto is not ground for reversal.³²⁰ In Montana, it is error for a judge of the district court to give oral instructions.^{320a} The practice of orally requesting the court to charge propositions of law is disapproved in Utah. Counsel should be required to conform to the statutes, and present their instructions in writing.³²¹ The object in requiring prayers for instructions to be numbered and signed is not for the information or guidance of the jury, but for the convenience of the court and the protection of the parties

Pac. 206. See *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

³¹⁵ *Estate of Spencer*, 96 Cal. 448, 31 Pac. 453.

³¹⁶ *Stewart v. Hunter*, 16 Or. 62, 8 Am. St. Rep. 267, 16 Pac. 876. See *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745; *People v. McNabb*, 79 Cal. 419, 21 Pac. 843. As to reading section of code to jury, see *People v. Burns*, 63 Cal. 614. As to reading extracts from pleadings to jury, see *Cook v. Merritt*, 15 Colo. 212, 25 Pac. 176.

³¹⁷ *Brown v. Crawford*, 2 Colo.

App. 235, 29 Pac. 1137; affirmed, 21 Colo. 272, 40 Pac. 692. See *Rich v. Lappin*, 43 Kan. 666, 23 Pac. 1038; *McIntosh v. Sawmill Phoenix*, 49 Wash. 152, 94 Pac. 930.

³¹⁸ *Boss v. Northern Pac. Ry. Co.*, 2 N. Dak. 128, 33 Am. St. Rep. 756, 49 N. W. 655.

³¹⁹ *Kent v. Favor*, 3 N. Mex. 218 (347), 5 Pac. 470.

³²⁰ *Denver etc. R. R. Co. v. Harris*, 3 N. Mex. 109 (114), 2 Pac. 369.

^{320a} *Marden v. Wheelock*, 1 Mont. 49.

³²¹ *People v. Miller*, 4 Utah, 410, 11 Pac. 514.

litigant in the matter of preserving their objections and exceptions. And if a party omits this requirement, or suffers the opposing party to do so without objecting in apt time, he will not be heard afterwards to complain of the omission.³²² The statute of New Mexico,^{322a} requiring the court to number its instructions is merely directory, and failure to comply with its provisions will not justify a reversal, it appearing that no rights of the parties were affected thereby.³²³

§ 1238. **Misleading and erroneous instructions.**—Where a person is in possession of a stock of goods, not only as mortgagee, but as vendee, an instruction as to the fraudulent character of the mortgage, ignoring the sale, is misleading.³²⁴ An instruction virtually assuming the testimony of a party to a material fact to be true charges the jury with respect to a matter of fact, and is erroneous.³²⁵ The giving of instructions at variance with the evidence, or not warranted by it, is clearly erroneous,³²⁶ and a subsequent correct instruction does not cure the error.³²⁷ In no case would it be proper to instruct the jury that if there is some evidence in favor of the plaintiff's side of the case, whether it be little or great, it is their duty to find for the plaintiff.³²⁸ In an action to recover upon an express contract for the sale of logs, an instruction that if defendant had converted the logs to its own use it would be liable for their value, is erroneous.³²⁹ Under the Oregon statute, it is error for the court to charge the jury as to the effect and value of certain of the evi-

³²² *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348. And see *Wray v. Carpenter*, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; *Denver etc. Railroad Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79.

^{322a} Comp. Laws, § 2059.

³²³ *Miller v. Preston*, 4 N. Mex. 314, (396), 17 Pac. 565.

³²⁴ *Chandler v. Colcord*, 1 Okla. 260, 32 Pac. 330. As to misleading instruction as to amount of recovery in action on special contract, see *Mattingly v. Roach*, 84 Cal. 210, 23 Pac. 1117; *Edison etc. Co. v. Navigation Co.*, 8 Wash. 370, 40 Am. St. Rep. 910, 36 Pac. 260, 24 L. R. A. 315. As to misleading instruction on question of rescission of contract, see *Gottstein*

v. Seattle Lumber etc. Co., 7 Wash. 424, 35 Pac. 133.

³²⁵ *Vulicevich v. Skinner*, 77 Cal. 239, 19 Pac. 424. See *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089; *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442.

³²⁶ *Innis v. Carpenter*, 4 Colo. App. 30, 34 Pac. 1011. See *People v. Mauritzen*, 84 Cal. 37, 24 Pac. 112; *Allen v. Union Pacific R. R. Co.*, 7 Utah, 239, 26 Pac. 297.

³²⁷ *Malone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522; *Fogarty v. Southern Pacific Co.*, 151 Cal. 785, 91 Pac. 650.

³²⁸ *Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167.

³²⁹ *Comegys v. American Lumber Co.*, 8 Wash. 661, 36 Pac. 1087.

dence given at the trial.³³⁰ The court has no right to direct as to the credence the jury shall give to any evidence submitted to them,³³¹ nor, by an instruction, to convey the impression that a different number of witnesses testified to a certain fact,³³² nor that the quality of the testimony must be considered more than the number of witnesses.³³³ An instruction good in itself but inapplicable to the issue being tried should not be given, as its tendency is to confuse the jury.³³⁴ In an action for damages for personal injuries, instructions should be clear and definite as to facts the existence of which would create a liability.³³⁵ Instructions invading the province of the jury are erroneous.³³⁶ So of instructions given on different theories.³³⁷ An instruction to a jury in a civil case, charging that they "should be satisfied by a clear preponderance of proof" before they can find certain facts, is not misleading, when the court has first charged the jury that "it is not required in a civil action to establish the facts beyond a reasonable doubt as in a criminal case, but a fair preponderance of proofs is all that is required."³³⁸ And failure to fully instruct a jury is not ground of complaint for a party who offers and is granted defective instructions.³³⁹ An instruction that there was no evidence contradicting the testimony of the defendant as to a certain fact was held proper.³⁴⁰ An instruction which might have a broader meaning than was properly intended, but which did not in fact mislead the jury, is harmless to the appellant.³⁴¹ So, in general terms, instructions are unobjectionable when they are sufficiently full, and, considered all together, state the law of the case clearly and correctly, and not unfairly to the appellant.³⁴²

³³⁰ *Meyer v. Thompson*, 16 Or. 194, 18 Pac. 16. See *Moorhouse v. Donaca*, 14 Or. 431, 13 Pac. 112.

³³¹ *State v. Huffman*, 16 Or. 15, 16 Pac. 640. As to erroneous instructions in an action by a female for her own seduction, see *Breon v. Henkle*, 14 Or. 494, 13 Pac. 112.

³³² *Idaho Mer. Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

³³³ *Gilmore v. Seattle etc. Ry. Co.*, 29 Wash. 150, 69 Pac. 743.

³³⁴ *Haraszthy v. Shandel*, 1 Colo. App. 137, 27 Pac. 876.

³³⁵ *Denver etc. Transit Co. v.*

Dwyer, 3 Colo. App. 403, 33 Pac. 815.

³³⁶ *Hannaker v. St. Paul etc. Ry. Co.*, 5 Dak. 1, 37 N. W. 717.

³³⁷ *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633.

³³⁸ *Hart v. Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

³³⁹ *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633.

³⁴⁰ *Moe v. Job*, 1 N. Dak. 140, 45 N. W. 700.

³⁴¹ *In re Burrell*, 77 Cal. 479, 19 Pac. 880.

³⁴² *Murray v. White*, 82 Cal. 119, 23 Pac. 35.

§ 1239. **Instructions refused.**—Instructions are properly refused when not warranted by the pleadings.³⁴³ It is not error to refuse instructions which are not appropriate to the issue as tendered and accepted.³⁴⁴ And a correct instruction upon a matter with respect to which the pleadings are silent, and upon which no issue is presented by them, is properly refused.³⁴⁵ If facts are admitted in the pleadings, the jury should be so instructed.³⁴⁶ To instruct the jury upon mere abstract questions of law, irrelevant to the case, serves only to bewilder and mislead them from the true issue to be determined.³⁴⁷ Where a party asks an abstract proposition of law, by way of instruction to a jury, he takes the risk of its being correct in all its parts,³⁴⁸ and the court is not bound to prepare and give a proper instruction upon the same point.³⁴⁹ And a court may refuse an instruction asked, when the same has already been given in substance.³⁵⁰ If the court has already given the law correctly to the jury upon a given point, it is not error to refuse a second instruction upon the same point.³⁵¹ Where equivalent instructions are asked and

³⁴³ *Thompson v. Lee*, 8 Cal. 276; *Davis v. Shepherd*, 31 Colo. 141, 72 Pac. 57.

³⁴⁴ *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923; *Ringue v. Oregon Coal & Nav. Co.*, 44 Or. 407, 75 Pac. 703; *Pacific Export Lumber Co. v. North Pacific Lumber Co.*, 46 Or. 194, 80 Pac. 105.

³⁴⁵ *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386. See *Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48; *Johnson v. Jones*, 16 Colo. 138, 26 Pac. 584.

³⁴⁶ *Tevis v. Hicks*, 41 Cal. 123.

³⁴⁷ *Fowler v. Smith*, 2 Cal. 39; *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342; *Branger v. Chevalier*, 9 Cal. 353; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Gray v. Sharpe*, 17 Colo. App. 139, 67 Pac. 351; *Young v. O'Brien*, 36 Wash. 570, 79 Pac. 211.

³⁴⁸ *Thompson v. Paige*, 16 Cal. 77.

³⁴⁹ *Ramm v. Hewitt etc. Co.*, 49 Wash. 263, 94 Pac. 1081.

³⁵⁰ *People v. King*, 27 Cal. 509, 87 Am. Dec. 95; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Belden v. Henriques*, 8 Cal. 87.

³⁵¹ *People v. Williams*, 32 Cal. 280;

People v. Lee Hung (Cal.), 1 Pac. 155, 1 West Coast Rep. 45; *Martin v. Hill*, 3 Utah, 157, 2 Pac. 62; *Territory v. Kinney*, 3 N. Mex. 97, (143), 2 Pac. 357; *Seattle v. Busby*, 2 Wash. T. 25, 3 Pac. 180. The decisions in support of this rule are very numerous. See *Hayward v. Rogers*, 62 Cal. 348; *Sharp v. Blankenship*, 79 Cal. 411, 21 Pac. 842; *Bartlett v. San Francisco*, 63 Cal. 156; *Johnson v. Jones*, 16 Colo. 138, 26 Pac. 584; *McKee v. Mining Co.*, 8 Colo. 392, 8 Pac. 561; *Farmer v. Phelps*, 18 Colo. 126, 31 Pac. 768; *Anderson v. North Pacific Lumber Co.*, 21 Or. 281, 28 Pac. 5; *Sharp v. Blankenship*, 79 Cal. 411, 21 Pac. 842; *Bullard v. Stone*, 67 Cal. 477, 8 Pac. 17; *Dufour v. Central Pacific R. R. Co.*, 67 Cal. 319, 7 Pac. 769; *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; *De Noon v. Morrison*, 83 Cal. 163, 23 Pac. 374; *Nichol v. Laumeister*, 102 Cal. 658, 36 Pac. 925; *Haas v. Whittier*, 97 Cal. 411, 32 Pac. 449. The court is not bound to repeat itself at the request of counsel. *Stevens v. Railroad Co.*, 100 Cal. 554, 35 Pac. 165; *Gaynor*

refused, the court should place its refusal on the ground that equivalent instructions were given. Unless this is done, the jury may be misled.³⁵² A court may refuse to give to the jury an instruction which embraces a question which came properly before the court, and not before the jury.³⁵³ It is not error for the court to refuse to instruct a jury "that where two innocent parties must suffer, that party who had been the cause of another's loss must lose."³⁵⁴ The court cannot be called upon to charge upon an assumed state of facts not proved upon the trial,³⁵⁵ but if the terms of a contract are established by evidence of both parties, its terms should be given to the jury by the court.³⁵⁶ The court has no right to charge the jury in regard to conclusions of facts,³⁵⁷ as it is the province of the jury, unaided by the court, to say whether a fact is proved or otherwise.³⁵⁸ It is not error for the court to refuse to instruct the jury upon a point in relation to which there is no evidence.³⁵⁹ Or where there is only such slight evidence as is plainly insufficient to establish it, it is proper for the court to instruct the jury to that effect, and withdraw the point from their consideration.³⁶⁰ Or which assumes a certain fact to exist, respecting which evidence has been introduced before the jury.³⁶¹

How far it is necessary and proper for the judge to refer to and comment upon the evidence in the charge is a question of discretion.³⁶² It is not error for the judge to intimate an opinion on a question of fact, if the determination of the question is left by him to the jury.³⁶³ The judge is not at liberty to state his opinion on any question, on the supposition that it is a question of law, and afterwards to submit it to the jury as a question of fact. If it is a matter of fact in dispute, he has no right to state his conclusions thereon; if it is a matter of law, he has no right to leave it to the jury.³⁶⁴ Instructions invading the province of the

v. Clements, 16 Colo. 209, 26 Pac. 324;
Cunningham v. Railway Co., 4 Utah,
206, 7 Pac. 795; *Ramm v. Hewitt*,
49 Wash. 263, 94 Pac. 1081.

³⁵² *People v. Hurley*, 8 Cal. 390;
People v. Ramirez, 13 Cal. 152.

³⁵³ *Branger v. Chevalier*, 9 Cal. 353.

³⁵⁴ *Davis v. Davis*, 26 Cal. 44, 85
Am. Dec. 157.

³⁵⁵ *Crawford v. Roberts*, 50 Cal.
236; *Sperry v. Spaulding*, 45 Cal.
544; *Pratt v. Ogden*, 34 N. Y. 22;
Hope v. Lawrence, 50 Barb. 258.

³⁵⁶ *Peyscr v. Western Dry Goods*

Co., 48 Wash. 55, 92 Pac. 886.

³⁵⁷ *Treadwell v. Wells*, 4 Cal. 260.

³⁵⁸ *People v. Dick*, 32 Cal. 213;
Larsen v. Oregon Ry. & Nav. Co., 19
Or. 240, 23 Pac. 974.

³⁵⁹ *Crawford v. Roberts*, 50 Cal.
236; *People v. Hurley*, 8 Cal. 390.

³⁶⁰ *Selden v. Cashman*, 20 Cal. 56,
81 Am. Dec. 93.

³⁶¹ *Preston v. Keys*, 23 Cal. 193.

³⁶² *Poler v. New York Cent. R. R.*,
16 N. Y. 480.

³⁶³ *Althof v. Wolf*, 2 Hilt. 344.

³⁶⁴ *Vedder v. Fellows*, 20 N. Y. 126.

jury are properly refused,³⁶⁵ and an instruction which assumes a fact in issue does so.³⁶⁶ The constitutional right of the court "to state the testimony" to the jury would hardly authorize a judge to express his opinion as to its effect.³⁶⁷ A charge to the jury, telling them that in determining a particular issue material to the case the court thought they "could have no hesitation whatever," taken in connection with the rest of the charge, was an intimation that the evidence sufficiently established the fact in question, and was erroneous.³⁶⁸ But where no other conclusion can be arrived at from the evidence, the error will not justify a reversal.³⁶⁹ Where the charge of the court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused which could properly have been given, or that some of those given are subject to verbal criticism.³⁷⁰ In New York, if a request involve several propositions, error in any justifies its refusal. The attention of the court should be drawn to each and every specific ruling.³⁷¹ And the proposition submitted must be good in all its parts, or refusal will not be error.³⁷² An instruction asked as a whole, which is erroneous in part, is properly refused, though another part of the instruction is correct.³⁷³ The same rule is laid down as to the offer of evidence.³⁷⁴

§ 1240. Refusal of instructions—Continued.—It is not error to refuse instructions wholly unwarranted by the facts.³⁷⁵ In

³⁶⁵ *Matteson v. Southern Pacific Co.*, 6 Cal. App. 318, 92 Pac. 101.

³⁶⁶ *Stephens v. Elliott*, 26 Mont. 92, 92 Pac. 45.

³⁶⁷ *Seligman v. Kalkman*, 8 Cal. 216.

³⁶⁸ *People v. Dick*, 34 Cal. 663.

³⁶⁹ *Pico v. Stevens*, 18 Cal. 377.

³⁷⁰ *Brooks v. Crosby*, 22 Cal. 43.

³⁷¹ *Magee v. Badger*, 34 N. Y. 247, 90 Am. Dec. 691.

³⁷² *Wright v. Paige*, 36 Barb. 438, 443. See *Doughty v. Hope*, 3 Denio, 594, 1 N. Y. 79; *Zabriskie v. Smith*, 13 N. Y. 332, 64 Am. Dec. 551; *Cronk v. Canfield*, 31 Barb. 171; *Magee v. Badger*, 30 Barb. 246; *Griggs v. Howe*, 2 Keyes, 581; *Jones v. Osgood*, 6 N. Y. 233.

³⁷³ *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Williamson v.*

Tobey, 86 Cal. 497, 25 Pac. 65. See *United States v. Musser*, 4 Utah, 153, 7 Pac. 389.

³⁷⁴ *Hosley v. Black*, 28 N. Y. 438, 26 How. Pr. 97. For the practice in New York, consult, further, *Taylor v. Atlantic Mutual Ins. Co.*, 9 Bosw. 369; *Gurney v. Smithson*, 7 Bosw. 396; *McIntyre v. Clapp*, 31 N. Y. 569; *Magee v. Badger*, 34 N. Y. 247, 383, 90 Am. Dec. 691; *Patchin v. Peck*, 38 N. Y. 39; *Hoxie v. Allen*, 38 N. Y. 179; *Fountain v. Pettee*, 38 N. Y. 184; *Meyer v. Fiegel*, 34 How. Pr. 434; *Mallory v. Tioga R. R. Co.*, 5 Abb. Pr. (N. S.) 420; *Bunnell v. Greathead*, 49 Barb. 106.

³⁷⁵ *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803; *Roberts v. Par-rish*, 17 Or. 583, 22 Pac. 136; *Central*

an action triable by the court either with or without a jury, when only certain specific questions of fact are required to be answered by the jury, subject to the power of the court to accept or reject the answers in whole or in part, it is not error for the court to refuse to instruct the jury.³⁷⁶ The refusal of the trial court, in an action in equity, to give proper instructions to the jury is not ground for reversal, where the court finds upon all the issues in the case, and the evidence is sufficient to warrant the findings.³⁷⁷ The verdict of a jury in an equity case is merely advisory, and error in the instructions is immaterial.³⁷⁸ An instruction which is misleading and erroneous should be refused on that ground, and, upon appeal, it is not necessary to determine whether another reason given by the court for refusing it was valid or not.³⁷⁹ Instructions must be applicable, or must be based upon evidence. If not pertinent to the evidence in the case, they are properly refused.³⁸⁰ Nor is it harmful error to refuse to instruct the jury as to what they already know in reference to their right to consider evidence which had been admitted before them without objection.³⁸¹ And failure to give more explicit instructions is not error, unless further instructions have been requested.³⁸² When, on account of the condition of the record, it is impossible to understand the evidence, it will be presumed that the court below properly refused the instructions requested.³⁸³ In the absence of any allegation of special damages the refusal of the court to give the following instruction was held to be erroneous:

Pacific Ry. Co. v. Feldman, 152 Cal. 303, 92 Pac. 849; *Matteson v. Southern Pacific Co.*, 6 Cal. App. 318, 92 Pac. 101.

³⁷⁶ *Saint v. Guerrerio*, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320. As to when court may properly refuse to submit question of fact to jury, see *Janin v. London etc. Bank*, 92 Cal. 14, 27 Am. St. Rep. 82, 27 Pac. 1100, 14 L. R. A. 320.

³⁷⁷ *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209, 32 Pac. 579, 21 L. R. A. 33; *Hewlett v. Pilcher*, 85 Cal. 545, 24 Pac. 781.

³⁷⁸ *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715; *Sweetser v. Dobbins*, 65 Cal. 531, 4 Pac. 540.

³⁷⁹ *Low v. Warden*, 77 Cal. 94, 19 Pac. 235. See *Fox v. Stockton etc.*

Harvester Works, 83 Cal. 333, 23 Pac. 295; *Leak v. Rio Grande Ry. Co.*, 9 Utah, 246, 33 Pac. 1045; *Clay County v. Harvey*, 9 Utah, 497, 35 Pac. 510.

³⁸⁰ *Brownell v. McCormick*, 7 Mont. 12, 14 Pac. 651; *Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171; *Dozenback v. Raymer*, 13 Colo. 451, 22 Pac. 787; *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848; *Shepherd v. Jones*, 71 Cal. 223, 16 Pac. 711; *Woo Dan v. Seattle etc. Ry. Co.*, 5 Wash. 466, 32 Pac. 103.

³⁸¹ *Chalmers v. Chalmers*, 81 Cal. 81, 22 Pac. 395.

³⁸² *Rice v. Whitmore*, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501.

³⁸³ *Fugate v. Smith*, 4 Colo. App. 201, 35 Pac. 283.

"The plaintiff having neither pleaded nor proved any special damages resulting from the alleged frightening of the horses, he can recover nothing from that cause."³⁸⁴ When proper instructions are refused, and the record on appeal shows affirmatively that there were no other such instructions given, the judgment must be reversed.³⁸⁵

§ 1241. **Instructions—How construed.**—Instructions are to be read and considered in the light of the pleadings and evidence in the case.³⁸⁶ They are to be read and considered as a whole;³⁸⁷ and the fact that when taken separately some of them may fail to enunciate in precise terms, and with legal accuracy, propositions of law, does not necessarily render them erroneous. It is sufficient if all the instructions taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just notion of the law upon the point discussed.³⁸⁸

§ 1242. **The same—Modification or amendment of.**—It is not error for the court to modify instructions asked by counsel before giving them.³⁸⁹ If defendant is not entitled to an instruction as submitted by him, a modification thereof which does not add anything of prejudice to his case is proper, though it takes away the whole effect of the instruction as requested.³⁹⁰ It is the duty of the court to make any and all corrections of the instructions, when reduced to writing, necessary to their validity.³⁹¹ The

³⁸⁴ *Larsen v. Oregon Navigation Co.*, 19 Or. 240, 23 Pac. 974. As to erroneous refusal of the court to charge the jury as to the legal effect of the complaint as an exhibit, see *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098.

³⁸⁵ *Stanton v. French*, 83 Cal. 194, 23 Pac. 355.

³⁸⁶ *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. 175.

³⁸⁷ *Hanscom v. Drullard*, 79 Cal. 234, 21 Pac. 736; *Cousins v. Partidge*, 79 Cal. 224, 21 Pac. 745; *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190, 22 Pac. 590; *Bradbury v. Butler*, 1 Colo. App. 430, 29 Pac. 463; *Coleman v. Davis*, 13 Colo. 98, 21 Pac. 1018; *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678.

³⁸⁸ *Stephenson v. Southern Pacific*

Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Seattle Gas etc. Co. v. Seattle*, 6 Wash. 101, 32 Pac. 1058; *Duggan v. Pacific Boom Co.*, 6 Wash. 593, 36 Am. St. Rep. 182, 34 Pac. 157; *Hamer v. First Nat. Bank*, 9 Utah, 215, 33 Pac. 941; *Northern Pacific R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866; *Kennon v. Gilmer*, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 847; *Fitschen v. Thomas*, 9 Mont. 52, 22 Pac. 450.

³⁸⁹ *King v. Davis*, 34 Cal. 100. See *Knapp v. King*, 6 Or. 243.

³⁹⁰ *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85, 74 Pac. 15, 63 L. R. A. 238.

³⁹¹ *Rice v. Goodridge*, 9 Colo. 237, 11 Pac. 91; *Cook v. Los Angeles etc. El. Co.*, 134 Cal. 279, 66 Pac. 306.

trial court has the right to amend an imperfect instruction, and its action in making the amendment is not error, if, when given as amended, the instruction states the law correctly.³⁹² One party cannot complain that an instruction submitted by him is modified so as to include the theory of the other party also.³⁹³ Where the only objection to an instruction is that it is too general in its terms, the proper practice is to move to make it more specific,³⁹⁴ and no such motion or request being made, a slight omission is not reversible error,³⁹⁵ and the instructions then need not necessarily cover all the phases of the case.³⁹⁶

§ 1243. **The same—Presumptions.**—When the record is silent as to what instructions the court gave the jury, the legal intentment is that they were properly instructed, and he who alleges error must make it affirmatively appear from the record.³⁹⁷ So where the jury are correctly instructed as to the applicability of the evidence before them, it is a presumption of law that they exercised their jurisdiction soundly.³⁹⁸ Where conflicting charges are given, one of which is erroneous, it is to be presumed that the jury may have followed that which is erroneous.³⁹⁹

§ 1244. **The same—Duty of jury to follow.**—The instructions of the court are the law of the case, so far as the jurors are concerned, and they are bound to follow them, whether they deem them correct or not.⁴⁰⁰ The jury are bound to accept all the instructions of the court as correct,⁴⁰¹ whether they consider such instructions correct or whether the instructions are in fact correct;⁴⁰² and they can no more be permitted to look beyond the instructions of the court to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the

³⁹² *People v. Hall*, 94 Cal. 595, 30 Pac. 7.

³⁹³ *Bingham v. Lipman, Wolfe & Co.*, 40 Or. 363, 67 Pac. 98.

³⁹⁴ *Enoch v. Spokane etc. Ry. Co.*, 6 Wash. 393, 33 Pac. 966.

³⁹⁵ *Little Dorrit Gold Min. Co. v. Arapahoe etc. Co.*, 30 Colo. 431, 71 Pac. 389; *Chicago etc. Co. v. Connelly*, 15 Okla. 45, 78 Pac. 18.

³⁹⁶ *Gillis v. Clarke Fork etc. Co.*, 32 Mont. 320, 80 Pac. 370.

³⁹⁷ *Coffin v. Taylor*, 16 Or. 375, 18 Pac. 638.

³⁹⁸ *People v. Rogers*, 71 Cal. 565, 12 Pac. 679.

³⁹⁹ *People v. Hancock*, 7 Utah, 180, 25 Pac. 1093; *People v. Berlin*, 10 Utah, 39, 36 Pac. 199.

⁴⁰⁰ *Lind v. Closs*, 88 Cal. 6, 25 Pac. 972; *Loveland v. Gardner*, 79 Cal. 317, 21 Pac. 766, 4 L. R. A. 395.

⁴⁰¹ *Sappenfield v. Main St. R. R. Co.*, 91 Cal. 48, 27 Pac. 590.

⁴⁰² *Bentley v. Brossard*, 33 Utah, 396, 94 Pac. 736.

case.⁴⁰³ But if a jury disregards an erroneous instruction of the court, their verdict is not against law.⁴⁰⁴

§ 1245. **The same—Error, when cured.**—Error in refusing to give proper instructions is cured if the court subsequently give an instruction covering the same ground.⁴⁰⁵ So where objectionable features in instructions are covered by other paragraphs stating the law clearly and correctly, the error is cured.⁴⁰⁶ But the giving of erroneous instructions is not cured by the giving of others which are inconsistent therewith, correctly stating the law.⁴⁰⁷

§ 1246. **Conduct of the jury.**—After hearing the charge, the jury may either decide in court or retire for deliberation.⁴⁰⁸ Should they retire for deliberation, the officer of the court, having first been sworn not to communicate nor allow others to communicate with them, conducts them to the jury-room, where they deliberate upon and make up their verdict. There is no provision in the code requiring the court to administer a special oath to the officer taking charge of the jury upon its retirement for deliberation, and it is in the discretion of the court to administer a special oath or not. The code contemplates that the official oath of the officer is sufficient.⁴⁰⁹ They may take with them all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings of the trial taken by themselves, or any of them, but none taken by any other persons.⁴¹⁰ Where papers have been read in evidence, it is discretionary with the court whether to allow the jury to take them or not.⁴¹¹ It is proper to refuse to let them

⁴⁰³ *Emerson v. Santa Clara County*, 40 Cal. 543.

⁴⁰⁴ *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856.

⁴⁰⁵ *Manning v. Dallas*, 73 Cal. 420, 15 Pac. 34.

⁴⁰⁶ *Cameron v. Union Trunk Line*, 10 Wash. 507, 39 Pac. 128.

⁴⁰⁷ *Sappenfield v. Main St. R. R. Co.*, 91 Cal. 48, 27 Pac. 590; *Miller v. Vermurie*, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600; *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522; *Fogarty*

v. Southern Pacific Co., 151 Cal. 785, 91 Pac. 650.

⁴⁰⁸ Cal. Code Civ. Proc., § 610.

⁴⁰⁹ *Boreham v. Byrne*, 83 Cal. 23, 23 Pac. 212.

⁴¹⁰ Cal. Code Civ. Proc., § 612; *Howland v. Willetts*, 9 N. Y. 170; *Porter v. Mount*, 45 Barb. 422. See *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596; *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318.

⁴¹¹ *Powley v. Swensen*, 146 Cal. 471, 80 Pac. 722.

take with them a map of the location of an accident which was used by witnesses in giving testimony, but which was not admitted in evidence.⁴¹² The pleadings should not be sent out with the jury;⁴¹³ and it is held to be bad practice to permit a jury to take a written charge to the jury-room.⁴¹⁴ They may come into court for information upon the testimony, in case of a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.⁴¹⁵ If the court reads to the jury all the instructions for which they ask, it is sufficient. All the instructions need not be read again.⁴¹⁶ The judge may keep the jury together as long as in his judgment there is any reasonable prospect of their being able to agree. But he has no right to threaten or intimidate them in order to affect their deliberations.⁴¹⁷ A new trial will not be granted because the judge tells them, through the sheriff, that if they do not agree in five minutes they must remain in the jury-room all night.⁴¹⁸ It is the province of the jury to determine from the evidence the issues of fact, and their decision is final.⁴¹⁹ Having determined upon their verdict, they are brought into court by the officer, and through their foreman they declare the same. If it be a sealed verdict, it is read by the clerk, so that parties may be distinctly informed of its purport.⁴²⁰ Jurors are bound upon their oaths and consciences to act intelligently, not blindly.⁴²¹ The weight of the evidence and the credibility of the witnesses are matters of which the jury are the proper judges.⁴²² Where the evidence leaves a question of fact in dispute, doubt,

⁴¹² *Carman v. Montana Cent. Ry. Co.*, 32 Mont. 137, 79 Pac. 690.

⁴¹³ *Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486.

⁴¹⁴ *Smith v. Lownsdale*, 6 Or. 78.

⁴¹⁵ Cal. Code Civ. Proc., § 614.

⁴¹⁶ *Russell v. Dennison*, 45 Cal. 338.

⁴¹⁷ *Green v. Telfair*, 11 How. Pr. 260.

⁴¹⁸ *People v. Hughes*, 29 Cal. 258.

⁴¹⁹ *McCauley v. Weller*, 12 Cal. 500.

⁴²⁰ *Blum v. Pate*, 20 Cal. 70.

⁴²¹ *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78.

⁴²² *Simonton v. Rohm*, 14 Colo. 51, P. P. F. Vol. I—51

23 Pac. 86; *Morey v. Harvey*, 18 Colo. 40, 31 Pac. 719; *Stone v. Crow*, 2 S. Dak. 525, 51 N. W. 335; *Colorado etc. Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *State v. Daly*, 16 Or. 240, 18 Pac. 357; *Tibballs v. Mt. Olympus Water Co.*, 10 Wash. 329, 38 Pac. 1120; *Halley v. Folsom*, 1 N. Dak. 325, 48 N. W. 219; *Oppenheimer v. Denver etc. R. R. Co.*, 9 Colo. 320, 12 Pac. 217; *Patterson v. Hayden*, 17 Or. 238, 11 Am. St. Rep. 822, 21 Pac. 129, 3 L. R. A. 529. Compare *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

or uncertainty, such fact should be determined by the jury.⁴²³ But a jury cannot perform the functions of appraisers.⁴²⁴

If after the impaneling of a jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled.⁴²⁵ In all cases where the jury are discharged or prevented from giving a verdict by reason of accident or other cause, during progress of the trial, or after the cause is submitted to them, the action may be again tried immediately or at a future time, as the court may direct.⁴²⁶ The court may receive a verdict or discharge a jury on Sunday or a holiday, and on such day may adjudicate the fact that the jury cannot agree.⁴²⁷ The court must adjudicate this fact upon some kind of evidence, such as their being called into court and pronouncing their inability to agree in presence of the court and parties.⁴²⁸ A final adjournment of the court for the term discharges the jury.⁴²⁹ While the jury are absent the court may adjourn from time to time in respect to other business, but it is nevertheless open for any purpose connected with the case submitted to the jury until a verdict is rendered or the jury discharged.⁴³⁰ The court may direct the jury to bring in a sealed verdict.⁴³¹

§ 1247. **Misconduct of jury.**—If intoxicating liquor is furnished to the jury during the trial or their deliberation on the verdict, it is ground for a new trial.⁴³² But where it clearly appears that a conversation had between a party and a juror during the progress of the trial had no reference to the trial, the court may properly refuse to discharge the jury.⁴³³

⁴²³ *Rauber v. Sundback*, 1 S. Dak. 268, 46 N. W. 927. See *Hartvig v. Northern Pacific Lumber Co.*, 19 Or. 522, 25 Pac. 358.

⁴²⁴ *Denver etc. R. R. Co. v. Costes*, 1 Colo. App. 336, 28 Pac. 1129. Compare *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625.

⁴²⁵ Cal. Code Civ. Proc., § 615.

⁴²⁶ Cal. Code Civ. Proc., § 616.

⁴²⁷ *People v. Lightner*, 49 Cal. 228. See *People v. Soto*, 65 Cal. 621, 4 Pac. 664.

⁴²⁸ *People v. Cage*, 48 Cal. 326, 17 Am. Dec. 436.

⁴²⁹ Cal. Code Civ. Proc., § 617. See *People v. Cage*, 48 Cal. 326, 17 Am. Dec. 436; *Himmelmahn v. Fitzpatrick*, 50 Cal. 650.

⁴³⁰ Cal. Code Civ. Proc., § 617.

⁴³¹ *Id.* See *Paige v. O'Neal*, 12 Cal. 488.

⁴³² *Bernier v. Anderson*, 8 Idaho, 675, 70 Pac. 1027.

⁴³³ *Vowell v. Issaquah Coal Co.*, 31 Wash. 103, 71 Pac. 725.

§ 1248. **View of property or premises by jury.**—When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.⁴³⁴ An irregularity of a witness accompanying the jury cannot be raised on appeal, if not raised before verdict.⁴³⁵ It is a matter resting in the sound discretion of the trial court to grant or refuse a request to have the jury view the premises or property in litigation.⁴³⁶ The jury having viewed the property which is the subject of litigation, may properly take into consideration the result of their observations in connection with the evidence in deliberating upon their verdict.⁴³⁷

§ 1249. **Withdrawal of case from jury.**—Where the testimony is substantially conflicting, but the clear weight of the evidence is with either side, the court is justified in taking the decision of the case from the jury.⁴³⁸ A verdict or a nonsuit should be directed in any case where a verdict rendered for the opposite party would be set aside.⁴³⁹ As a general rule, on an application to take the case from the jury, whether by motion for a nonsuit, or by the direction of a verdict, or by demurrer to evidence, the evidence of the opposite party must be assumed to be true, and he is to be given the benefit of all legitimate inferences therefrom in his favor.⁴⁴⁰ Where the facts show negligence on the part of the plaintiff contributing to the accident, the case may be withdrawn from the jury.⁴⁴¹

⁴³⁴ Cal. Code Civ. Proc., § 613.

⁴³⁵ Wood v. Moulton, 146 Cal. 317, 80 Pac. 92.

⁴³⁶ Saint v. Guerrero, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335; Klepsch v. Donald, 4 Wash. 436, 31 Am. St. Rep. 939, 30 Pac. 991; Bellingham etc. R. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144. See Keller v. Bley, 15 Or. 429, 15 Pac. 705.

⁴³⁷ Ormund v. Granite Min. Co., 11 Mont. 303, 28 Pac. 289.

⁴³⁸ Guley v. Northwestern etc.

Transportation Co., 7 Wash. 491, 35 Pac. 372; Corning v. Troy etc. Nail Factory, 44 N. Y. 577.

⁴³⁹ Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322; Watson v. Manitou & Pike's Peak Ry. Co., 41 Colo. 138, 92 Pac. 17, 17 L. R. A. (N. S.) 916.

⁴⁴⁰ Marshall v. Harney Peak etc. Mfg. Co., 1 S. Dak. 350, 47 N. W. 290; Walker v. Supple, 54 Ga. 178; Maynes v. Atwater, 88 Pa. St. 496; Myers v. Dixon, 45 How. Pr. 48.

⁴⁴¹ Mau v. Morse, 3 Colo. App. 359, 33 Pac. 283; Brown v. Mil-

§ 1249a. **Excusing juror.**—The right of a party to an action to have the cause tried by an impartial jury does not give him any right to have it tried by any particular jurors, and the act of the court in excusing a juror does not give an available exception to a party objecting thereto, even if such juror is competent to act in the case.⁴⁴²

§ 1250. **Fees of jury.**—A rule of the superior court requiring a party demanding a trial by jury to deposit the jury fees with the clerk in advance of the trial is a reasonable regulation of the mode of enjoyment of the right of trial by jury, and is not a denial or impairment of the right. And such party, upon refusing to comply with the rule, waives his right to a jury.⁴⁴³ Under the California statute,⁴⁴⁴ trial jurors are entitled to *per diem* compensation only when they are in attendance upon the court, and are not entitled to any compensation during the time when they are excused by the court from attendance.⁴⁴⁵ The trial court may stay all proceedings in an action until the party in whose favor a verdict has been rendered pays the fees of the jury and the reporter.⁴⁴⁶

§ 1251. **Amendment of verdict.**—The court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the case, where the amendment in no respect changes the rights of the parties.⁴⁴⁷ The right to correct does not depend upon the judgment, and the steps necessary for that purpose must be taken in the statutory time.⁴⁴⁸ When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may

waukee R. R. Co., 22 Minn. 165; Denver etc. R. R. Co., v. Ryan, 17 Colo. 103, 28 Pac. 79.

⁴⁴² Asevad v. Orr, 100 Cal. 294, 34 Pac. 777. As to practice where juror is discharged because of sickness, see *People v. Brady*, 72 Cal. 490, 14 Pac. 202; *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115; *People v. Stewart*, 64 Cal. 60, 28 Pac. 112; *State v. Hazledahl*, 2 N. Dak. 522, 52 N. W. 315.

⁴⁴³ *Conneau v. Geis*, 73 Cal. 176, 2 Am. St. Rep. 785, 14 Pac. 580.

⁴⁴⁴ Stats. of 1871-1872, p. 188.

⁴⁴⁵ *Jacobs v. Elliott*, 104 Cal. 318, 37 Pac. 942.

⁴⁴⁶ *Rhodes v. Spencer*, 68 Cal. 199, 8 Pac. 855. See *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87.

⁴⁴⁷ *Perkins v. Wilson*, 3 Cal. 139; *Schoolfield v. Brunton*, 20 Colo. 139, 36 Pac. 1103; *Marine Sav. Bank v. Young*, 5 Wash. 394, 31 Pac. 864; *Frohner v. Rodgers*, 2 Mont. 179; *Osborne v. Morris*, 21 Or. 367, 28 Pac. 70. See *Morris v. Burke*, 15 Mont. 214, 38 Pac. 1065; *Truebody v. Jacobson*, 2 Cal. 269.

⁴⁴⁸ *People v. Hill*, 16 Cal. 113.

be corrected under the advice of the court, or the jury may be again sent out.⁴⁴⁹ But where the court might have withdrawn such question from the jury, and does accept the general verdict, it is the same as if the court had refused to submit such question in the first instance.⁴⁵⁰ Error in substance cannot be corrected by motion.⁴⁵¹ If the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error.⁴⁵² But if the general verdict finds nominal damages, and a special finding shows certain damage with a value attached to it, the court may join the two amounts thus found into one judgment for damages.⁴⁵³

§ 1252. Chance verdict.—A verdict to which the assent of any of the jurors was obtained by a resort to chance will be set aside;⁴⁵⁴ such verdicts being regarded in the same light as gambling verdicts.⁴⁵⁵ When jurors agree each one to mark down the sum he thinks proper to find as damages, and then to divide the whole amount of those sums by the number of persons composing the jury, which result shall be their verdict, a verdict thus found is irregular, and will be set aside.⁴⁵⁶ But if such means be adopted without any being bound thereby, and afterwards the jury agree upon the sum thus computed, the court will not disturb the verdict.⁴⁵⁷ Such verdict is not a chance verdict within the meaning of subdivision 2 of section 657 of the California Code of Civil Procedure,⁴⁵⁸ but the practice is vicious, and a verdict thus arrived at should be set aside, if the facts are proved by competent testimony.⁴⁵⁹ However, proof that an average was taken, that the verdict was for a sum near that

⁴⁴⁹ Cal. Code Civ. Proc., § 619; Atchison etc. Ry. Co. v. Hale, 64 Kan. 751, 68 Pac. 612. See, as to the power of correcting mere technical errors, Wells v. Cox, 1 Daly, 515.

⁴⁵⁰ Robinson v. Palatine Ins. Co., 11 N. Mex. 162, 66 Pac. 535.

⁴⁵¹ Brush v. Kohn, 9 Bosw. 589.

⁴⁵² Ross v. Austhill, 2 Cal. 183.

⁴⁵³ Billings v. Atchison etc. Ry. Co., 76 Kan. 325, 91 Pac. 72.

⁴⁵⁴ See Cal. Code Civ. Proc., § 657, subd. 2; Donner v. Palmer, 23 Cal. 40.

⁴⁵⁵ Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78.

⁴⁵⁶ Wilson v. Berryman, 5 Cal. 45, 63 Am. Dec. 78.

⁴⁵⁷ Id.; Pence v. California Min. Co., 27 Utah, 378, 75 Pac. 934; Bell v. Butler, 34 Wash. 131, 75 Pac. 130.

⁴⁵⁸ Code Civ. Proc., § 657; Boyce v. California Stage Co., 25 Cal. 460.

⁴⁵⁹ Turner v. Tuolumne County Water Co., 25 Cal. 397. Upon subject of chance verdict, see Dixon v. Pluns, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698; Goodman v. Cody, 1 Wash. T. 329, 34 Am. Rep. 808; Gordon v. Trevarthen, 13 Mont. 387, 40 Am. St. Rep. 452, 34 Pac. 185; Pawnee etc. Imp. Co. v. Adams, 1 Colo. App. 250, 28 Pac. 662.

average, and it not appearing that they had agreed to accept the average as a verdict, is not sufficient to set it aside as a quotient verdict.⁴⁶⁰

§ 1253. **Character and form of verdict.**—When the party does not rely in his pleadings upon an estoppel, but himself opens the truth or falsehood of the facts which he claims that the other party is estopped to aver or deny, and makes the truth of these facts the very issue which the jury are called upon to try, the jury are bound to find according to the real truth of the facts proved before them.⁴⁶¹ The terms and expressions in the pleading will not necessarily give character to or determine the effect or meaning of the verdict.⁴⁶² A recovery, if had, must be grounded upon the facts which are averred in the complaint, and not upon those which are denied.⁴⁶³ The verdict must be confined to the matters put in issue by the pleadings.⁴⁶⁴ A verdict need not be entitled at all.⁴⁶⁵ Where a case is tried by the court without a jury, the findings of the court upon the facts shall be deemed a verdict.⁴⁶⁶ The verdict of a jury in a chancery case is only advisory to the chancellor or this court,⁴⁶⁷ and may be disregarded.⁴⁶⁸

§ 1254. **Claim and delivery, form of verdict in actions for.**—In actions for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property; and may at the same time assess the damages, if any are claimed in the complaint or answer, which

⁴⁶⁰ Stanley v. Stanley, 32 Wash. 489, 73 Pac. 596.

⁴⁶¹ Anthony v. Brayton, 7 R. I. 52. See Cal. Code Civ. Proc., §§ 1908, 1962.

⁴⁶² McLaughlin v. Kelly, 22 Cal. 212.

⁴⁶³ Gregory v. Haworth, 25 Cal. 653.

⁴⁶⁴ Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332; Truebody v. Jacobson, 2 Cal. 285; Marquard v. Wheeler, 52 Cal. 445.

⁴⁶⁵ McGarrity v. Byington, 12 Cal. 429.

⁴⁶⁶ Kyle v. Rippy, 19 Or. 186, 25 Pac. 141.

⁴⁶⁷ Still v. Saunders, 8 Cal. 281; James v. Superior Court, 78 Cal. 107, 20 Pac. 241; Kellogg v. Kellogg, 21 Colo. 181, 40 Pac. 358; Clavey v. Lord, 87 Cal. 413, 25 Pac. 493; McDonald v. Thompson, 16 Colo. 13, 26 Pac. 146.

⁴⁶⁸ Goode v. Smith, 13 Cal. 84; Wingate v. Ferris, 50 Cal. 105; Johnson v. Powers, 65 Cal. 179, 3 Pac. 625; Sweetser v. Dobbins, 65 Cal. 529, 4 Pac. 540.

the prevailing party has sustained by reason of the taking or detention of such property.⁴⁶⁹ Where there has been a nonsuit in the original action, these questions are open on the trial of an action on the replevin bond.⁴⁷⁰

§ 1255. **Conclusiveness of verdict.**—The finding of a jury, or of the court below acting as a jury, upon a question of fact is final and conclusive.⁴⁷¹ A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies in respect of the same fact or title;⁴⁷² but the fact or title must be material or relevant;⁴⁷³ and the court will intend that the verdict settles every question of fact litigated upon the trial.⁴⁷⁴ A general rule has been maintained that the verdict of a jury is conclusive upon the question of fact submitted to them, if there be any evidence to support it.⁴⁷⁵ A verdict is never conclusive upon immaterial or collateral issues.⁴⁷⁶ Where there is such overwhelming evidence against the verdict as to justify the conclusion that it was rendered under the influence of passion or prejudice, or bias of some kind, a new trial should be granted, even though there be some conflict.⁴⁷⁷

⁴⁶⁹ Cal. Code Civ. Proc., § 627. This section does not apply to a nonsuit. As to form and sufficiency of verdict in replevin, see *Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48; *Blackfoot Stock Co. v. Delamue*, 3 Idaho, 291, 29 Pac. 97; *Quinn v. Parke etc. Machinery Co.*, 5 Wash. 276, 31 Pac. 866; *Cattle Co. v. Slaughter*, 6 Utah, 278, 21 Pac. 997; *Smith v. Smith*, 17 Or. 444, 21 Pac. 439; *Corbell v. Childers*, 17 Or. 528, 21 Pac. 670; *Chandler v. Coleord*, 1 Okla. 260, 32 Pac. 330; *Kuhlman v. Williams*, 1 Okla. 136, 28 Pac. 867; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605; *Ryan v. Fitzgerald*, 87 Cal. 345, 25 Pac. 546.

⁴⁷⁰ *Ginaca v. Atwood*, 8 Cal. 446.

⁴⁷¹ *Perry v. Cochran*, 1 Cal. 180; *Duff v. Fisher*, 15 Cal. 380; *Hurd v. Atkins*, 1 Colo. App. 449, 29 Pac. 528; *Woods v. Courtney*, 16 Or. 121, 17 Pac. 745.

⁴⁷² *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472.

⁴⁷³ See, as to presumption in favor of correctness of verdict, not clearly designating its precise import, *Carpenter v. Simmons*, 28 How. Pr. 12.

⁴⁷⁴ *Wolf v. Goodhue Fire Ins. Co.*, 43 Barb. 400.

⁴⁷⁵ *Noonan v. Hood*, 49 Cal. 294; *Trenor v. Central Pacific R. R. Co.*, 50 Cal. 222; *Miller v. Lockwood*, 32 N. Y. 293; *Hyatt v. Trustees of Rondout*, 44 Barb. 385; *Fleming v. Smith*, 44 Barb. 554; *Kavanaugh v. Beckwith*, 44 Barb. 192; *People v. Townsend*, 37 Barb. 520; *Cothran v. Collins*, 29 How. Pr. 155; *Decker v. Myers*, 31 How. Pr. 372; *Lewis v. Blake*, 10 Bosw. 198.

⁴⁷⁶ *McDonald v. Bear River etc. W. & Min. Co.*, 15 Cal. 145. As to qualification of rule as regards verdict manifestly against evidence, see *Suydam v. Grand Street etc. R. R. Co.*, 41 Barb. 375, 17 Abb. Pr. 304; *Greer v. Mayor of New York*, 1 Abb. Pr. (N. S.) 206.

⁴⁷⁷ *Dickey v. Davis*, 39 Cal. 569;

§ 1256. Directing verdict.—The California law confers express authority upon the courts below to direct a special verdict;⁴⁷⁸ and the court must determine what particular facts the jury shall find specially, and neither party has the right to dictate terms.⁴⁷⁹ And where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings, and should be separately and distinctly stated.⁴⁸⁰ If defendant's proof is solely upon a different contract to the one pleaded, and he does not ask permission to amend his answer, the court may disregard his proof and direct verdict for plaintiff.⁴⁸¹ In all cases the court may instruct the jury, if they render a general verdict, to find upon particular questions of facts, to be stated in writing.⁴⁸² Where there is no dispute as to facts, and the law upon these facts declares a transaction fraudulent, it is not a question for the jury. The court in such case may direct the jury how to find, or set aside the verdict, if they find to the contrary.⁴⁸³ Or where the evidence will not authorize a different verdict, it is proper to instruct the jury as to the verdict which they should find.⁴⁸⁴ But plaintiff should first be given opportunity to introduce evidence in support of his case and also in rebuttal.⁴⁸⁵

It is proper for the court to direct a verdict in all cases where there is no disputed question of fact to be submitted to the jury. In any case where there is no evidence to warrant an adverse verdict, and where the court would feel bound to set aside such verdict if rendered, it is proper for the court to direct a verdict for the party entitled thereto.⁴⁸⁶ It cannot be deter-

Mason v. Austin, 46 Cal. 387; Sherman v. Mitchell, 46 Cal. 579. See, generally, "New Trials" and "Appeals."

⁴⁷⁸ Cal. Code Civ. Proc., § 625; Cal. Prac. Act, § 175; Burritt v. Gibson, 3 Cal. 396.

⁴⁷⁹ American Co. v. Bradford, 27 Cal. 360.

⁴⁸⁰ Phoenix Water Co. v. Fletcher, 23 Cal. 482.

⁴⁸¹ Winchester v. Joslyn, 31 Colo. 220, 102 Am. St. Rep. 30, 72 Pac. 1079.

⁴⁸² Cal. Code Civ. Proc., § 625.

⁴⁸³ Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145;

Murray v. Bush, 29 Wash. 662, 70 Pac. 133.

⁴⁸⁴ Wilson v. Alcatraz Asphalt Co., 142 Cal. 182, 75 Pac. 787.

⁴⁸⁵ Mau v. Stoner, 10 Wyo. 125, 67 Pac. 618; Wyo. Rev. Stats., § 3644.

⁴⁸⁶ Armijo v. New Mexico Town Co., 3 N. Mex. 244 (427), 5 Pac. 709. See, also, Coffin v. Hutchinson, 22 Or. 554, 30 Pac. 424; Haugen v. Chicago etc. R. R. Co., 3 S. Dak. 395, 53 N. W. 769; Longley v. Daly, 1 S. Dak. 257, 46 N. W. 247; Peet v. Dakota Ins. Co., 1 S. Dak. 462, 47 N. W. 532; Martin v. Ward, 69 Cal. 129, 10 Pac. 276; Bowman v. Eppinger, 1 N. Dak. 21, 44 N. W. 1000.

mined as a matter of law that undisputed testimony must be accepted by the jury as true.⁴⁸⁷ Where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, the instruction is proper, unless the circumstances of the case indicate that upon another trial the evidence may be materially different, in which case the facts should be submitted to the jury in order that a new trial may be had; but in either case the decision of the trial court will be sustained, unless it clearly appears that its conclusion is wrong upon the facts.⁴⁸⁸ A court of the United States has authority to direct a jury to find a verdict for a defendant, and it should always do so when it will not permit a verdict for the plaintiff to stand.⁴⁸⁹ The court may direct the jury to bring in a sealed verdict at the opening of court, in case of an agreement during recess or adjournment for the day, but a final adjournment for the term, by operation of law discharges the jury and renders them incompetent to return a verdict.⁴⁹⁰

§ 1257. **Entry of verdict.**—Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length, and, where a special verdict is found, either the judgment rendered thereon or the order reserving it for argument or further consideration.⁴⁹¹ That will be treated as the verdict which the jury actually bring in, and the court should direct it to be recorded as rendered.⁴⁹² The court has no right to direct the jury to find a designated verdict.⁴⁹³ It cannot, in an action at law, enter a verdict contrary to the will of the jury, or substitute its judgment for theirs and assume the power to decide issues of fact once submitted to the jury, or render a judgment contrary to the verdict.⁴⁹⁴ When a verdict

⁴⁸⁷ Harrod v. Latham etc. Co., 77 Kan. 466, 95 Pac. 11.

⁴⁸⁸ Lacey v. Porter, 103 Cal. 597, 37 Pac. 635. As to when verdict should be directed for plaintiff, see Campbell v. Clay, 4 Colo. App. 551, 36 Pac. 909; Clancy v. Reis, 5 Wash. 371, 31 Pac. 971. When for defendant, see Bassinger v. Spangler, 9 Colo. 175, 10 Pac. 809; Chivington v. Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.

⁴⁸⁹ Alexander v. Tennessee etc.

Min. Co., 3 N. Mex. 173, 3 Pac. 735.

⁴⁹⁰ Anderson v. Hulet, 4 Colo. App. 448, 36 Pac. 309.

⁴⁹¹ Cal. Code Civ. Proc., § 628. See Von Schmidt v. Widber, 99 Cal. 515, 34 Pac. 109.

⁴⁹² Moody v. McDonald, 4 Cal. 297.

⁴⁹³ Smith v. Shattuck, 12 Or. 362, 7 Pac. 335.

⁴⁹⁴ Montgomery v. Sayre, 91 Cal. 206, 27 Pac. 648.

is rendered and recorded the jury is *functus officio*. Prior to that time the verdict is in the control of the jury in some respects, but after those events the province of the jury is exhausted.⁴⁹⁵

§ 1258. **Errors cured.**—A defective allegation of a fact may be cured by verdict, but not the absence of an allegation.⁴⁹⁶ The failure to aver performance is cured by verdict.⁴⁹⁷ So in a verified complaint, where a special demand is essential, the error of a general averment of demand is cured by verdict.⁴⁹⁸ After verdict, defects in substance in the declaration are cured, if the issue joined be such as necessarily required on the trial proof of the facts defectively or imperfectly stated or omitted; and the court will presume that the facts showing the right were proved.⁴⁹⁹ Where the complaint contains the substantial averments of a cause of action, though defective in form and certainty, the defect is cured by verdict.⁵⁰⁰ The verdict does not supply any fact omitted from a pleading, but it establishes every reasonable inference that can be drawn therefrom.⁵⁰¹ The doctrine that a defective pleading may be cured by verdict can have no application where there is an entire absence of a material allegation.⁵⁰²

§ 1259. **General verdict.**—A general verdict is that by which a jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant.⁵⁰³ In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict.⁵⁰⁴ The

⁴⁹⁵ *In re Thompson*, 9 Mont. 381, 23 Pac. 933; *Morris v. Burkes*, 15 Mont. 214, 38 Pac. 1065.

⁴⁹⁶ *Hentsch v. Porter*, 10 Cal. 555.

⁴⁹⁷ *Happe v. Stout*, 2 Cal. 460.

⁴⁹⁸ *Mills v. Barney*, 22 Cal. 240; *Jones v. Block*, 30 Cal. 227.

⁴⁹⁹ *Stanley v. Whipple*, 2 McLean, 35, Fed. Cas. No. 13286. See *Garland v. Davis*, 4 How. 131, 145, 11 L. Ed. 907; *Pearson's Exrs. v. Bank of the Metropolis*, 1 Pet. 89, 7 L. Ed. 65.

⁵⁰⁰ *People v. Rains*, 23 Cal. 127. See *Garner v. Marshall*, 9 Cal. 268. As to defective pleading aided or cured by verdict, see *School District*

v. Ross, 4 Colo. App. 493, 36 Pac. 560; *Aiken v. Coolidge*, 12 Or. 244, 6 Pac. 712; *Wild v. Oregon R. R. Co.*, 21 Or. 159, 27 Pac. 954; *Harkness v. McClain*, 8 Utah, 52, 29 Pac. 964.

⁵⁰¹ *Weiner v. Lee Shing*, 12 Or. 276, 70 Pac. 111.

⁵⁰² *Richards v. Traveler's Ins. Co.*, 80 Cal. 505, 22 Pac. 939. See *Hazard Powder Co. v. Volger*, 3 Wyo. 189, 18 Pac. 636.

⁵⁰³ Cal. Code Civ. Proc., § 624.

⁵⁰⁴ Cal. Code Civ. Proc., § 625. See, also, *Meyers v. Hart*, 3 Colo. App. 392, 33 Pac. 647; *Thompson v. Gregor*, 11 Colo. 531, 19 Pac. 461.

right to judgment on special findings is limited to cases where there is an inconsistency between the general verdict and the special findings.⁵⁰⁵ A general verdict will include all parties who do not answer separately or demand separate verdicts.⁵⁰⁶ Its effects will be limited to such issues as necessarily controlled the action of the jury.⁵⁰⁷ In an action to recover the possession of land, the following verdict: "We, the jury in this case, find a verdict in favor of the plaintiff against the defendants, for the possession of the premises described in the complaint herein, and the sum of one hundred and sixty-five dollars damages," was held substantially a general verdict.⁵⁰⁸ A general verdict entered on counts of which part are bad is erroneous. But if the good counts set forth a sufficient cause of action it may stand.⁵⁰⁹ Where the plaintiff sues on two causes of action, but produces no evidence to support the second, a general verdict for the gross amount sued for cannot be sustained.⁵¹⁰

§ 1260. **How authenticated.**—The verdict of a jury is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the clerk.⁵¹¹

§ 1261. **Informal verdict.**—Where the declaration in an action of *assumpsit* contained the following counts: 1. On a promissory note; 2. *Indebitatus assumpsit*, for the hire of chattels; 3. An account stated; 4. *Quantum valebat*, for the service of chattels; 5. Work and labor, goods sold and delivered, and money lent and advanced; 6. Money had and received; 7. An account stated; 8. A special agreement for the hire of chattels; and the defendant pleaded: a. The general issue; b. Statute of limitations; c. Payment; and the jury found a verdict for "the defendant upon the issue joined, as to the within note of four hundred and fifty-six dollars, and the within account,"—this verdict, although informal, was sufficient authority to enter a general judgment for defendant.⁵¹² When the verdict returned by the jury is in-

⁵⁰⁵ Chicago etc. Ry. v. Morris, 16 Wyo. 308, 93 Pac. 664.

⁵⁰⁶ Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597; Ellis v. Jeans, 7 Cal. 409.

⁵⁰⁷ Id.; McDonald v. Bear River etc. W. & Min. Co., 15 Cal. 145.

⁵⁰⁸ Hutton v. Reed, 25 Cal. 478. See Leese v. Clark, 28 Cal. 26.

⁵⁰⁹ Fry v. Bennett, 28 N. Y. 324.

⁵¹⁰ Kent v. Abeel, 12 Colo. 547, 21 Pac. 718.

⁵¹¹ Reynolds v. Harris, 8 Cal. 618.

⁵¹² Downey v. Hicks, 14 How. 240, 14 L. Ed. 404.

formal, it is the duty of the court to explain to them its defects, and direct them to put it in proper form.⁵¹³ The only object of a verdict is to express in intelligible language the result at which a jury have arrived, and a verdict that the plaintiffs are "entitled to the sum of two thousand five hundred dollars," is equivalent to finding the issues in favor of the plaintiffs and assessing their damages at that sum.⁵¹⁴ A verdict for the recovery of money must be certain as to the amount.⁵¹⁵

§ 1262. Joint verdict.—A joint verdict against answering and defaulting defendants is conclusive against all when a separate verdict has not been demanded.⁵¹⁶ And if no objection or exception is taken to the verdict on that ground in time to afford an opportunity to correct it, the defendants cannot afterwards object to the joint verdict and judgment.⁵¹⁷

§ 1263. Mining claims, verdict in actions for.—In an action to recover a quartz-ledge when defendants deny plaintiffs' title and ouster, and set up title in themselves to a part only in the ledge, a special verdict awarding defendants that portion of the ledge they claim, without a general verdict, if accepted by plaintiffs, is a finding in favor of defendants, and entitles them to costs.⁵¹⁸ The words "more or less," contained in a verdict, give all between the notices.⁵¹⁹

§ 1264. Setting aside verdict.—A court may, of its own motion, set aside the verdict of a jury, when clearly and palpably against the evidence.⁵²⁰ A general objection to the form of a verdict, without any specification of particular defects, will not be considered.⁵²¹ A verdict obtained upon incompetent evidence may be set aside, but not if the evidence were admitted without objection. In such case, that which vitiates the verdict is the error of the court in admitting the evidence.⁵²²

⁵¹³ *People v. Dick*, 34 Cal. 663.

⁵¹⁴ *Mendelsohn v. Anaheim L. Co.*, 40 Cal. 660.

⁵¹⁵ *Watson v. Damon*, 54 Cal. 278. See *Estate of Cahill*, 74 Cal. 52, 15 Pac. 364.

⁵¹⁶ *Anderson v. Parker*, 6 Cal. 197; *Ellis v. Jeans*, 7 Cal. 409.

⁵¹⁷ *Hicks v. Coleman*, 25 Cal. 122,

85 Am. Dec. 103. See *State v. Weeks*, 23 Or. 3, 34 Pac. 1095.

⁵¹⁸ *Gonzales v. Leon*, 31 Cal. 98.

⁵¹⁹ *Id.*

⁵²⁰ *Duff v. Fisher*, 15 Cal. 375.

⁵²¹ *Mahoney v. Van Winkle*, 21 Cal. 552.

⁵²² *McCloud v. O'Neill*, 16 Cal. 392.

§ 1265. **Verdict in particular actions.**—In an action of ejectment, a general verdict is sufficient, and will not be disturbed on the ground of the insufficiency of the evidence, if the evidence is substantially conflicting.⁵²³ If in such action the plaintiff fail to establish his right of possession, a general verdict for the defendant is sufficient in form.⁵²⁴ In an action for use and occupation, a verdict assessing “damages at three thousand and fifty dollars, and legal interest” is bad for uncertainty, and will not sustain a judgment unless the words “and legal interest” be treated as surplusage.⁵²⁵ On the trial of an information in the nature of a *quo warranto*, the respondent is entitled to a trial by jury and to a unanimous verdict.⁵²⁶ But the admission of improper evidence is no ground for setting aside the verdict where no injury was done thereby to the party objecting. Where the law declares certain facts conclusive evidence of fraud, a verdict against such conclusion will be set aside; but where the facts are declared merely presumptive, it is otherwise.⁵²⁷ The amendment of 1862 to section 193 of the California Practice Act, allowing the affidavits of jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trial made after its passage.⁵²⁸ Such affidavits are not allowed unless it be a chance verdict which is impeached.⁵²⁹ A verdict was set aside on the ground of misconduct on the part of the officer in charge.⁵³⁰ The affidavits of the jurymen who rendered a verdict, that they misunderstood its effect, cannot be received to impeach or defeat it.⁵³¹

§ 1266. **The same—Continued.**—A verdict so clearly against an overwhelming weight of testimony that, if not willfully wrong, it could have resulted only from misapprehension or mistake of law, should be set aside.⁵³² A verdict unsupported by evidence

⁵²³ Joy v. McKay, 70 Cal. 445, 11 Pac. 763.

⁵²⁴ Pike v. Sutton, 21 Colo. 84, 39 Pac. 1084. As to informal but sufficient verdict in ejectment, see Johnson v. Visher, 96 Cal. 310, 31 Pac. 106. Verdict in assumpsit, agreement as to issues, see Redmond v. Weismann, 77 Cal. 423, 20 Pac. 544.

⁵²⁵ Meeker v. Gardella, 1 Wash. 139, 23 Pac. 837.

⁵²⁶ Bradford v. Territory, 1 Okla. 366, 34 Pac. 66.

⁵²⁷ Priest v. Union Canal Co., 6 Cal. 170.

⁵²⁸ Donner v. Palmer, 23 Cal. 40.

⁵²⁹ Turner v. Tuolumne County Water Co., 25 Cal. 397; Boyce v. California Stage Co., 25 Cal. 460.

⁵³⁰ Thomas v. Chapman, 45 Barb. 98. See “New Trial.”

⁵³¹ Polhemus v. Heiman, 50 Cal. 438.

⁵³² Lawrence v. Weir, 3 Colo. App. 401, 33 Pac. 646.

must be set aside.⁵³³ So of a verdict that must have been the result of prejudice, mistake, or bias.⁵³⁴ But a verdict will not be set aside if the evidence substantially supports it. The verdict must be plainly wrong and manifestly against the weight of the evidence.⁵³⁵ If there is a substantial conflict in the evidence, a verdict will not be disturbed.⁵³⁶ And the refusal of a trial court to set aside the verdict of a jury and grant a new trial is an exercise of discretion, not to be reviewed by an appellate court, unless it can be shown there has been an abuse of discretion, or unless there be a great preponderance of evidence against the verdict.⁵³⁷

§ 1267. **Impeachment of verdict by oaths of jurors.**—Affidavits of jurors will not be received to impeach their verdict, unless authorized by statute, and only then upon the grounds, and in the manner, permitted by the statute.⁵³⁸ Under section 657 of the California Code of Civil Procedure such affidavits can only be resorted to for the purpose of impeaching the verdict, when the verdict has been determined by a resort to chance.⁵³⁹ And

⁵³³ Cronk v. Chicago etc. R. R. Co., 3 S. Dak. 93, 52 N. W. 420.

⁵³⁴ Denver etc. R. R. Co. v. De Graff, 2 Colo. App. 43, 29 Pac. 664; Caldwell v. Willey, 16 Colo. 169, 26 Pac. 161; Hockaday v. Goodwin, 1 Colo. App. 90, 27 Pac. 875.

⁵³⁵ People v. Swasey, 6 Utah, 93, 21 Pac. 400; Hopkins v. Ogden City, 5 Utah, 390, 16 Pac. 596; Burden v. Cropp, 7 Wash. 198, 34 Pac. 834.

⁵³⁶ Clanton v. Coward, 67 Cal. 373, 7 Pac. 787; Declez v. Save, 71 Cal. 552, 12 Pac. 722; Frank v. Murray, 7 Mont. 4, 14 Pac. 654; Montana Ry. Co. v. Warren, 6 Mont. 275, 12 Pac. 641; Beck v. Beck, 6 Mont. 285, 12 Pac. 646; Pielke v. Chicago etc. R. R. Co., 6 Dak. 444, 43 N. W. 813; Halley v. Folsom, 1 N. Dak. 325, 48 N. W. 219; National Refining Co. v. Miller, 1 S. Dak. 548, 47 N. W. 962; Jeansch v. Lewis, 1 S. Dak. 609, 48 N. W. 128; Smith v. Rio Grande etc. R. R. Co., 9 Utah, 141, 33 Pac. 626; Puget Sound etc. R. R. Co. v. Ingersoll, 4 Wash. 675, 30 Pac. 1097; Williams v. Wishard, 1 Colo. App. 212, 28 Pac. 20; Denver etc.

R. R. Co. v. Richards, 2 Colo. App. 87, 29 Pac. 1010; Kinney v. Wood, 10 Colo. 270, 15 Pac. 402; Coon v. Duckett, 13 Colo. 14, 21 Pac. 905; Hurd v. Union Pacific Ry. Co., 8 Utah, 241, 30 Pac. 982; Aultman v. Miller etc. Mills, 9 Wash. 68, 36 Pac. 1046; Holman v. Boston Land etc. Co., 20 Colo. 7, 36 Pac. 797; Layton v. Kirkendall, 20 Colo. 236, 38 Pac. 55.

⁵³⁷ Page v. Rodney, 2 Wash. T. 461, 7 Pac. 895. See Beekman v. Hamlin, 23 Or. 313, 31 Pac. 707; State v. Foot You, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537. Overruling on this point, State v. Olds, 19 Or. 397, 24 Pac. 394; Rhone v. Powell, 20 Colo. 41, 36 Pac. 899.

⁵³⁸ Murphy v. Murphy, 1 S. Dak. 316, 47 N. W. 142, 9 L. R. A. 820; Gaines v. White, 1 S. Dak. 434, 47 N. W. 524; Cline v. Broy, 1 Or. 89; Knight v. Fisher, 15 Colo. 176, 25 Pac. 78; Homer v. Inter-Mountain Abstract Co., 9 Utah, 193, 33 Pac. 700.

⁵³⁹ Fredericks v. Judah, 73 Cal. 604, 15 Pac. 305. See, also, Pawnee etc. Imp. Co. v. Adams, 1 Colo. App.

an affidavit by a jurymen that the verdict was arrived at by resorting to the determination of chance, and that he was induced to assent thereto in that manner, is not conclusive upon the trial court, and where the court finds upon conflicting evidence, both oral and by affidavit, that the verdict was not a chance verdict its action will not be interfered with upon appeal.⁵⁴⁰ Affidavits of jurors are not admissible to impeach their verdict on the ground that it is what is known as a "quotient verdict,"⁵⁴¹ or that, in their opinion, the conclusion of the majority was reached by giving a wrong construction or too much weight to a part of the evidence.⁵⁴²

§ 1268. **Special verdict.**—A special verdict is that by which the jury find the facts only, leaving the judgment to the court. It shall present the conclusions of fact as established by the evidence, and not the evidence to prove them, and those conclusions of fact shall be so presented that nothing shall remain to the court but to draw the conclusions of law.⁵⁴³ Special issues in form of questions, submitted by stipulation, and answered by the jury and signed by the foreman, constitute a special verdict.⁵⁴⁴ Special verdicts and special findings are identical, and a request for special findings authorized by statute is mandatory, and cannot be refused on the grounds that the request does not include certain words in the code.⁵⁴⁵ In an action for the recovery of money only it is optional with the court to submit particular questions of fact to the jury.⁵⁴⁶ In all cases other

250, 28 Pac. 662; *Richards v. Richards*, 20 Colo. 303, 38 Pac. 323; *Wray v. Carpentier*, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; *Bernier v. Anderson*, 8 Idaho, 675, 70 Pac. 1027.

⁵⁴⁰ *Dixon v. Pluns*, 101 Cal. 511, 35 Pac. 1030.

⁵⁴¹ *Ulrick v. Dakota Trust Co.*, 2 S. Dak. 285, 49 N. W. 1054. See *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132. Compare *Dixon v. Pluns*, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698; *Village of Ponca v. Crawford*, 23 Neb. 662, 8 Am. St. Rep. 144, 37 Pac. 609; *Southern Nev. etc. Co. v. Holmes Min. Co.*, 27 Nev. 107, 103 Am. St. Rep. 759, 73 Pac. 759.

⁵⁴² *Spencer v. Spencer*, 31 Mont. 631, 79 Pac. 320.

⁵⁴³ Cal. Code Civ. Proc., § 624. As to submission of special issues to jury, see *Smith v. Occidental S. S. Co.*, 99 Cal. 462, 34 Pac. 84; *Eisenhart v. Ordean*, 3 Colo. App. 162, 32 Pac. 495; *Lufkins v. Collins*, 2 Idaho, 256, 10 Pac. 300; *Wild v. Oregon etc. R. R. Co.*, 21 Or. 159, 27 Pac. 954; *Rohr v. Isaacs*, 8 Or. 451; *Redford v. Spokane Street R. R. Co.*, 9 Wash. 55, 36 Pac. 1085.

⁵⁴⁴ *In re Keithley's Estate*, 134 Cal. 9, 66 Pac. 5; Cal. Code Civ. Proc., § 624.

⁵⁴⁵ *Plyer v. Pacific Portland Cement Co.*, 152 Cal. 125, 92 Pac. 56; Cal. Code Civ. Proc., § 625.

⁵⁴⁶ *Olmstead v. Dauphiny*, 104 Cal.

than for the recovery of money only, or specific real property, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they return a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon.⁵⁴⁷ Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.⁵⁴⁸

When the jury are directed by the court to find a general verdict, and also to make a special finding of facts, and a general verdict is returned in favor of one party, and the findings on the special issues are in favor of the other party, the court should render judgment in accordance with the special findings, if they embrace all the issues raised in the pleadings; if not, then judgment should be rendered on the general verdict.⁵⁴⁹ A general verdict implies a finding for the prevailing party of every fact essential to support a verdict, while a special verdict is to test the validity of the general verdict.⁵⁵⁰ The special findings of a jury are inconsistent with their general verdict when the former, as a matter of law, will authorize a different judgment than that which the latter will.⁵⁵¹ The findings of the jury on special issues submitted to them are ineffective for any purpose, and cannot control the general verdict, unless they are signed either by the jury or by their foreman.⁵⁵² A special verdict must find the facts expressly and specially, and not generally or impliedly.⁵⁵³ And the findings must be distinct,⁵⁵⁴ and not equivocal. Such verdict settles the facts, and the court by its judgment pronounces the conclusions of law upon the facts so found.⁵⁵⁵ A special verdict

635. Compare *Webb v. Denver etc. R. R. Co.*, 7 Utah, 17, 24 Pac. 616; *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49. As to discretion of the court in requiring a special verdict from the jury, see *Columbia etc. R. R. Co. v. Hawthorne*, 3 Wash. T. 353, 19 Pac. 25; *Knahtla v. Oregon etc. Ry. Co.*, 21 Or. 136, 27 Pac. 91.

⁵⁴⁷ Cal. Code Civ. Proc., § 625.

⁵⁴⁸ *Id.*; *Rolfes v. Russel*, 5 Or. 400; *Willey v. Morrow*, 1 Wash. T. 474; *Loewenberg v. Rosenthal*, 18 Or. 178, 22 Pac. 601; *Rio Grande etc. R. R. Co. v. Deasey*, 3 Colo. App. 196, 32 Pac. 725; *Cox v. Delmas*, 99 Cal.

104, 124, 33 Pac. 836; *Stewart v. Walla Walla Pub. Co.*, 1 Wash. 521, 20 Pac. 605; *Bradbury v. Idaho etc. Imp. Co.*, 2 Idaho, 239, 10 Pac. 620.

⁵⁴⁹ *McDermott v. Higby*, 23 Cal. 489.

⁵⁵⁰ *Plyer v. Pacific Portland Cement Co.*, 152 Cal. 125, 92 Pac. 56.

⁵⁵¹ *Loewenberg v. Rosenthal*, 18 Or. 178, 22 Pac. 601.

⁵⁵² *Greenberg v. Hoff*, 80 Cal. 81, 22 Pac. 69.

⁵⁵³ Cal. Code Civ. Proc., § 624; *Breeze v. Doyle*, 19 Cal. 102.

⁵⁵⁴ *Woodson v. McCune*, 17 Cal. 298.

⁵⁵⁵ *People v. Hill*, 16 Cal. 113.

is not invalidated because the jury, in addition thereto, find a general verdict embodying a conclusion of law.⁵⁵⁶ And if the party dissatisfied fails to move for a new trial, the verdict is conclusive on the facts.⁵⁵⁷ The court, having directed the jury to find a special verdict upon questions submitted in writing to their consideration, may withdraw any of such questions and instruct them that they need not answer. This is purely a matter of discretion, over which the court, on appeal, will not exercise control.⁵⁵⁸ An objection to the form of a special verdict must be taken before the verdict is received and recorded; otherwise, the objection will not be considered on appeal.⁵⁵⁹ A judgment for the plaintiff will not be modified upon appeal so as to conform to a special verdict in his favor, if such special verdict is not supported by the complaint, and the proper judgment was entered in conformity to the cause of action stated in the complaint.⁵⁶⁰ Where a special verdict of a jury is adopted in an equity case by the court, it takes the place of, and is equivalent to, findings by the court. And in order to show such an adoption it is not necessary that the word "adopt" should be used, but it is sufficient if it appears in any way.⁵⁶¹

§ 1268a. Construction of special verdict.—All reasonable presumptions will be indulged in favor of the general verdict, and none indulged in favor of the answers to the special interrogatories; if the answers are to control, they must be in irreconcilable conflict with the general verdict. If the answers are themselves antagonistic or inconsistent, they neutralize each other and will be disregarded. The special findings must exclude every theory which will sustain the general verdict, and they are inconsistent only when, as a matter of law, they will authorize a judgment different from that which the general verdict will permit.^{561a}

§ 1269. Verdict by stipulation.—A stipulation that a verdict should be entered in favor of the defendant, saving to the plaintiff the same rights which he would have had in case a jury had

⁵⁵⁶ *Smith v. Ireland*, 4 Utah, 187, 7 Pac. 749.

⁵⁵⁷ *Garwood v. Simpson*, 8 Cal. 101; *Duff v. Fisher*, 15 Cal. 380.

⁵⁵⁸ *Taylor v. Ketchum*, 5 Robt. 507, 35 How. Pr. 296.

⁵⁵⁹ *Alhambra Water Co. v. Rich-*
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ardson, 72 Cal. 598, 14 Pac. 379.

⁵⁶⁰ *Kullmann v. Greenbaum*, 84 Cal. 98, 24 Pac. 49.

⁵⁶¹ *Morrison v. Stone*, 103 Cal. 94, 37 Pac. 142.

^{561a} *Antonian v. Southern Pac. Co.*, 9 Cal. App. 718, 100 Pac. 877.

actually rendered a verdict for the defendant, should be regarded in precisely the same light as a verdict, and be followed by the same legal results.⁵⁶²

§ 1270. **Verdict sustained.**—When the jury found the only issues involved in the controversy, an exception to the verdict, that no verdict was found upon the issue presented by the pleadings, will not be sustained.⁵⁶³ Where there are special and general counts in a declaration, and a demurrer is filed which affects only the special counts, and the party goes to trial upon the general issue plea to the general counts, a verdict and judgment so obtained will not be set aside because the demurrer was undisposed of.⁵⁶⁴ Objection cannot be taken on a writ of error that the verdict in a trial where there were several issues was that the jury found the “issue” for the plaintiff.⁵⁶⁵

§ 1271. **Declaring verdict.**—When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict; if any juror disagrees, they must be sent out again; but if no disagreement be expressed, and neither party require the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if any one answer in the negative, the jury must again be sent out.⁵⁶⁶ Upon the rendition of the verdict, the court orders judgment to be entered up accordingly.

§ 1272. **Validity and construction of verdict—Generally.**—As a general rule, a party cannot complain of an error which is practically beneficial to him; and a verdict will not be set aside for an error which is in favor of the party excepting to it. Damages are not the prime object in an action of claim and delivery, and a general verdict for the plaintiff in such action will not be set aside because the jury did not find damages.⁵⁶⁷ And irregularity

⁵⁶² *Sunol v. Hepburn*, 1 Cal. 258.

⁵⁶³ *Burritt v. Gibson*, 3 Cal. 396.

⁵⁶⁴ *Townsend v. Jennison*, 7 How. 706, 12 L. Ed. 880.

⁵⁶⁵ *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

⁵⁶⁶ Cal. Code Civ. Proc., § 618. If there should be any good reason the jury should be polled. *Hindrey v. Williams*, 9 Colo. 371, 12 Pac. 436.

⁵⁶⁷ *Gaines v. White*, 1 S. Dak. 434, 47 N. W. 524.

of a verdict in such action in failing to find all the facts it should have done will not, under Montana statutes, invalidate the verdict.⁵⁶⁸ Where the verdict states the facts fully and definitely in reference to all matters at issue between the parties, it will not be disturbed, even in an action for the recovery of money, on the ground that it does not state the amount of the recovery.⁵⁶⁹ So where the answer admitted the indebtedness and amount thereof, and the only denial was that the debt was not yet due.⁵⁷⁰ An answer, "we do not know," or "we think not," is an answer in the negative by the jury.⁵⁷¹ A verdict will not be disturbed for an improper remark of the trial judge, unless it is reasonably certain that the interests of the complaining party were prejudiced thereby.⁵⁷² A verdict cannot be attacked on the ground that it is not supported by the evidence, when the record contains no specifications of the particulars in which the evidence is insufficient to sustain it.⁵⁷³ The objection must be stated with so much of the evidence or other matter as is necessary to explain it, so that the opposite party may be fully advised of the defects in his evidence.⁵⁷⁴ In determining the correctness of a verdict, weight should be given the fact that on two previous trials the finding had been the same.⁵⁷⁵ That a verdict includes the value of property not declared for in the complaint is wholly immaterial where the plaintiff permits to be taken from the verdict a sum largely in excess of the value of such property.⁵⁷⁶ A verdict cannot be said to be against law, as contrary to the instructions of the court, because inconsistent with the facts as maintained by one party, if the jury might, upon the evidence, have decided the question of fact contrary to such party, and consistently with the instructions.⁵⁷⁷ Where the court, upon hearing evidence after the jury have passed upon some of the vital issues, makes findings

⁵⁶⁸ *Miles v. Edsall*, 7 Mont. 185, 14 Pac. 701.

⁵⁶⁹ *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78.

⁵⁷⁰ *Joseph v. Mandy Clothing Co.*, 13 Mont. 195, 33 Pac. 1.

⁵⁷¹ *Kalina v. Union Pacific Ry.*, 69 Kan. 172, 76 Pac. 438; *Guernsey v. Fulmer*, 66 Kan. 767, 71 Pac. 578.

⁵⁷² *Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171.

⁵⁷³ *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708.

⁵⁷⁴ *Holcomb v. Keliher*, 3 S. Dak. 497, 54 N. W. 535.

⁵⁷⁵ *Todd v. Demeree*, 15 Colo. 88, 24 Pac. 563.

⁵⁷⁶ *Perkins v. Marrs*, 15 Colo. 262, 25 Pac. 168. As to reducing amount of verdict, see *Patrick etc. Co. v. Skoman*, 1 Colo. App. 323, 29 Pac. 21; *Phelps v. Cogswell*, 70 Cal. 201, 11 Pac. 628.

⁵⁷⁷ *Northern Ry. Co. v. Jordan*, 87 Cal. 23, 25 Pac. 273.

upon all of the issues, contrary to the verdict, such action is in effect a setting aside and vacating of the verdict, and it is the duty of the court to order a new trial by jury, and it has no power to proceed to determine the cause without a jury.⁵⁷⁸

§ 1273. **Interpretation of verdict.**—Verdicts are to have a reasonable intendment, and to receive a reasonable construction. Courts always disregard verbal inaccuracies in a general verdict, and will give judgment thereon if the facts found are sufficient, and the meaning is sufficiently clear.⁵⁷⁹ It must be intended that the verdict is as comprehensive as the issues, and includes every question of fact at issue.⁵⁸⁰ If a special verdict is susceptible of two constructions, that one must be used which will support the general verdict.⁵⁸¹ A verdict is good if the title sufficiently identifies the cause in which it is rendered, and the findings of the matter submitted in issue may be ascertained and clearly understood from the wording of it.⁵⁸² And a party will not be heard to object to a verdict for the first time upon appeal from the judgment, if it is susceptible of a construction which may have a lawful effect relevant to the pleadings.⁵⁸³ A special verdict upon various questions submitted to a jury should be read together, and if the findings upon a particular question be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning. Findings should be so construed as to avoid a contradiction if it can be reasonably done.⁵⁸⁴

⁵⁷⁸ *Montgomery v. Sayre*, 91 Cal. 206, 27 Pac. 648.

⁵⁷⁹ *Thayer v. Burger*, 100 Ind. 262; *Thames L. & T. Co. v. Beville*, 100 Ind. 309; *Jeansch v. Lewis*, 1 S. Dak. 609, 48 N. W. 128; *Warren v. Southern California Ry. Co. (Cal.)*, 67 Pac. 1; *Drake v. Justice Gold Min. Co.*, 32 Colo. 259, 75 Pac. 912.

⁵⁸⁰ *Hall v. Zeller*, 17 Or. 381, 21 Pac. 192.

⁵⁸¹ *Grant v. Spokane Tr. Co.*, 47 Wash. 112, 91 Pac. 553.

⁵⁸² *Kelsey v. Chicago etc. Ry. Co.*, 1 S. Dak. 80, 45 N. W. 204.

⁵⁸³ *Johnson v. Visher*, 96 Cal. 310, 31 Pac. 106.

⁵⁸⁴ *Alhambra etc. Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379.

TRIAL BY JURY—FORMS.

§ 1274. General verdict.

Form No. 399.

[TITLE.]

We, the jury in the above entitled action, find for the plaintiff, and assess his damages at . . . dollars [or, find for the defendant].

Dated . . . , 19 . .

O. P., Foreman.

§ 1275. Verdict for defendant on plaintiff's claim and on counterclaim.

Form No. 400.

[TITLE.]

We, the jury in this action, find for the defendant upon the cause of action stated in the complaint, and also find for the defendant upon his counterclaim, and assess his damages thereon at . . . dollars.

Dated . . . , 19 . .

O. P., Foreman.

§ 1276. Verdict for excess, both parties having proved a cause of action.

Form No. 401.

[TITLE.]

We, the jury in this action, find for the plaintiff on the cause of action stated in the complaint, and that there is due thereon . . . dollars, and we also find for the defendant on the counterclaim stated in the answer, and that there is due thereon . . . dollars, and we assess the damages of the defendant [or, plaintiff] at the sum of . . . dollars, being the amount of the excess due him upon the above findings.

Dated . . . , 19 . .

O. P., Foreman.

§ 1277. Verdict subject to opinion of the court.

Form No. 402.

[TITLE.]

We, the jury in this action, find for the plaintiff, and assess his damages at . . . dollars, [or, find for the defendant], as directed by the court, and subject to the opinion of the court upon the questions of law.

Dated . . . , 19 . .

O. P., Foreman.

§ 1278. Verdict in replevin for plaintiff.

Form No. 403.

[TITLE.]

We, the jury in this action, find for the plaintiff, that he is entitled to a return of the property described in the complaint [or, describe the property recovered], and assess the value of said property at . . . dollars, and the plaintiff's damages, by reason of the detention [or, taking and withholding] of said property, at . . . dollars.

Dated . . . , 19 . .

O. P., Foreman.

§ 1279. Verdict in replevin for the defendant.

Form No. 404.

[TITLE.]

We, the jury in this action, find for the defendant, that he is entitled to a return of the property described in the complaint [or, describe the property], and assess the value thereof at the sum of . . . dollars, and the defendant's damages, by reason of the taking, withholding, and detention of the same, at the sum of . . . dollars.

Dated . . . , 19 . .

O. P., Foreman.

§ 1280. Verdict for plaintiff in replevin.

Form No. 405.

[TITLE.]

We, the jury in this action, find for the plaintiff, that he is the absolute owner of the personal property described in the complaint [or, that he has a qualified ownership in the property described in the complaint, by virtue of a levy thereon made by him as sheriff under an execution held by him against the property of . . . , or otherwise briefly describe the qualified title]; that said property is of the value of . . . dollars [or, is of the following value: here name each article and give its value separately]; and we assess the plaintiff's damages for the wrongful detention of said property at . . . dollars.

Dated . . . , 19 . .

O. P., Foreman.

§ 1281. General verdict for plaintiff in ejectment.

Form No. 406.

[TITLE.]

We, the jury in this action, find for the plaintiffs, that they are the owners of an estate in fee simple [or, an estate for the life of A. B., or otherwise specify the particular estate and its duration] in the lands described in the complaint, and have a right to recover the possession of the same, and we assess their damages for the unlawful withholding thereof at the sum of . . . dollars, and [if special damage be claimed in the complaint] we further assess the plaintiff's damages for waste committed thereon at the sum of . . . dollars.

Dated . . . , 19 . .

O. P., Foreman.

[If the plaintiff had title at the time the action was commenced, which has terminated pending the action, the verdict should state both facts and the date of the termination, and assess damages only to that date.]

§ 1282. Separate verdict in ejectment for defendant's improvements, when plaintiff recovers the land.

Form No. 407.

[TITLE.]

We, the jury in this action, find the defendant entitled to recover, upon his counterclaim herein, the value of the improvements made and taxes paid by him upon the said premises, and assess the amount thereof at . . . dollars.

Dated . . . , 19 . .

O. P., Foreman.

[This is to be returned with the general verdict for the plaintiff.]

§ 1283. Separate verdict in ejectment for a part of the premises only.

Form No. 408.

[TITLE.]

We, the jury in this action, find for the plaintiff, that he is the owner in fee simple [or, otherwise describe the estate as in preceding forms] in and to a part of the premises described in the complaint, to-wit: [here describe the part recovered]; and we assess his damages [as in preceding forms]; and as to the remainder of the premises described in the complaint, we find for the defendant.

Dated . . . , 19 . .

O. P., Foreman.

§ 1284. Special verdict.

Form No. 409.

[TITLE.]

We, the jury in this action, find the following special verdict in said action:

Question 1. [Insert question.]

Answer. [Insert answer.]

Question 2. [Insert question.]

Answer. [Insert answer.]

[Proceed in the same manner with all of the questions.]

Dated . . . , 19 . .

O. P., Foreman.

§ 1285. General verdict, with findings on particular questions.

Form No. 410.

[TITLE.]

We, the jury in this action, find for the plaintiff and assess his damages at . . . dollars [or, find for the defendant]; and we further find in answer to questions submitted by the court as follows:

Question 1. [Insert question.]

Answer. [Insert answer.]

[Proceed as above with remaining questions.]

Dated . . . , 19 . .

O. P., Foreman.

§ 1286. Notice of motion for trial of issues of fact in equitable case, or issues not made by the pleadings, before a jury.

Form No. 411.

[TITLE.]

Take notice, that upon the pleadings in this action and upon the proceedings on file [and upon the affidavit of G. H., herewith served,] the undersigned will move the . . . court at . . . , on the . . . day of . . . , 19.., at . . . o'clock A. M., or as soon thereafter as counsel can be heard, for an order that the following issues be submitted to a jury for trial, viz.:

I. [State issues in succinct form.]

[DATE.]

G. H., Attorney for Plaintiff.

[ADDRESS.]

§ 1287. Order for trial of issues in equitable action before jury.

Form No. 412.

[TITLE.]

The motion of the plaintiff herein for an order submitting certain issues to a jury for trial having come on to be heard upon the pleadings herein [and the affidavit of G. H.], and [state any further affidavits or papers used on the motion], after hearing G. H., Esq., for the motion, and J. K., Esq., in opposition:

Ordered, that the following issue between the parties be tried by a jury at the . . . term of the said court, to be held at . . . , on the . . . day of . . . , 19 . . . , [or, at the present term of this court], viz.:

[State issue clearly and succinctly.]

By the Court:

O. P., Judge.

CHAPTER XLVIII.

TRIAL BY A REFEREE.

§ 1288. **In general.**—A reference may be ordered, upon the agreement of the parties, filed with the clerk or entered in the minutes,—1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon; 2. To ascertain a fact necessary to enable the court to determine an action or proceeding.¹ Under Colorado practice, a reference may be ordered by the court on the stipulation of the parties to try all issues of fact as well as of law, and to report findings and judgment thereon.² The court may appoint one or more referees to examine the accounts made in probate proceedings and report thereon, subject to confirmation, when the same are complicated and contested by the heirs, and may allow a reasonable compensation to the referees, to be paid out of the estate.³ The consent of a party to an order of reference must be in writing, or entered on the minutes.⁴ The court has no power, when either of the parties object, to order a reference with directions to the referee to report a judgment.⁵ Consent may be given by oral consent, in open court, entered on the minutes.⁶ An order of court is necessary to constitute a reference, and no reference is good, as such, without an order.⁷ In

¹ Cal. Code Civ. Proc., § 638; N. Y. Code, § 1011; Ohio Code, § 281; Or. B. & C. Codes, § 160; Nev. Comp. Laws, par. 3279, § 184; Wash. Bal. Codes, §§ 4968, 5033; Idaho Rev. Codes, § 4414; Ariz. Laws, par. 184; ² Till. & Shear. Pr. 516. See *Faulkner v. Hendy*, 103 Cal. 20, 36 Pac. 1021; *Von Schmidt v. Widber*, 99 Cal. 515, 34 Pac. 109.

² *Sartor v. Strassheim*, 8 Colo. 185, 6 Pac. 215.

³ Cal. Code Civ. Proc., § 1636; Alaska Codes, pt. 4, ch. 86, §§ 859, 862, 871; Ariz. Civ. Code, § 1870; Idaho Rev. Codes, § 5601; Mont. Rev. Codes, § 7648; Nev. Comp. Laws, § 2992; N. Mex. Comp. Laws, § 2005; Utah Rev. Stats., § 3947; Wash. Bal. Codes,

§ 6330; Wyo. Rev. Stats., § 4724.

⁴ *Smith v. Polack*, 2 Cal. 92. This decision applies only to cases at common law. *Smith v. Rowe*, 4 Cal. 6.

⁵ *Williams v. Benton*, 24 Cal. 424; *Hendy Machine Works v. Pacific etc. Construction Co.*, 99 Cal. 421, 33 Pac. 1084. See *Sieber v. Frink*, 7 Colo. 150, 2 Pac. 901.

⁶ *Bates v. Vischer*, 2 Cal. 355; *People v. McGinnis*, 1 Park. Cr. Rep. 387; *Keator v. Ulster Plank-Road Co.*, 7 How. Pr. 41; *Bloore v. Potter*, 9 Wend. 480; *Leayercroft v. Fowler*, 7 How. Pr. 259. See *Diddell v. Diddell*, 8 Abb. Pr. 167, and note, p. 171.

⁷ *Heslep v. San Francisco*, 4 Cal. 4; *Bonner v. McPhail*, 31 Barb. 106.

California, the whole issue in divorce cases cannot be referred even by stipulation of parties. The referee, in such cases, is but a master to take testimony.⁸ In New York, after issue joined, the parties have an absolute right to a reference of all the issues, and the proper order to be procured is an order to hear and determine the issues. It is only in cases where no issue is joined, or where some interlocutory question is involved, that a reference in a divorce case simply to take and report evidence is allowable.⁹

The order of reference cannot go beyond the pleadings,¹⁰ and must conform to the stipulation.¹¹ Where a cause has been referred by stipulation of the parties to take evidence and report a judgment, and the referee reports a judgment which is entered, and the court subsequently grants a new trial, it cannot again refer the case to the same or another referee without a new consent.¹² The order of reference should state whether it was made on the agreement of parties, upon the application of one party, or on motion of the court.¹³ An order of reference referring "the action" to a referee, "with the usual powers," based upon the consent of the defendant in open court that the case be referred to take the testimony and report, warrants the referee in making and reporting findings of fact and conclusions of law.¹⁴ The reference of an action for trial and judgment does not deprive the court of power to order its dismissal for want of diligence in its prosecution before the referee.¹⁵

§ 1289. Compulsory reference.—When the parties do not consent the court may, upon the application of either or of its own motion, direct a reference in the following cases: 1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein; 2. When the taking of an account is

⁸ *Baker v. Baker*, 10 Cal. 527; Cal. Civ. Code, § 130.

⁹ *Sullivan v. Sullivan*, 52 How. Pr. 453. This decision was under the former New York code; now, by section 1012 of the present New York code, the court may, in its discretion, grant or refuse a reference; and where a reference is granted, the court must designate the referee.

¹⁰ *Dranger v. Chevalier*, 9 Cal. 351.

¹¹ *Haner v. Bliss*, 7 How. Pr. 246. See, also, *Scudder v. Snow*, 29 How. Pr. 95.

¹² *Daverkosen v. Kelley*, 43 Cal. 477.

¹³ *Terpening v. Holton*, 9 Colo. 306.

¹⁴ *Ilstad v. Anderson*, 2 N. Dak. 167, 49 N. W. 659.

¹⁵ *Saville v. Frisbie*, 70 Cal. 87, 11 Pac. 502.

necessary for the information of the court before judgment, or for carrying a judgment or order into effect; 3. When a question of fact other than upon the pleadings arises, upon motion or otherwise, in any stage of the action; 4. When it is necessary for the information of the court in a special proceeding;¹⁶ 5. In Idaho, when the parties are numerous, and the convenience of the witnesses and the ends of justice will be promoted.¹⁷ And the rule is extended to cases where judgment is taken upon failure to answer.¹⁸ A compulsory reference of an action as involving a long account can be ordered where the accounts to be examined are the immediate object of the suit or the ground of the defense. They must be directly, and not incidentally and collaterally, involved.¹⁹ In an action requiring the examination of a long account on the trial of an issue of fact a compulsory order of reference is proper, notwithstanding the complaint may contain allegations of fraud, which constitute ground for the arrest of the defendant, and he has been arrested thereon.²⁰ If the amounts are not in dispute, but defendant claims he was authorized to hire a collector, and that such hire consumed the amount in controversy, it is a question for a jury, and not for a referee.²¹ Either an action in tort or on contract may be referred, where it appears, from affidavits or the pleadings, that so many separate and distinct items will be litigated that a jury cannot keep the evidence upon each separately in mind.²² If a collateral matter not raised by the pleadings be sent to a referee under the second and third subdivisions of section 639 of the California Code of Civil Procedure, a motion for new trial is not necessary to bring the action of the referee before the court for review. The finding of the referee in such case does not take

¹⁶ Cal. Code Civ. Proc., § 639. See N. Y. Code, §§ 1013, 1015; Nev. § 185; Or. B. & C. Codes, § 161; McDonald v. American Mortgage Co., 17 Or. 626, 21 Pac. 883.

¹⁷ Boise City Irr. etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25.

¹⁸ Cal. Code Civ. Proc., § 585, subd. 2. As to judgment for defendant upon an issue of law, see Cal. Code Civ. Proc., § 636.

¹⁹ Kain v. Delano, 11 Abb. Pr. (N. S.) 29.

²⁰ Atocha v. Garcia, 15 Abb. Pr.

303, 24 How. Pr. 186. As to reference where the examination of a long account is involved, see Tribou v. Strowbridge, 7 Or. 156; McDonald v. American Mortgage Co., 17 Or. 626, 21 Pac. 883; Templeton v. Linn County, 22 Or. 328, 29 Pac. 795, 15 L. R. A. 730; Deane v. Willamette Bridge Co., 22 Or. 169, 29 Pac. 440, 15 L. R. A. 614.

²¹ Wilson v. Union Distilling Co., 16 Colo. App. 429, 66 Pac. 170.

²² Salem Light etc. Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675.

the place of a special verdict, and is not binding on the court until adopted by it.²³

An account is a statement of commercial or pecuniary transactions between parties, occurring at various times.²⁴ A bill of articles delivered at one time is not an account;²⁵ nor a single bill of lading containing items;²⁶ nor numerous items of damage;²⁷ nor of articles lost in an action upon an insurance policy;²⁸ nor claim for numerous articles under a single obligation.²⁹ When the taking of an account is required, it is in the discretion of the court to take the account, or to refer it to a commissioner or referee.³⁰ A reference may be ordered in any equity suit, where either party alleges facts showing an accounting to be necessary.³¹ When the court itself takes or states the account, a refusal to order a reference for such purpose is not erroneous.³² In an action at law, the necessity of taking a long account will not authorize the court to refer the case without the consent of parties.³³ It cannot be ordered merely on the ground that if plaintiff recovers judgment such examination will become necessary,³⁴ though such account may be taken before main issues are tried by a jury, reserving those issues for such trial.³⁵ In an action for balance of account, the defense was payment by a promissory note; replication, that plaintiff was induced to receive the note by fraudulent representations; it was held that the case was not referable without written consent of both parties.³⁶ And in an action to dissolve a partnership, the court may order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts; but it has no power, if objection is made, to order a reference of any other

²³ *Harris v. San Francisco S. R. Co.*, 41 Cal. 393.

²⁴ *Freeman v. Atlantic Mutual Ins. Co.*, 13 Abb. Pr. 124.

²⁵ *Swift v. Wells*, 2 How. Pr. 79; *Miller v. Hooker*, 2 How. Pr. 171; *Stewart v. Elwele*, 3 N. Y. Code Rep. 139.

²⁶ *Miller v. Hooker*, 2 How. Pr. 171.

²⁷ *Dewey v. Field*, 13 How. Pr. 437; *McCullough v. Brodie*, 13 How. Pr. 346; *Sharp v. Mayor of New York*, 9 Abb. Pr. 426, 18 How. Pr. 213.

²⁸ *Freeman v. Atlantic etc. Ins. Co.*, 13 Abb. Pr. 124. But, to the

contrary, see *Lewis v. Irving Fire Ins. Co.*, 15 Abb. Pr. 303, note.

²⁹ *Van Rensselaer v. Jewett*, 6 Hill, 373, 41 Am. Dec. 750.

³⁰ *Hidden v. Jordan*, 28 Cal. 301.

³¹ *Jones v. Gardner*, 57 Cal. 641.

³² *Emery v. Mason*, 75 Cal. 222, 16 Pac. 894.

³³ *Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206.

³⁴ *Cameron v. Freeman*, 10 Abb. Pr. 333, 18 How. Pr. 310; *Keeler v. Poughkeepsie etc. Co.*, 10 How. Pr. 11.

³⁵ *Bowman v. Sheldon*, 1 Duer, 607.

³⁶ *Seaman v. Mariani*, 1 Cal. 336.

issue, or to direct referees to report a judgment;³⁷ and an averment in the answer that the accounts had been adjusted, and that the parties had "not taken any new contracts since," is held not sufficient to prevent a reference.³⁸ On an application for the protection of an attorney's lien, the court has power to refer the question without consent.³⁹ The action of the trial court in making an order of reference without the consent of the parties in a case where such consent is required, will not be reviewed by the appellate court in the absence of an exception thereto by the party complaining of such ruling.⁴⁰ In actions other than those arising upon contract for the recovery of money or damages only, if no answer has been filed after default entered, if the taking of an account or the proof of any fact is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose.⁴¹

§ 1290. Order of reference—Practice thereon—Affidavit.—The motion must be made on affidavit showing that issue is joined.⁴² The affidavit should be made by the party himself, or show sufficient excuse for his not doing so.⁴³ The order is not void for indefiniteness for failure to show whether reference was made to the person as referee or as court commissioner.⁴⁴

§ 1291. Confession of judgment.—A reference with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment-roll in the case, and whether the same was filed in the clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to a reference the question as to what amount, if any, is still unpaid on the judgment.⁴⁵

³⁷ Williams v. Benton, 24 Cal. 425.

³⁸ Kennedy v. Shilton, 1 Hilt. 546, 9 Abb. Pr. 157. Note to Pratt v. Stiles.

³⁹ Ackerman v. Ackerman, 14 Abb. Pr. 229. But compare Fox v. Fox, 24 How. Pr. 409. See Hale v. Swinburne, 17 Abb. N. C. 385.

⁴⁰ Shain v. Peterson, 99 Cal. 486, 33 Pac. 1085. See Hendy Machine Works v. Pacific Cable Construction Co., 99 Cal. 421, 33 Pac. 1084.

⁴¹ Cal. Code Civ. Proc., § 585,

subd. 2; Nev. Comp. Laws, par. 3247, § 125, subd. 2.

⁴² Jansen v. Tappen, 3 Cow. 34. See Lord v. Connor, 48 How. Pr. 95.

⁴³ Mesick v. Smith, 2 How. Pr. 7; Ross v. Beecher, 2 How. Pr. 157; Little v. Bigelow, 2 How. Pr. 164; Wood v. Crowner, 4 Hill, 548. As to amendment of order of reference, see United States v. Church, 6 Utah, 15, 21 Pac. 503.

⁴⁴ Howard v. Hanson, 49 Wash. 314, 95 Pac. 265.

⁴⁵ Solomon v. Maguire, 29 Cal. 227.

§ 1292. Equity cases.—In an equity case where the trial of an issue of fact involved requires the examination of a long account the court may order a reference with directions to report upon the account, or any issue of fact involved in the account.⁴⁶ Not only must there be an account, but it must be a long one; four items, or even seven, will not constitute such an account.⁴⁷

§ 1293. Duties of referees.—When the court has decided the principles upon which an account should be taken and settled, it is the duty of the referee to take the account in pursuance of the principles thus settled; it is not competent for him to review the action of the court.⁴⁸ It is the duty of a referee to act upon the questions committed to him, and to report whatever he is required to report by the order under which he acts.⁴⁹ A referee must keep as free from outside influence, or the influence of the parties, as jurors,⁵⁰ and cannot be a witness in a proceeding had before him.⁵¹

§ 1294. Motion, when made.—The motion should not be made while an issue of law remains undecided which, if decided in a particular way, would dispose of all the issues of fact. In short, it ought not to be made till the cause is ready for trial, though it may be made immediately upon joinder of issue, without waiting for a possible amendment of course by the adverse party.⁵² And either party may have order of reference revoked or reconsidered, if such amendment be made.⁵³ It ought to be made before notice of trial.

§ 1295. Motion opposed.—When the motion is opposed, on the ground that difficult questions of law are involved, an affidavit to that effect should be submitted, showing what questions are involved.⁵⁴ And questions of law must be clearly stated.⁵⁵ It is not a sufficient objection to a motion for reference to show that

⁴⁶ *Williams v. Benton*, 24 Cal. 425.

⁵¹ *Morss v. Morss*, 11 Barb. 510.

⁴⁷ *Parker v. Snell*, 10 Wend. 577;

⁵² *Enos v. Thomas*, 4 How. Pr. 290.

Harris v. Mead, 16 Abb. Pr. 257;

⁵³ *Beardsley v. Stover*, 7 How. Pr.

Smith v. Brown, 3 How. Pr. 9.

294.

⁴⁸ *Smith v. Walker*, 38 Cal. 385, 99 Am. Dec. 415.

⁵⁴ *Dewey v. Field*, 13 How. Pr.

⁴⁹ *Hihn v. Peck*, 30 Cal. 280; *Quincy v. Young*, 5 Daly, 44.

437; *Salisbury v. Scott*, 6 Johns. 329; *Barber v. Cromwell*, 10 How. Pr. 351.

⁵⁰ *Dorlon v. Lewis*, 9 How. Pr. 1; *Yale v. Gwinits*, 4 How. Pr. 253.

⁵⁵ *Salisbury v. Scott*, 6 Johns. 329; *Anonymous*, 5 Cow. 423.

the action was in a previous trial left to a jury.⁵⁶ An offer to admit upon the trial the items of an account upon stipulation will defeat the motion.⁵⁷ Where there is reasonable ground for controversy as to whether the issues involve an accounting, the decision of the lower court to refer the matter will not ordinarily be disturbed.⁵⁸

§ 1296. Notice of motion.—In general, a notice of motion is necessary, though the court may, upon its own motion, order a reference on the hearing without any formal motion or previous notice.⁵⁹

§ 1297. Number and residence of referees.—A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending.⁶⁰ In New York, by agreement of parties, there may be five in number.⁶¹ When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.⁶²

§ 1298. Objections to referees.—Objections to the appointment of any person as referee may be made on grounds substantially the same as challenges to jurors for cause, except that the prohibited degree of relationship is the third instead of the fourth, and also a modification in the sixth ground.⁶³ And objections so taken must be heard and disposed of by the court; affidavits may be read, and any person examined as a witness in reference to such objections.⁶⁴ The fact that the referee, in proceeding supplementary to execution, was the clerk of the

⁵⁶ *Brown v. Bradshaw*, 1 Duer, 635,
8 How. Pr. 176.

⁵⁷ *Mullin v. Kelly*, 3 How. Pr. 12.

⁵⁸ *Salem Light etc. Co. v. Anson*,
41 Or. 562, 67 Pac. 1015, 69 Pac
675.

⁵⁹ *Kelly v. Searing*, 4 Abb. Pr. 354.
See *Hall v. Superior Court*, 69 Cal.
79, 10 Pac. 257.

⁶⁰ Cal. Code Civ. Proc., § 640; Nev.
Comp. Laws, par. 3281, § 186.

⁶¹ N. Y. Code Civ. Proc., § 1025.

⁶² Cal. Code Civ. Proc., § 1053;
N. Y. Code Civ. Proc., § 1026; *Jack-
son v. Ives*, 22 Wend. 637.

⁶³ Cal. Code Civ. Proc., § 641, as
amended 1907; Or. B. & C. Codes,
§ 164; Nev. Comp. Laws, par. 3282,
§ 187; Idaho Rev. Codes, § 4417;
Ariz. Laws, § 187.

⁶⁴ Cal. Code Civ. Proc., § 642;
Nev. Comp. Laws, par. 3283, § 188.

attaching creditor is not any considerable evidence of fraud.⁶⁵ The California statute concerning references does not require that referees should be sworn;⁶⁶ and in New York the oath may be waived.⁶⁷ Omission to take the oath is an irregularity, which is waived by going to trial without objection.⁶⁸

§ 1299. Partition, action of.—The appointment of referees to try all the issues in actions for partition is governed by the general provisions of the Practice Act, and can only be made upon the agreement of all the parties. It is erroneous for the court to order a reference for the purpose of trying all the issues in an action for partition in which there is a party whose name is unknown, and whose consent cannot, therefore, be procured, and all proceedings thereon must fall.⁶⁹ The court, in case of lienholders, of record, on property in controversy, who have not been made parties to the suit, must appoint a referee to determine the extent of their interest.⁷⁰

§ 1300. Power of referees.—Under a reference to try issues and report a judgment, the referee can exercise all the powers of a judge in relation to the trial of a cause referred to him,⁷¹ in so far as they are conferred by the stipulation or order for reference.⁷² But the order must be entered to confer such power fully.⁷³ A referee has power to dismiss plaintiff's complaint on his failure to appear, or to prosecute after appearance.⁷⁴ He may give judgment on the pleadings for plaintiff where the answer does not constitute a defense.⁷⁵ A court commissioner has no jurisdiction to hear a motion or to make any order in reference to the dissolution of an injunction, unless the motion is referred to him by the court.⁷⁶ It is the business of a referee

⁶⁵ *Adams v. Hackett*, 7 Cal. 187.

⁶⁶ *Sloan v. Smith*, 3 Cal. 406. In New York and Ohio, it is otherwise. Ohio Code, § 288; N. Y. Code, § 1016.

⁶⁷ *Id.* See *Katt v. Germania Fire Ins. Co.*, 26 Hun, 429; *Leyde v. Martin*, 16 Minn. 38.

⁶⁸ *Logan v. Brown*, 20 Okla. 334, 95 Pac. 441.

⁶⁹ *Hastings v. Cunningham*, 35 Cal. 549; Prac. Act, §§ 182, 183; Cal. Code Civ. Proc., §§ 638, 639.

⁷⁰ Cal. Code Civ. Proc., § 761, as amended 1907.

⁷¹ *Plant v. Fleming*, 20 Cal. 92; *Woodruff v. Dickie*, 31 How. Pr. 164. See *Stimson v. Estes*, 3 Or. 521; *Bohlman v. Coffin*, 4 Or. 313; *Thompson v. Patterson*, 54 Cal. 542; *Reever v. White*, 8 Utah, 190, 30 Pac. 685.

⁷² *Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

⁷³ *Bonner v. McPhail*, 31 Barb. 106.

⁷⁴ *Morange v. Meigs*, 54 N. Y. 207.

⁷⁵ *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609.

⁷⁶ *Stone v. Bunker Hill Co.*, 28 Cal. 497.

appointed to take evidence to take all that is offered, and leave it to the court, on the hearing of the matter, to determine what is or is not competent;⁷⁷ and if objections taken before the referee are not renewed before the court on trial, and ruling had thereon, they are not available on appeal.⁷⁸ Referees have no power to allow pleadings to be amended after a case has been submitted to them,⁷⁹ and cannot make valid findings upon questions not pleaded.⁸⁰ It is directly otherwise in New York practice.⁸¹ To determine the power of a referee, the object for which he was appointed, or the nature of the reference, must be continually kept in view.⁸² A referee cannot delegate his authority, nor try a cause by deputy.⁸³

§ 1301. **Compensation of referee.**—The referee's fee is not fixed at five dollars per day, but is within the discretion of the court, and section 768 of the California Code of Civil Procedure prevails over section 1028 thereof.⁸⁴ In the partition of seventeen tracts of land, of the value of eight hundred thousand dollars, where three referees were appointed, each of whom consumed about one year in doing the work, and each testified that their services were reasonably worth seven thousand five hundred dollars each, an allowance of five thousand dollars is not excessive.⁸⁵ For thirty days' service as referee, an allowance of two thousand five hundred and fifty dollars should be cut down to one thousand dollars.⁸⁶

§ 1302. **Title.**—References may be ordered to examine title,—e. g. in an action for specific performance,—but not, however, before judgment, if any other question than that of title be in dispute,⁸⁷ unless all other questions are frivolous.⁸⁸ And, after

⁷⁷ *Scott v. Williams*, 23 How. Pr. 393, 14 Abb. Pr. 70.

⁷⁸ *Fox v. Moyer*, 54 N. Y. 125.

⁷⁹ *De La Riva v. Berreyesa*, 2 Cal. 195.

⁸⁰ *Sutton v. Clarke*, 40 Or. 508, 67 Pac. 742.

⁸¹ See N. Y. Code Civ. Proc., § 1018; superseding *Billings v. Baker*, 6 Abb. Pr. 213.

⁸² *Betts v. Letcher*, 1 S. Dak. 182, 46 N. W. 193.

⁸³ *Shultz v. Whitney*, 9 Abb. Pr. 71, 17 How. Pr. 471; *Heyer v. Deaves*, 2 Johns. Ch. 154.

⁸⁴ *Mesnager v. De Leonis*, 140 Cal. 402, 73 Pac. 1052.

⁸⁵ *Treadwell v. Treadwell*, 134 Cal. 158, 66 Pac. 197.

⁸⁶ *Jordan v. Western Union Tel. Co.*, 69 Kan. 140, 76 Pac. 396.

⁸⁷ *Blyth v. Elmhirst*, 1 Ves. & B. 1; *Paton v. Rogers*, 1 Ves. & B. 351; *Morgan v. Shaw*, 2 Meriv. 138; *Portman v. Mill*, 2 Russ. 570; *Gordon v. Ball*, 1 Sim. & St. 178.

⁸⁸ *Wood v. Machu*, 5 Hare, 158; *Boyes v. Liddell*, 1 Y. & C. 133; *Boehm v. Wood*, 1 Jac. & W. 419; *Withy v. Cottle*, 1 Sim. & S. 174,

some conflict of decisions, it appears to be settled that the order may contain a direction that the referee may ascertain not only whether there is a good title, but when such title was perfected.⁸⁹

§ 1303. Conduct of the trial.—A trial before referees should be conducted in the same manner as before a court;⁹⁰ and the evidence should be embodied in a bill of exceptions, and certified by the referees.⁹¹ Where a reference is had to take an account, it is within the discretion of the referees to open the case, after it is once closed, for the purpose of receiving additional testimony,⁹² even after they have announced their decision,⁹³ though not after they have signed their report and given notice thereof to either party;⁹⁴ nor after it has been filed;⁹⁵ nor has a referee a right to bring in and file an additional or amended report.⁹⁶

Where a referee admits the testimony of a witness against the objection of a defendant, such testimony cannot afterwards be thrown out without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony,⁹⁷ unless no possible evidence would be admissible upon the point,⁹⁸ or unless proper warning be given to the parties at the time it is received that it will be stricken out, unless other evidence necessary to make it valid is furnished.⁹⁹ Referees should observe the rules of evidence.¹⁰⁰ Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing.¹⁰¹

Turn. & R. 78. As to what order of reference may contain on examination of title, see *Bennett v. Rees*, 1 Keen, 405; *Anonymous*, 3 Mad. 495; *Hyde v. Wroughton*, 3 Mad. 279; *Jennings v. Hopton*, 1 Mad. 211; overruling *Gibson v. Clark*, 2 Ves. & B. 103. Compare *Luban v. Lightbody*, 8 Price, 606. See *Birch v. Haynes*, 2 Meriv. 444.

⁸⁹ *Bennett v. Rees*, 1 Keen, 405; *Hyde v. Wroughton*, 3 Mad. 279.

⁹⁰ *Goodrich v. Mayor etc. of Marysville*, 5 Cal. 430; *Phelps v. Peabody*, 7 Cal. 50.

⁹¹ *Goodrich v. Mayor etc. of Marysville*, 5 Cal. 430; *Poire v. Rocky Mountain T. Co.*, 7 Colo. 588, 4 Pac. 1179.

⁹² *Marziou v. Pioche*, 10 Cal. 545; *Delafield v. De Grauw*, 9 Bosw. 1;

Duguid v. Ogilvie, 3 E. D. Smith, 527; *Cleaveland v. Hunter*, 1 Wend. 104.

⁹³ *Ayrault v. Sackett*, 17 How. Pr. 507; affirming 17 How. Pr. 461; *Pratt v. Stiles*, 9 Abb. Pr. 154.

⁹⁴ *Shearman v. Justice*, 22 How. Pr. 241.

⁹⁵ *Niles v. Price*, 23 How. Pr. 473.

⁹⁶ *Headley v. Reed*, 2 Cal. 325.

⁹⁷ *Monson v. Cooke*, 5 Cal. 436; *Meyers v. Betts*, 5 Denio, 81; *Clusman v. Merkel*, 3 Bosw. 402; *Allen v. Way*, 7 Barb. 585; *Johnson v. McIntosh*, 31 Barb. 267.

⁹⁸ *Brown v. Colie*, 1 E. D. Smith, 265.

⁹⁹ *Brooks v. Christopher*, 5 Duer, 216.

¹⁰⁰ *De La Riva v. Berreyesa*, 2 Cal. 195.

¹⁰¹ *Baker v. Woodward*, 12 Or. 3,

§ 1304. Findings of referee.—The report of a referee must separately state the facts found and the conclusions of law thereon. The report must be made within twenty days after the testimony is closed.¹⁰² Under the former California statute, this was held to be directory merely, and a failure to file within the time neither invalidates the report nor a judgment thereon.¹⁰³ The court may extend the time within which to file the report;¹⁰⁴ and if no objection is made to the time of filing a report, it will be presumed that such objection is waived.¹⁰⁵ In Nevada, it is held that if a referee fails to make his report within the time ordered by the court, he may be removed on the application of either party, but if not removed his authority does not expire.¹⁰⁶ In New York, also, it has been held that the requirement as to the time within which the report must be filed was absolute, but the section of the New York code (§ 1019) differs materially from the California Code of Civil Procedure (§ 643). Under a reference upon all the issues, the report must pass upon them all,¹⁰⁷ except those upon which no evidence is offered.¹⁰⁸ Everything necessary to support the judgment must be inserted in the statement of facts;¹⁰⁹ nothing must be left to inference, though a finding of fact may be interpreted by a finding of law.¹¹⁰

§ 1305. Sufficient findings.—The decision of a referee stands on the same footing as that of a judge or the verdict of a jury, and though unsatisfactory will be conclusive on a question of fact, if there is any evidence to support it,¹¹¹ and a judgment is

6 Pac. 173. As to objections to evidence, see *Illstad v. Anderson*, 2 N. Dak. 167, 49 N. W. 659.

¹⁰² Cal. Code Civ. Proc., § 643; N. Y. Code Civ. Proc., § 1022; *Lambert v. Smith*, 3 Cal. 408; *Roberts v. Carter*, 28 Barb. 462, 17 How. Pr. 524; *Church v. Erben*, 4 Sandf. 691; *Tilman v. Keane*, 1 Abb. Pr. (N. S.) 23; *Wright v. Sanders*, 28 How. Pr. 395; *Niles v. Battershall*, 27 How. Pr. 381; *Toll v. Whitney*, 18 How. Pr. 161. As to findings by referee, see *Park v. Mighell*, 3 Wash. 737, 29 Pac. 556; *Bigne v. David*, 17 Or. 362, 21 Pac. 52; *Williams v. Gallick*, 11 Or. 337, 3 Pac. 469; *Lee Sack Sam v. Gray*, 104 Cal. 243, 38 Pac. 85.

¹⁰³ *Keller v. Sutrick*, 22 Cal. 471.

¹⁰⁴ *Clark v. Bank of Hennessey*, 14 Okla. 572, 79 Pac. 217.

¹⁰⁵ *Bradford v. Cline*, 12 Okla. 339, 72 Pac. 369.

¹⁰⁶ *Rhodes v. Williams*, 12 Nev. 21.

¹⁰⁷ *Solomon v. Maguire*, 29 Cal. 227; *Rogers v. Beard*, 20 How. Pr. 282; *Van Steenburgh v. Hoffman*, 6 How. Pr. 492.

¹⁰⁸ *Ingraham v. Gilbert*, 20 Barb. 151; *Patterson v. Graves*, 11 How. Pr. 91.

¹⁰⁹ *Tomlinson v. Mayor of New York*, 23 How. Pr. 452; *Hickok v. Bliss*, 34 Barb. 321.

¹¹⁰ *Smith v. Devlin*, 23 N. Y. 363.

¹¹¹ *Knowles v. Joost*, 13 Cal. 620; *Muller v. Boggs*, 25 Cal. 179; *Peck*

to be entered thereon in the same manner.¹¹² When a referee reports his decision upon the whole case, his report stands as the decision of the court. When he reports the facts only, his report is a special verdict.¹¹³ But not so as to conclusions of fact drawn from the pleadings alone.¹¹⁴ When the order of reference requires the referee to try the issues and report his finding thereon, the referee may make a general finding upon the facts put in issue, stating the facts according to their legal effect.¹¹⁵ Where an action at law is tried by a referee, who is charged to find the facts and the law, he should find the facts in detail; and where there is a counterclaim filed in the action, he should state clearly what items he allowed for and against each party.¹¹⁶ The report of a referee and the award of an arbitrator are in all essentials the same.¹¹⁷ The findings of facts by a referee are presumed to be based on sufficient evidence, where no statement on motion for a new trial appears in the transcript on appeal.¹¹⁸ Where a cause is tried before a referee having authority to hear and decide the whole issue, his findings of fact upon oral and documentary evidence are entitled to the same consideration as the verdict of a jury or the findings of the court based upon like evidence produced in open court,¹¹⁹ but there must be evidence to support it.¹²⁰

§ 1306. Decree upon report.—In a suit in chancery it is perfectly competent for the judge who tried the cause, after exceptions have been filed to the report of a referee upon the facts, and the report set aside for cause shown, to take up the testimony reported by the referee, find the facts, and render a decree in the cause.¹²¹ In proper cases, the report may take the form of a finding upon trial by the court, with modifications of

v. Vandenberg, 30 Cal. 11; Stephens v. Parvin, 33 Colo. 60, 78 Pac. 688; Johnson v. Johnson, 18 Colo. App. 493, 72 Pac. 604; Quirk v. Clark, 7 Mont. 31, 14 Pac. 669; Bartel v. Mathias, 19 Or. 482, 24 Pac. 918.

¹¹² Peck v. Alexander, 40 Colo. 392, 91 Pac. 38; Colo. Code, 212.

¹¹³ Harris v. San Francisco Sugar Refining Co., 41 Cal. 393.

¹¹⁴ Simmons v. Sisson, 26 N. Y. 264.

¹¹⁵ Hihn v. Peck, 30 Cal. 280.

¹¹⁶ Park v. Mighell, 3 Wash. 737, 29 Pac. 556.

¹¹⁷ Headley v. Reed, 2 Cal. 322; Tyson v. Wells, 2 Cal. 122; Grayson v. Guild, 4 Cal. 122.

¹¹⁸ Donahue v. Cromartie, 21 Cal. 80.

¹¹⁹ Kimball v. Lyon, 19 Colo. 266, 35 Pac. 44. See Bartel v. Mathias, 19 Or. 482, 24 Pac. 918.

¹²⁰ Baldwin Co. v. Patrick, 39 Colo. 347, 91 Pac. 828.

¹²¹ McHenry v. Moore, 5 Cal. 90.

the reading. Findings of fact made by a referee in an equity case may be set aside and others made by the court.¹²²

§ 1307. Exceptions.—The findings of the referee or commissioner may be excepted to and reviewed in like manner as if made by the court.¹²³ Exceptions must be taken during the progress of the trial to the rulings of the referee in the same manner as before a court.¹²⁴ Exceptions to the report must be specific, not general,¹²⁵ and called to the attention of the trial court.¹²⁶ If there be no exceptions embodied in the report showing that the referee erred in fact, and the rule of law by which he arrived at his conclusions being not disclosed, the court cannot disturb the report, and an order granting a new trial will be reversed.¹²⁷ But if it appear that the evidence was insufficient to justify the decision, the court may grant a new trial.¹²⁸ When a case is referred to a referee, under the statute, to hear and determine the issues of law and of fact, and report the same to the court, and he makes his report, wherein no errors of law or of fact occur, and no exceptions are taken, the court below should not set aside the report and grant a new trial.¹²⁹

§ 1308. Setting aside report of referee—Error must be apparent.—The report of the referee cannot be attacked, except for error or mistake of law, apparent on its face, or by motion for new trial, upon exceptions taken at the trial, or the evidence certified. And the party objecting must see that such testimony as he relies on is properly certified.¹³⁰ The *onus* is upon the party who alleges that error was committed to make it appear that such was the case.¹³¹ The error complained of, whether

¹²² *Pratsch v. Aberdeen Packing Co.*, 7 Wash. 346, 35 Pac. 123.

¹²³ Cal. Code Civ. Proc., § 645; *Porter v. Barling*, 2 Cal. 72.

¹²⁴ *Phelps v. Peabody*, 7 Cal. 50; *Branger v. Chevalier*, 9 Cal. 353; *Belmont v. Smith*, 1 Duer, 675. See *Tacoma Grocery Co. v. Draham*, 8 Wash. 263, 40 Am. St. Rep. 907, 36 Pac. 31.

¹²⁵ *Newell v. Doty*, 33 N. Y. 83; *Graham v. Chrystal*, 1 Abb. Pr. (N. S.) 121; *Pearson v. Knapp*, 1 Myl. & K. 312; *Ward v. Fitzhugh*, 7 Sim. 42; *Gompertz v. Best*, 1 Y. & C. 114. But

see *Woods v. Woods*, 10 Sim. 197; *Moore v. Langford*, 6 Sim. 323; *Cullen v. Dean of Kildare*, 2 Ir. Ch. 133; *Stocken v. Dawson*, 2 Phil. 141.

¹²⁶ *Neher v. Armijo*, 11 N. Mex. 67, 66 Pac. 517.

¹²⁷ *Tyson v. Wells*, 2 Cal. 122. See *Wilson v. Davis*, 1 Mont. 183.

¹²⁸ *Cappe v. Brizzolara*, 19 Cal. 607.

¹²⁹ *Grayson v. Guild*, 4 Cal. 125.

¹³⁰ *Goodrich v. Mayor etc. of Marysville*, 5 Cal. 430.

¹³¹ *Mead v. Bunn*, 32 N. Y. 275.

of law or fact, must appear on the face of the award or report.¹³² For error in the report of a referee, the same may be set aside, and a new reference ordered.¹³³

§ 1309. Grounds of objection.—A court cannot interfere and set aside the report of a referee upon the same ground as it will proceed to set aside the verdict of a jury.¹³⁴ When the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the court by the referee, the proper course is to move to set aside the report, and for a new trial.¹³⁵ If a report does not pass upon all the issues referred, it should be set aside,¹³⁶ and so should a report which does not find the issues of law and fact separately.¹³⁷

§ 1310. Insufficient grounds.—It is error for the court to set aside the report of a referee, upon an examination of testimony which was not properly before it.¹³⁸ The court will not disturb the award of an arbitrator or report of a referee, unless the error complained of, whether of law or fact, appear on the face of the award or report.¹³⁹ The defect of a plea, though it be bad on demurrer, is not sufficient reason to set aside the report after submission to a referee.¹⁴⁰ The decision of a referee upon a question of fact will not be set aside where the evidence is conflicting.¹⁴¹ The findings of a referee will rarely be disturbed on appeal when there are circumstances tending to weaken the testimony of the defeated party or to sustain the findings as made.¹⁴² Where there is a large mass of contradictory evidence reported, it will be presumed that the court weighed the evidence properly in setting aside the finding of the facts by the referee.¹⁴³ It would be gross abuse of discretion for a court to

¹³² *Tyson v. Wells*, 2 Cal. 122.

¹³³ *Hidden v. Jordan*, 32 Cal. 397.

¹³⁴ *McHenry v. Moore*, 5 Cal. 90; *Dorlon v. Lewis*, 9 How. Pr. 1; *Roosa v. Saugerties etc. Turnpike Co.*, 12 How. Pr. 297.

¹³⁵ *Branger v. Chevalier*, 9 Cal. 353.

¹³⁶ *Pratt v. Stiles*, 9 Abb. Pr. 156, 17 How. Pr. 211.

¹³⁷ *Hulce v. Sherman*, 13 How. Pr. 411; *Church v. Erben*, 4 Sandf. 691.

¹³⁸ *Goodrich v. Mayor etc. of Marysville*, 5 Cal. 430.

¹³⁹ *Tyson v. Wells*, 2 Cal. 122.

¹⁴⁰ *Ritchie v. Davis*, 5 Cal. 453.

¹⁴¹ *Brady v. Brown*, 20 Cal. 520; *Hummel v. Friese*, 24 Or. 586, 29 Pac. 438; *Lovejoy v. Chapman*, 23 Or. 571, 32 Pac. 687; *Bruce v. Phoenix Ins. Co.*, 24 Or. 492, 34 Pac. 16.

¹⁴² *Id.* See *Fabie v. Lindsay*, 8 Or. 474; *Merchants' Nat. Bank v. Pope*, 19 Or. 35, 26 Pac. 622; *Paddock v. Balgord*, 2 S. Dak. 100, 48 N. W. 840; *Hannaman v. Karrick*, 9 Utah, 236, 33 Pac. 1039.

¹⁴³ *McHenry v. Moore*, 5 Cal. 90.

set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the judge.¹⁴⁴

§ 1311. **Motion to set aside.**—The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, depends on the character of the reference. If it be special, the report has the effect of a special verdict;¹⁴⁵ if general, it stands as the decision of the court; judgment may be entered thereon, and exceptions taken and reviewed, as if the action had been tried by the court;¹⁴⁶ but if it be of a collateral matter, not an issue raised by the pleadings, it does not take the place of a special verdict, nor is it binding on the court until adopted, nor is a motion for a new trial necessary in order to bring it up for review.¹⁴⁷ Failure to appear and prosecute a motion to set aside the report of a referee, and for new trial, is an abandonment of the motion.¹⁴⁸

§ 1312. **Power of court.**—A court has power to set aside the report of a referee, and grant a new trial, on the ground that the evidence before the referee did not justify his decision.¹⁴⁹ Findings of fact made by a referee in an equity case may be set aside and others made by the court. Where the court sets aside the report of a referee in whole or in part, and elects to find the facts and determine the law itself, it is its duty to find the facts and conclusions of law in the same manner as it is required to do when it tries a case without the intervention of a jury.¹⁵⁰ But exceptions to the ruling of the referee must have been taken at the trial. If the referee reports the facts upon all the issues, but draws an erroneous conclusion of law from the facts found, the court, before a judgment is entered, may set aside the conclusions of law, and direct a proper judgment to be entered.¹⁵¹ It is not good practice, where a ref-

¹⁴⁴ *Goodrich v. Mayor etc. of Marysville*, 5 Cal. 430.

¹⁴⁵ Cal. Code Civ. Proc., § 645.

¹⁴⁶ Cal. Code Civ. Proc., §§ 644, 645; *Peabody v. Phelps*, 9 Cal. 213; *Harris v. San Francisco S. R. Co.*, 41 Cal. 393.

¹⁴⁷ *Id.* As to time within which notice of motion must be given to set aside report, see Cal. Code Civ. Proc., § 659.

¹⁴⁸ *Mahoney v. Wilson*, 15 Cal. 43;

Frank v. Doane, 15 Cal. 303; *Green v. Doane*, 15 Cal. 304.

¹⁴⁹ See Cal. Code Civ. Proc., § 657; *Cappe v. Brizzolara*, 19 Cal. 607.

¹⁵⁰ *Pratsch v. Aberdeen Packing Co.*, 7 Wash. 355, 35 Pac. 123. See *Merchants' Nat. Bank v. Pope*, 19 Or. 35, 26 Pac. 622.

¹⁵¹ *Calderwood v. Pyser*, 31 Cal. 333; *Scott v. Pilkington*, 15 Abb. Pr. 280; *Merritt v. Millard*, 10 Bosw. 309.

eree has reported findings of facts, for the court to strike out a finding made by the referee and substitute one of its own; but if the appellant is not prejudiced by such action, it will not be sufficient ground to award a new trial.¹⁵² The court will not interfere with the exercise of a sound discretion by the referee in a matter properly resting in such discretion; e. g. order him to open the case of either party to receive additional testimony after the case is closed.¹⁵³

§ 1313. **Judgment on report—Duty of court.**—A reference is a substitution for a jury, and a judgment should be had on the report as upon a verdict, and a motion to set aside the report is necessary before the appellate court can be required to examine the report and set it aside.¹⁵⁴ So with the report of a referee upon conflicting testimony, which will not be set aside upon an appeal from an order refusing to grant a new trial.¹⁵⁵ If the report of a referee under the statute contain sufficient on which to base a judgment, it is the duty of the court below to enter judgment in accordance with it.¹⁵⁶ Where a referee in dissolution of a partnership finds certain property in his hands, belonging to the partners in equal shares, to be disposed of by the court according to their interests, and makes no disposition of such property in his report, it is a failure to find upon a material issue, and judgment should not enter thereon.¹⁵⁷ A *mandamus* lies to compel the judge of a district court to enter judgment on the report of a referee.¹⁵⁸

§ 1314. **Grounds for appeal.**—An order overruling an exception to the report of a referee, taken on the alleged ground that the report did not find the facts as required by the order of reference, may be reviewed on an appeal from a final judgment.¹⁵⁹ When an erroneous judgment has been entered in the court below in favor of the plaintiff on the report of a referee, and the report has been erroneously set aside, and a new trial granted, from which action the plaintiff appeals, the supreme court will correct both errors at the same time, in a chancery

¹⁵² Pratalongo v. Larco, 47 Cal. 378.

¹⁵³ Dow v. Darragh, 10 Jones & Sp.

80.

¹⁵⁴ Gunter v. Sanchez, 1 Cal. 48.

¹⁵⁵ Ritchie v. Bradshaw, 5 Cal.

229.

¹⁵⁶ Headley v. Reed, 2 Cal. 322.

¹⁵⁷ Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303.

¹⁵⁸ Russell v. Elliott, 2 Cal. 246. As to entry of judgment on report of referee, see Bowie v. Borland, 68 Cal. 233, 9 Pac. 79.

¹⁵⁹ Hihn v. Peck, 30 Cal. 280.

case.¹⁶⁰ If the commissioner to whom a case has been referred to take an account commits an error at the threshold which unsettles the account, the court is not bound to go over the account and correct the error, but may set aside the report and again refer the case.¹⁶¹ The supreme court will not review a judgment entered on the report of a referee, if no objection was made to it in the court below.¹⁶² So where the testimony is conflicting, the supreme court will not disturb the findings.¹⁶³ Nor will it review the findings to ascertain whether they are contrary to the evidence except on appeal from an order denying a new trial.¹⁶⁴ An order setting aside a report of a referee appointed to take an account is merely interlocutory, and not subject to appeal before judgment.¹⁶⁵ So of an order setting aside a finding in a divorce case, and sending the case back to the referee for further testimony.¹⁶⁶ It seems that a stay of proceedings granted on an appeal from an order of reference is proper.¹⁶⁷ No appeal lies from an order setting aside the report of a referee upon an application for a writ of mandate.¹⁶⁸

§ 1315. **May be set aside.**—Judgment is entered upon the report of a referee as matter of course, and the only mode of taking advantage of it is by moving to set it aside, as on motion for a new trial.¹⁶⁹ Judgment entered upon findings of the referee that do not cover all the issues pleaded should be set aside.¹⁷⁰ After rendition of judgment, the court may award a new trial, and set aside the report for any reason that would be sufficient to set aside the report of any arbitrator.¹⁷¹ The provisions of the Practice Act relating to new trials are general, and vest in courts the same power in cases tried by a referee as in other cases.¹⁷² But those provisions only apply in case of the trial of an issue raised by the pleadings; as to collateral matters referred, no motion for new trial is necessary.¹⁷³

¹⁶⁰ Grayson v. Guild, 4 Cal. 125.

¹⁶¹ Hidden v. Jordan, 32 Cal. 397.

¹⁶² Porter v. Barling, 2 Cal. 72.

¹⁶³ Muller v. Boggis, 25 Cal. 179.

¹⁶⁴ Peck v. Vandenberg, 30 Cal. 11.

¹⁶⁵ Johnston v. Dopkins, 6 Cal. 83.

¹⁶⁶ Baker v. Baker, 10 Cal. 528.

¹⁶⁷ Smith v. Pollock, 2 Cal. 94.

¹⁶⁸ Thomas v. Smith, 1 Mont. 21.

¹⁶⁹ Headley v. Reed, 2 Cal. 322;
Sloan v. Smith, 3 Cal. 406. See Faulk-

ner v. Hendy, 103 Cal. 20, 36 Pac. 1021.

¹⁷⁰ Sutton v. Clarke, 40 Or. 508, 67

Pac. 742; Clarke v. Hewitt, 136 Cal.
77, 68 Pac. 303.

¹⁷¹ Sloan v. Smith, 3 Cal. 406;
Headley v. Reed, 2 Cal. 322.

¹⁷² Cappe v. Brizzolara, 19 Cal.
607; Cal. Code Civ. Proc., § 656;
Prac. Act. § 192.

¹⁷³ Harris v. San Francisco S. R.
Co., 41 Cal. 393.

FORMS IN TRIAL BY REFEREE.

§ 1316. Affidavit by defendant to move for reference of an action involving a long account.

[TITLE.]

Form No. 413.

[VENUE.]

C. D., being first duly sworn, says that he is the defendant in this action; that the same is brought by the plaintiff on an account for goods, wares, and merchandise, alleged to have been heretofore sold and delivered to this defendant; that issue was joined herein on the . . . day of . . . , 19 . . . , by the service of the defendant's answer, in which the defendant denies the sale and delivery of a part of the said goods and merchandise, and alleges payment as to the balance thereof, and also alleges as a counterclaim that the plaintiff is indebted to this defendant upon an account for work, labor, and services rendered.

That by the bill of particulars of the plaintiff's claim, heretofore served herein, the same contains . . . items, all of which [or, state how many] this defendant, by his answer, controverts.

That the items of this defendant's counterclaim embrace an account of . . . separate items, and that the trial of this issue will require the examination of a long account,—namely, the said account of the said plaintiff, and also of this affiant as aforesaid.

That no difficult questions of law are, to the best of this affiant's knowledge and belief, involved in the said issues in this action.

[JURAT.]

C. D.

§ 1317. Order to show cause why reference should not be ordered.

Form No. 414.

[TITLE.]

Upon the affidavit of A. B., and on reading the pleadings on file herein, and on motion of L. M., Esq., attorney for defendant:

Ordered, that the . . . herein show cause, at the courthouse in the city of . . . , in said county, on the . . . day of . . . , 19 . . . , at the opening of court on that day, or as soon thereafter

as counsel can be heard, why the order of reference applied for herein should not be granted.

That a copy of this order and said affidavit be served on the plaintiff's attorney, at least . . . before the time fixed for the hearing of such motion.

O. P., Circuit Judge.

§ 1318. Affidavit to oppose motion, denying account.

[TITLE.]

Form No. 415.

[VENUE.]

C. D., being duly sworn, says that he is the defendant in this action, and that the issue joined herein will not require the examination of a long account within the meaning of the statute.

That this action is brought to recover for a bill of goods sold by plaintiff to defendant; and that all of said goods were sold at one time, and as one transaction, and the alleged credit is a payment made by defendant at said time, and then deducted from the amount to be due from defendant to the plaintiff; and there are no other items of charge or credit involved in the issues herein.

[JURAT.]

C. D.

§ 1319. Affidavit to oppose motion where fraud is set up.

Form No. 416.

[Commencement as in form No. 415.]

That this action is brought upon an insurance policy alleged to have been made by defendants; and that the only items of account are the items of damage, which plaintiff claims he has sustained by a peril insured against.

That the defense [or, one of the defenses] set up by the defendants is fraud on the part of the plaintiff, in [here briefly disclose it], as more fully appears by reference to their answer herein.

[JURAT.]

C. D.

§ 1320. Affidavit to oppose motion where there are difficult questions of law.

Form No. 417.

[Commencement as in form No. 415.]

That he has fully and fairly stated the case in this cause to his counsel O. P., who resides at No. . . . street, in the city of

. . . ; and that the investigation and trial of the issues of fact in this cause will, as deponent is advised by said counsel, after such statement, and believes, require the decision of difficult questions of law.

That [here state, unless the moving affidavits correctly state it, the nature of the issue, and that] the following will be insisted on on behalf of said plaintiff: [Here briefly state deponent's points of law.] And deponent is informed and believes that the defendant's counsel will urge [here briefly state his anticipated points]; which points, as deponent is advised by his said counsel, are material to the cause, and are difficult, especially in their application to the facts of this case.

[JURAT.]

C. D.

§ 1321. Stipulation to refer.

Form No. 418.

[TITLE.]

It is hereby stipulated and agreed by the parties to this action, that [the right of trial by jury be waived, and that] it be referred to R. F., Esq., of . . . , counselor at law, to hear, try, and determine the issues in this case; and that an order may be entered accordingly.

[DATE.]

A. B., Plaintiff's Attorney.

C. D., Defendant's Attorney.

§ 1322. Order referring the cause, without motion.

Form No. 419.

[TITLE.]

This cause coming on to be tried, and it appearing to the satisfaction of the court that it will require the examination of a long account:

Ordered, that it be referred to R. F., Esq., of . . . , counselor at law, to hear, try, and determine the whole issues in this cause.

[DATE.]

By the Court:

L. M., Judge.

§ 1323. Order of reference to take an account as to damages.

Form No. 420.

[TITLE.]

This cause coming on to be tried, and it appearing that the taking of an account is necessary for the information of the court before judgment thereupon, on hearing counsel for the respective parties:

Ordered, that it be referred to R. F., Esq., as sole referee,* to ascertain and report [the amount of wharfage which should be allowed to the plaintiffs for the breach of the covenant by the defendants, contained in the grant mentioned in the pleadings]. And for such purpose he is to ascertain [etc., specifying the principles on which the account is taken]. And he is to compute the interest on such amount, and state the same in his report.

And upon such report being confirmed according to the practice of this court either party may bring on the cause for final judgment.

[DATE.]

§ 1324. Order of reference to take an account between parties to a mortgage, in an action to redeem.

Form No. 421.

[As in form No. 420 to the star (*) continuing:] to take and state an account between the several parties to this action, in the manner and under the directions following, to-wit:

That he compute the amount due upon the bond and mortgage executed by the plaintiff to the defendant Z., mentioned in the complaint, from the . . . day of . . . , 19 . . . , down to which time the interest appears to have been paid.

That he ascertain [from the deeds, or otherwise] the consideration paid by the purchasers and defendants, X. and Y., from the said Z., at the auction sale of the said premises, made on the . . . day of . . . , 19 . . . , [proceeding to state the mode of apportioning the redemption money among them].

That he open and state an account with each of such defendants in which he is to allow such party his proportion of the mortgage money so ascertained as aforesaid, with interest; and also all taxes and assessments paid by him or those under whom he claims, upon the lots now held by him; and also any sum paid for necessary repairs upon the same, and any amount expended

for lasting improvements, with interest on such sums respectively; and that he state and charge such party with any rents and profits of such lots received by him, or those under whom he claims, or by any one on his or their behalf, or which could have been received without willful default, with interest.

And upon the coming in and confirmation of the report, the action may be brought on for final determination.

§ 1325. Order of reference for accounting in partnership cause.

Form No. 422.

[As in form No. 420 to the star (*), continuing:] to take and state an account of all dealings and transactions between the plaintiff and defendant, as partners, under the style of A. B. & Co.; and for the better taking and stating of which account the parties are to produce before the said referee, under oath, all books, deeds, papers, and writings in their custody, or under their control, relating thereto; and are to be examined upon interrogatories or otherwise, as the said referee shall direct, who, in taking the said account, is to make all just allowances to the parties as between themselves; and what, on the balance of the said account, shall appear to be due from either party to the other, is to be paid as the said referee shall direct; and the referee is at liberty to state and report any special circumstances, as well as his reasons for allowing or disallowing any allowances which may be claimed.

And it is further ordered, that the question of costs, as well as all other questions, are reserved until the coming in of the report and hearing for further directions.

§ 1326. Order of reference to determine priority among creditors.

Form No. 423.

[As in form No. 420 to the star (*), continuing:] to ascertain and report who are the creditors of the said firm of A. B. & Co., and the amounts due to said creditors respectively, and the order in which they are entitled to payment out of the assets of the said firm of A. B. & Co. [in conformity with the provisions of the statute of limited partnerships.]

That any party to this action, or any person claiming to be a creditor of said firm, and presenting to the said referee *prima facie* evidence of his claim, shall have the right to contest any claim preferred by any other creditor, and that testimony may be taken before said referee on the part of the claimants and contestants; that the said referee report to this court the names of the creditors, and the amounts found by him to be due to each respectively, and the order in which they are entitled to payment; and that in case any of said claims be contested, the said referee do report the facts relative to the claim so contested, and the grounds of objection alleged by the contestant, and the decision of the said referee thereupon.

And it is further ordered, that on the coming in of the referee's report, any party to this action, or any creditor whose claim is allowed by the referee, may apply to this court for an order for the final distribution of the balance of the funds in the hands of the receiver herein among the creditors of said firm, as ascertained by said report, or by the order of the court thereupon.

And it is further ordered, that either party, or any creditor, may apply to this court, from time to time, for further directions in the premises.

§ 1327. Order of reference to take all testimony and report to the court.

Form No. 424.

[TITLE.]

This action coming on for trial, after hearing G. H., Esq., for the plaintiff, and J. K., Esq., for the defendant:

Ordered, that it be referred to L. M., Esq., as sole referee to take the testimony in said action, and that he report the same to this court with all convenient speed.

§ 1328. Plaintiff's account, to be presented on reference.

Form No. 425.

[TITLE.]

Statement of mutual accounts between the plaintiff and defendant as partners, under the name of A. B. & Co. [since last balance and settlement had between them, on the . . . day of . . . , 19 . . .].

[Here state items,—e. g. thus:]

A. B., in account with Y. Z., in respect to said partnership transactions.

<i>Dr.</i>	<i>Contra.</i>	<i>Cr.</i>
19 . . .	19 . . .	
Jan. 15. To cash received at that date on partnership note of F. P., and not entered on firm books. \$...	Jan. 1. By balance due said A. B. on settlement of partnership accounts and transactions up to date, as appears by partnership books of account deposited with referee \$...	
May 5. To one half merchandise account charged to account of plaintiff, as appears by the firm books deposited with referee \$...	Interest thereon to date \$...	
	Feb. 3. By cash, etc. \$...	

[VENUE.]

A. B., the above-named plaintiff, being duly sworn, says that the foregoing account, and the said several accounts and entries embraced in the settlement of the . . . day of . . . , 19 . . . , upon the partnership books herewith, deposited with the referee in this action, including both debts and credits, are correct, according to the best of deponent's knowledge, information, and belief, and this deponent does not know of any error or omission in said account to the prejudice of his said copartner, the defendant.

[JURAT.] A. B.

§ 1329. Order that books and papers be deposited with referee before accounting.

Form No. 426.

[TITLE.]

On reading and filing the affidavit of A. B., the plaintiff [or, on the petition of C. D.; or, on the certificate of the referee] herein, dated the . . . day of . . . , 19 . . . , and on motion of M. N. for the plaintiff, and on hearing O. P. for the defendant [or, on proof of due service of notice of this motion, and no one appearing] in opposition:

Ordered, that the defendant Y. Z., within [four] days after personal service hereof on said defendant, or on his attorneys, produce before the said referee, under oath, all [here specify the writings] in his custody or power, relating to the matters in question; or, in default thereof, that, on the referee's certifi-

cate of such default, an attachment issue to the sheriff of the county of . . . , to take the said defendant into custody and bring him before this court to answer for the contempt.

[DATE.]

§ 1330. Oath of referee.

Form No. 427.

[TITLE.]

[VENUE.]

I, [E. F.], having been appointed referee in this action [to try the issues in this action; or, for the purposes in said order mentioned], do solemnly swear [or, affirm] that I will faithfully discharge my duties as such referee to the best of my ability. So help me God. [Or, in case of affirming: And this I do under the pains and penalties of perjury.]

[JURAT.]

E. F.

§ 1331. Appointment of first meeting, by referee.

Form No. 428.

[TITLE.]

The undersigned, referee herein, hereby appoints the . . . day of . . . next, at . . . o'clock in the . . . noon, at the office of . . . , No. . . . street, in the city of . . . , for the trial of this action.

[DATE.]

R. F., Referee.

§ 1332. Notice of hearing or trial, by party.

Form No. 429.

[TITLE.]

Take notice, that this action will be brought to a hearing before R. F., referee herein, at his office No. . . . street, in the city of . . . , on the . . . day of . . . next, at . . . o'clock in the . . . noon.

[DATE.]

A. B., Plaintiff's Attorney.

[ADDRESS.]

§ 1333. Report in partnership cause.

Form No. 430.

[TITLE.]

To the . . . Court for said . . . County:

Pursuant to the order of reference made in this action on the . . . day of . . . , 19 . . . , I, the undersigned, as such referee,

respectfully report that having taken the oath required by law as such referee, I appointed the . . . day of . . . , 19 . . . , as the time, and my office in the city of . . . as the place, for the trial of said action, and duly gave each party notice of the time and place of such trial.

That on said day the trial was commenced, and then proceeded from day to day until the . . . day of . . . , on which it concluded, A. B., Esq., appearing for the plaintiff, and C. D., Esq., for the defendant.

[That upon the opening of the case the defendant moved to dismiss the action on the ground that the complaint stated no cause of action, which motion I denied, and to which ruling the defendant excepted.]

[That thereupon the plaintiff moved for leave to amend his complaint, which leave was granted, and the defendant excepted thereto, and a copy of said amendment is hereto attached.]

The testimony taken before me is hereto annexed, marked exhibit A, and made part of this report, and the exceptions and rulings therein are stated in said evidence as they were taken.

And I further report that, after argument of counsel, being now fully advised in the premises, I find as conclusions of fact:

I. That from the . . . day of . . . , 19 . . . , to the . . . day of . . . , [when this action was commenced], the parties hereto were partners in the business of . . . , at . . . , [under articles of agreement set forth in the complaint herein].

II. That the defendant in the month of . . . took exclusive possession of the partnership assets and books, and then, and ever since, prevented the plaintiff from having free access thereto, and obstructed his use and control thereof.

I find as conclusions of law:

I. That the plaintiff is entitled to a judgment declaring said partnership dissolved as of the . . . day of . . . , 19 . . .

II. That the plaintiff is entitled to an accounting with the defendant in respect to the partnership dealings, and the use made of the partnership property by the defendant.

III. That on such accounting the plaintiff is entitled to have allowed to him [here set forth the principles on which the accounting should be taken].

[DATE.]

M. N., Referee.

§ 1334. Report of referee.

Form No. 431.

[TITLE.]

To the Superior Court of the County of . . . , State of California:

Pursuant to an order of this court in this action, made on the . . . day of . . . , 19 . . . , I, the undersigned court commissioner [or referee], report:

I. That I have been attended by the attorneys for the several parties who appeared in this action [name who appeared for plaintiff and who for defendant], and I proceeded to a hearing of the matter so referred. I further report that on such hearing, the books, deeds, papers, and vouchers of the said [partnership] have been produced before me, and both parties have rendered their respective accounts, which are hereto annexed, and marked "schedule A."

II. That I examined said . . . concerning the transactions [state what], and adjusted a mutual account between . . . and . . . , making therein all just allowances, and striking a balance which shows what appears to be due from either party to the other, which said account is hereto annexed, marked "schedule B."

III. That said . . . owes to said partnership, etc. [state facts].

IV. That the balance shown by said schedule B [state its apportionment].

[DATE.]

[SIGNATURE.]

§ 1335. Referee's report on accounting in partnership cause.

Form No. 432.

[TITLE.]

To the . . . Court of . . . :

Pursuant to an order of this court in this action, dated the . . . day of . . . , 19 . . . , I, the undersigned referee, report:

I. That having been attended by the attorneys for the several parties who appeared in this action, I proceeded to a hearing of the matter so referred. I further report that on such hearing, the books, deeds, papers, and vouchers of the said partnership having been produced before me, the defendant rendered his [or, both parties rendered their respective] accounts, which are hereto annexed, and marked schedule A.

II. That I examined said defendant, and also X. Y., concerning the transactions aforesaid, and adjusted a mutual account be-

tween the plaintiff and defendant, making therein all just allowances, and striking a balance which shows what appears to be due from either party to the other, which said account is hereto annexed, marked schedule B.

III. That said defendant owes to said partnership at this date, the sum of . . . dollars, with interest from the . . . day of . . . , 19 . . . , at the rate of . . . per cent per annum, amounting to . . . dollars, which sum I have allowed.

IV. That the balance shown by said schedule B, after defendant has made good to said partnership said sum, belongs to plaintiff and defendant in equal shares [or, in the following proportions, stating them].

[DATE.]

O. P., Referee.

§ 1336. Referee's report as to priority of creditors.

Form No. 433.

[TITLE.]

To the . . . Court of . . . :

Pursuant to an order of this court in this action, dated the . . . day of . . . , 19 . . . , I, the undersigned referee, report:

That I have been attended upon such reference by counsel for the plaintiff and for the defendants, and for M. N. and O. P., creditors of said firm of Y. Z. & Co.

That upon being served with a copy of the said order, I caused notice to be published [twice a week, for three weeks, in two daily newspapers of the city of New York, one published in the morning and one published in the afternoon], requiring all persons having any claim against the said firm to produce and prove the same before me at a place in said city, and by a time therein specified; copies of which notice, with affidavits of the publication thereof, are hereto annexed, marked schedule No. 1 and schedule No. 2.

That I also obtained from the defendant W. X. a list of the outstanding creditors of the said firm, made up by him while acting as assignee thereof, and which he testified was correct, to the best of his knowledge, information, and belief; and I caused duplicates of the said notice to be served upon all of such creditors, either personally or by being left at their place of business, or when such creditors were a firm, now dissolved, to be served as aforesaid upon one of the members of such creditor firm.

II. I further report, that the creditors of the said firm of Y. Z. & Co., and the amounts at the date of this my report found due to them, respectively, are as follows: [Designating names and amounts.]

III. I further report, that of the said creditors, M. N., above mentioned, is entitled to be preferred to all the others to the extent of . . . dollars, being the amount [specifying nature of claim and grounds of preference]; that except as to the said sum of . . . dollars, all the said creditors, including the said M. N., are entitled to be paid ratably and proportionately out of the assets of the firm of Y. Z. & Co., and that neither ought to be postponed to any other in whole or in part, except as aforesaid.

IV. I further report, that one, and one only, of the said claims is contested by either party, or by any creditor,—namely, the said claim of O. P.; that the facts relative to the said claim are as follows: [stating the facts and continuing]; and that I found the facts in respect thereto to be as above stated and decided, and do report that, by virtue of the facts above stated, the said O. P. has a valid claim against the said Y. Z. & Co., for the amount stated in the seventh item of the second article of this my report, being the sum of . . . dollars, with interest thereon from the said . . . day of . . . , 19 . .

[DATE.]

[SIGNATURE.]

§ 1337. Notice of motion for reference to obtain surplus moneys on foreclosure sale.

Form No. 434.

[TITLE.]

Take notice, that upon the annexed affidavit of W. X., and upon the pleadings and proceedings on file in this action, the undersigned will move the . . . court on the . . . day of . . . , 19.., at . . . o'clock A. M., or as soon thereafter as counsel can be heard, that it be referred to R. F., Esq., of . . . , to ascertain and report the amount due to the said W. X., or to any other person, which is a lien upon such surplus moneys, and as to the priority of the several liens thereon, and for such other relief as may be just.

[DATE.]

M. N., Attorney for said W. X.

[Addressed to every party who has appeared or filed notice of claim.]

§ 1338. Order of reference of claims to surplus moneys.

Form No. 435.

[TITLE.]

On reading and filing notice of claim by W. X. to surplus moneys in this action, and on motion of M. N. for the said W. X., and O. P. having been heard for [or, and on reading and filing proof of due service of notice of this application on] all the parties who have appeared or who have served notice of claim of such moneys, in opposition:

Ordered, that it be referred to R. F., Esq., of . . . , as a referee, to ascertain and report the amount due to the said W. X., or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; and that the said referee report thereon with all convenient speed.

[DATE.]

[SIGNATURE.]

§ 1339. Referee's report thereon.

Form No. 436.

[TITLE.]

To the . . . Court of . . . :

Pursuant to an order of this court in this action, dated the . . . day of . . . , 19 . . . , I, the undersigned referee, report:

I caused all the parties who have appeared in this action, and all persons having filed notice of claim upon such surplus moneys, to be summoned to appear before me, as appears by the certificate of the clerk, showing what notices of claim have been filed, and by the summons and proof of service, which are annexed and marked schedule A; and that on the hearing I was attended by M. N., for W. X., and by O. P., for the defendant Y. Z.

The amount of such surplus moneys is . . . dollars, as appears by the certificate of the clerk of this court, hereto annexed as schedule B.

[Then set forth the claims, the evidence or facts proved, and any objections interposed, and then the conclusion of the referee, —e. g. thus:]

And I find the foregoing facts, and from the facts so found I report that said W. X., under and by virtue of the sheriff's deed to him, is the owner of the equity of redemption of said premises, and, as such owner, he is entitled to the whole of said

surplus moneys, and that there is no lien or claim thereon prior to the lien and claim of said W. X.

[DATE.]

R. F., Referee.

§ 1340. Notice of filing report of referee.

Form No. 437.

[TITLE.]

Sir: Please take notice, that on the . . . day of . . . , 19 . . . , M. N., the referee appointed to try the issues herein, filed in the office of the clerk of said court his report, and that a copy of his findings of fact and conclusions of law as contained in said report are hereto annexed and herewith served on you.

[DATE.]

O. P., Attorney for . . .

To [address], Attorney for . . .

§ 1341. Exceptions to report.

Form No. 438.

[TITLE.]

And now comes the plaintiff [or, defendant], and excepts to the report of M. N., referee in said action, dated . . . , 19 . . . , as follows:

I. He excepts to the first finding of fact in said report contained [or, if the exception be to a part of the finding: to that part of the first finding of fact], which reads as follows: [insert part excepted to.]

II. [Proceed in same way as to other findings excepted to.]

III. [If the exception be based upon a failure to find as to any specific fact:] He excepts to the said report for the reason that the said referee failed to find [here state fact omitted].

[DATE.]

O. P., Plaintiff's [or, Defendant's] Attorney.

§ 1342. Motion for further report.

Form No. 439.

[TITLE.]

[The object of the motion may be stated thus after formal parts:] That M. N., the referee in this action, be required to

make a further report herein, stating [his findings of fact and conclusions of law separately; or, his finding upon the question, here briefly state question].

§ 1343. Motion to set aside report and for a new trial.

Form No. 440.

[TITLE.]

Sir: Please take notice, that upon the report of O. P., Esq., the referee herein, heretofore filed and upon the pleadings and papers on file in this action [and the affidavits of E. F. and G. H., of which copies are herewith served on you], the plaintiff [or, defendant] will move the court, on the . . . day of . . . , 19.., at the courthouse in the city of . . . , in said county, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the said report of the referee, and directing a new trial of the issues in this action.

[DATE.]

M. N., . . . Attorney.

To [address], . . . Attorney.

§ 1344. Order confirming, setting aside, or amending referee's report.

Form No. 441.

[TITLE.]

This cause coming on to be heard on the . . . day of . . . , 19.., upon the motion of A. B., the plaintiff [or, defendant], to [confirm the report of O. P., Esq., referee herein; or, to alter the report of O. P., referee herein; or, to modify the report of O. P., referee herein; or, to set aside the report of O. P., referee herein]; and said motion having been heard upon the pleadings, the evidence taken, and the findings of said referee, and the [here specify any other papers that may have been used upon the motion], and after hearing G. H., Esq., for the . . . , for the motion, and L. M., Esq., in opposition, and being advised in the premises:

Ordered, that the said report of the referee herein be and the same is hereby confirmed, and that judgment be entered in accordance therewith, to-wit: [here specify the judgment to be entered]; or,

Ordered, that the said report be altered and modified in the following respects, to-wit: [here specify the alteration or modification], and that judgment be entered upon the same as so altered and modified, to-wit: [here specify the substance of the judgment ordered]; or,

Ordered, that the said report be and the same is hereby set aside, [and that a trial by the court of the several issues so referred be had]; or,

Ordered, that said report be referred back to said referee, who is directed to amend the same in the following respects, namely, [here specify the nature of the amendments directed].

By the Court:

J. K., Judge.

CHAPTER XLIX.

EXCEPTIONS.

§ 1345. **In general.**—An exception is an objection usually made during the trial of a cause, and which would not appear of record in the case unless so taken. It is always interposed upon the theory that some ruling had been made by the court which is erroneous, and to which erroneous decision or ruling the party makes an objection. Such exception is either noted by the clerk of the court or the official reporter, if there be one, or in the judge's minutes, or, what is more usual, and indeed the better practice, it is briefly written out by the attorney objecting at the time, and then corrected and signed by the court, and thus becomes a bill of exceptions, on which the party may appeal to the supreme court without further assignment of errors.¹ An exception to secure a reversal of the decision must go to some vital point, something material; not to a mere slight or trifling error. It is not every error which will be reviewed by an appellate court. The exception should state the point with clearness, so that there can be no question in the higher courts relative to what the question is.

No particular form is necessary to be adopted. Any language, written even in a very informal manner, if it points out the alleged error with clearness, is good. No specific rule can be laid down to govern each case, but one thing should always be the rule: an objection should not be interposed at random with the hope merely of saving a point not then in sight. An exception is taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time, from the calling of the action for trial to the rendering of the verdict or decision.² The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision finally determining the rights of the parties, or some of them; an order or decision from which an appeal may be taken; an order

¹ See Cal. Code Civ. Proc., § 646.

² *Quivey v. Gambert*, 32 Cal. 304.

sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or portion thereof, refusing a continuance, modifying, giving, or refusing to give, in whole or in part, an instruction to the jury; an order made upon *ex parte* application; and an order or decision made in the absence of a party, are deemed to have been excepted to.³ The sole object of a bill of exceptions is to make a record of the special action of the court of what is not record by the general law.⁴ And it is not necessary to embody therein any matter of record.⁵ Under Colorado practice, all matters *dehors* the record proper must be preserved by bill of exceptions, and this is true in equitable as well as legal actions.⁶ But what belongs to the record proper, and is contained therein, cannot be contradicted, qualified, or varied by anything contained in a bill of exceptions.⁷ But documents and affidavits, to be reviewed by the appellate court, must be embodied in a bill of exceptions or record.⁸ So of affidavits as to the incompetency of a juror.⁹

Where the record on appeal did not contain the whole judgment-roll, and the absent portions were not presented in a bill of exceptions or statement on appeal, no questions arising on matters contained in such absent portions can be made on appeal.¹⁰ But where the bill of exceptions appears upon its face to have been regularly taken, the court cannot presume against the record.¹¹ Nor will it sustain mere technical exceptions taken in the course of the trial, where the judgment seems right on the merits, unless compelled by law so to do.¹² If there is a technical variance between the evidence and finding of facts and the pleading, and no objection is made on that ground in the court below, but the objection is taken for the first time in

³ Cal. Code Civ. Proc., § 647, as amended 1907. See *Ganceart v. Henry*, 98 Cal. 283, 33 Pac. 92; *Davis v. Honey Lake Water Co.*, 98 Cal. 415, 417, 33 Pac. 270.

⁴ *Parsons v. Davis*, 3 Cal. 425.

⁵ *Johnson v. Sepulveda*, 5 Cal. 149; *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641; *Atchison etc. R. R. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512.

⁶ *Putnam v. Sea*, 8 Colo. 298, 7 Pac. 172; *Marshall etc. Min. Co. v. Kirtley*, 8 Colo. 108, 5 Pac. 649; *Bergundthal v. Bailey*, 15 Colo. 257, 25

Pac. 86; *Brink v. Posey*, 11 Colo. 521, 19 Pac. 467; *Hammond v. Bovee*, 4 Colo. App. 269, 35 Pac. 674.

⁷ *Kirkpatrick v. Wheeler*, 8 Colo. 414, 8 Pac. 654.

⁸ *Gates v. Buckingham*, 4 Cal. 286.

⁹ *People v. Stonecifer*, 6 Cal. 411.

¹⁰ *Hastings v. Cunningham*, 35 Cal. 549; *Sather etc. Co. v. Arthur R. Briggs Co.*, 138 Cal. 724, 72 Pac. 352.

¹¹ *United States v. Hodge*, 6 How. 279, 12 L. Ed. 437.

¹² *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574.

the appellate court, the judgment will not be reversed by reason of such variance.¹³ So, likewise, on the ground of variance between pleadings and proof, or of admission of evidence not within the issue,¹⁴ or in respect of a defect of the evidence produced,¹⁵ or of defects in the pleadings themselves,¹⁶ or of an erroneous admission or assumption of the existence of matters not proved in fact.¹⁷ Where the transcript contained, together with the judgment-roll, a copy of an order, certified to by the clerk, sustaining a demurrer to a replication, and there was no statement or bill of exceptions, it was held that the appellate court could not review the action of the court below upon the demurrer.¹⁸ A party may take his bill of exceptions to the admission or exclusion of testimony, or to the rulings of the judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the exception taken; the presiding judge shall sign the same, as the truth of the case may be, which bill shall then become a part of the record; and it shall only be necessary to bring to the supreme court a transcript of the pleadings and the judgment, and the bill or bills of exceptions so taken. A bill of exceptions must be reduced to writing, and settled by the judge within the time prescribed by the statute.¹⁹ Exceptions must be taken and preserved in substantial compliance with the statute.²⁰ The supreme court notices only the errors committed against the appellant, not those committed against the successful party.²¹ Exceptions taken by the prevailing party are not available to his adversary, unless there be a cross-appeal.²² Where the respondent takes no appeal,—at least, where he files no transcript and assigns no errors,—the judgment will not be reversed at his instance.²³ It has been the practice of the supreme court to examine

¹³ *Dikeman v. Norrie*, 36 Cal. 94; *McDermott v. Grimm*, 4 Colo. App. 39, 34 Pac. 909.

¹⁴ *Commercial Bank of Rochester v. Shuart*, 46 Barb. 372; *Allen v. Merchants' Mut. Ins. Co.*, 46 Barb. 642.

¹⁵ *Colwell v. Lawrence*, 24 How. Pr. 324.

¹⁶ *Simmons v. Sisson*, 26 N. Y. 264; *Ashley v. Marshall*, 29 N. Y. 494.

¹⁷ *People v. Third Ave. R. R. Co.*, 30 How. Pr. 121; *Paige v. Fazaekerly*,

36 Barb. 392; *McDonald v. Christie*, 42 Barb. 36.

¹⁸ *Bostwick v. McCorkle*, 22 Cal. 669.

¹⁹ Cal. Code Civ. Proc., § 650.

²⁰ *Randall v. Greenhood*, 3 Mont. 506; *Blackwell v. McLean*, 9 Wash. 301, 37 Pac. 317; *German Nat. Bank v. Elwood*, 16 Colo. 244, 27 Pac. 705.

²¹ *Frank v. Doane*, 15 Cal. 304.

²² *Beach v. Cooke*, 28 N. Y. 508, 86 Am. Dec. 260; *Dougherty v. Henarie*, 47 Cal. 13.

²³ *Travers v. Crane*, 15 Cal. 12.

the case only upon the errors assigned by the appellant, and not to look into the exceptions taken by respondent.²⁴ The party alleging error on appeal must make it affirmatively appear,²⁵ as the court will not consider on appeal rulings to which no exception was taken in the court below.²⁶ If parties choose to submit to rulings without taking exceptions, they cannot afterwards question them here.²⁷ And the exception, when taken, must be specific, and must point out the exact nature and extent of the objection relied on, to be available for a review. But where the ruling is in general terms, a general exception may suffice.²⁸ A mere rescript of the testimony by question and answer, with the objections taken and the rulings thereon, will not be considered.²⁹ It is important that each specification of error be complete within itself so as to clearly present the question involved.³⁰

§ 1346. Error in law.—For error in law excepted to, an appeal lies without motion for a new trial.³¹ So the granting of a nonsuit on the facts is a question of law, and may be reviewed on appeal without motion for a new trial.³² But it must be excepted to and specified as an error of law occurring at the trial, and appear in the stating or substantive part of the bill of exceptions or statement.³³ When errors of law are relied upon as errors on appeal, the particular errors must be pointed out by the counsel; otherwise, they will be disregarded, unless they plainly appear from the transcript on appeal.³⁴ Error in law occurring at a trial may be

²⁴ *Jackson v. Feather River Water Co.*, 14 Cal. 18; *Poppe v. Athearn*, 42 Cal. 607.

²⁵ *Todd v. Winants*, 36 Cal. 129.

²⁶ *Keeran v. Griffith*, 34 Cal. 581; *Lightner v. Menzell*, 35 Cal. 452.

²⁷ *Frink v. Alsip*, 49 Cal. 105. See *Globe Investment Co. v. Boyum*, 3 N. Dak. 538, 58 N. W. 339.

²⁸ *Sawyer v. Chambers*, 44 Barb. 42, 43 Barb. 622; *Collyer v. Collins*, 17 Abb. Pr. 467.

²⁹ *Caldwell v. Parks*, 50 Cal. 502. See, also, *People v. Getty*, 49 Cal. 584; Cal. Code Civ. Proc., § 648. As to sufficiency of assignment of errors, consult *Shinnock v. Kuhn*, 4 N. Mex. 159 (234), 13 Pac. 424; *Lamy v. Lamy*, 4 N. Mex. 43 (29), 12 Pac. 650, 140, (291), 13 Pac. 178; *Deemer*

v. Falkenberg, 4 N. Mex. 57 (149), 12 Pac. 717; *Watson v. Gray's Harbor Brick Co.*, 3 Wash. 283, 28 Pac. 527; *Wolcott v. Bachman*, 3 Wyo. 335, 23 Pac. 72, 673; *Johnson v. Fanno*, 23 Or. 514, 32 Pac. 396; *Archbishop v. Hack*, 23 Or. 536, 32 Pac. 402; *Thompson v. New York Life Ins. Co.*, 21 Or. 466, 28 Pac. 628.

³⁰ *Herbert v. Dufur*, 23 Or. 462, 32 Pac. 302. See *Bridal Veil Lumber Co. v. Johnson*, 25 Or. 105, 34 Pac. 1026.

³¹ *Rice v. Gashirie*, 13 Cal. 53.

³² *Cravens v. Dewey*, 13 Cal. 42; *Darst v. Rush*, 14 Cal. 83.

³³ *Hanna v. De Garmo*, 140 Cal. 172, 73 Pac. 830; *In re Kasson's Est.*, 141 Cal. 33, 74 Pac. 436.

³⁴ *Sanchez v. McMahon*, 35 Cal.

reviewed upon a bill of exceptions, as well as upon a motion for a new trial.³⁵ When an appeal is taken on a bill of exceptions, errors of law occurring at the time may be reviewed, although no specification of the particular errors of law on which the appellant relies is contained in the bill.³⁶ But an order striking out a statement on motion for a new trial cannot be brought before the supreme court for review by a bill of exceptions.³⁷ On appeal by a plaintiff from an order overruling a motion for a new trial made by him on the ground of insufficiency of evidence to justify the verdict, an exception taken by defendant on the trial to the competency of a witness who testified for plaintiff will not be considered.³⁸ The objection that the judgment is not authorized by the pleadings may be taken on an appeal from the judgment-roll alone. The fact that a motion for a new trial was made which did not state this as one of the grounds does not operate as a waiver of the objection.³⁹

The United States supreme court can notice a material and incurable defect in the pleadings and verdict, as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here.⁴⁰ Where the court below tries the cause without a jury, the proper mode of reserving questions of law is to ask the court to decide them, and note the refusal in a bill of exceptions.⁴¹ Where plaintiffs, having excepted to the ruling of the court excluding certain evidence, take, in consequence of such ruling, a nonsuit, with leave to move to set aside, they do not waive any of their rights as to the exceptions taken. Objections to the introduction of evidence are confined on appeal to the grounds taken below.⁴²

218. See as to positive waiver of objection on the ground of error of law committed at the trial, unless the exception be taken to it at the time, *McCartney v. Fitz-Henry*, 16 Cal. 186; *Lightner v. Menzel*, 35 Cal. 452; *King v. Meyer*, 35 Cal. 646; *Henry v. Southern Pacific R. R. Co.*, 50 Cal. 176; *Barlow v. Scott*, 24 N. Y. 40; *Pollen v. Leroy*, 10 Bosw. 38; *Enos v. Eigenbrodt*, 32 N. Y. 444.

³⁵ *Walls v. Preston*, 25 Cal. 61.

³⁶ *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111.

³⁷ *Quivey v. Gambert*, 32 Cal. 304. But see *Cal. Code Civ. Proc.*, § 651; *Lucas v. Mayor etc. City of Marysville*, 44 Cal. 212.

³⁸ *Pierce v. Jackson*, 21 Cal. 636.

³⁹ *Putnam v. Lamphier*, 36 Cal. 151.

⁴⁰ *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907.

⁴¹ *Griswold v. Sharpe*, 2 Cal. 17; *Lucas v. San Francisco*, 28 Cal. 591.

⁴² *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 549; *King v. Meyer*, 35 Cal. 646. When too late to raise question of variance, see *Brace v. Doble*, 3 S. Dak. 416, 53 N. W. 859.

§ 1347. **Exceptions to evidence—Admission of evidence.**—A bill of exceptions which states that the paper was “offered” in evidence does not show that the paper was read in evidence.⁴³ An objection to the sufficiency of evidence should be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence.⁴⁴ An exception must be made, or the objection is waived, and cannot afterwards be raised.⁴⁵ The same applies to objectionable remarks made by the court on the exclusion of evidence.⁴⁶ As to whether an exception lies to an illegal question asked by a juror, *quære*.⁴⁷ The evidence of an incompetent witness is competent when admitted without objection.⁴⁸ The objection to evidence as incompetent, irrelevant, and immaterial does not cover the point that it is hearsay.⁴⁹ Objections to the introduction of evidence must be taken on the trial below; they cannot be taken for the first time in the appellate court.⁵⁰ Objections to a deposition cannot be made unless taken when it is offered in evidence.⁵¹ Appellant must have offered the testimony and taken exception to the court’s ruling excluding such testimony.⁵²

§ 1348. **Documentary evidence.**—An exception to the admissibility of a deed in evidence must be taken on the trial of the cause at *nisi prius*. The point cannot be considered on appeal.⁵³ A statement in a bill of exceptions that the plaintiff offered in evidence a deed to him and others, conveying the demanded premises to the parties therein named, according to their respective interests, does not show whether the deed conveyed the land to the parties as tenants in common or in severalty.⁵⁴

⁴³ Page v. O’Brien, 36 Cal. 559.

⁴⁴ Goodale v. West, 5 Cal. 339; Mott v. Smith, 16 Cal. 533; Hoxie v. Allen, 38 N. Y. 175.

⁴⁵ Castro v. Gill, 5 Cal. 42; Letter v. Putney, 7 Cal. 423.

⁴⁶ Halverson v. Seattle El. Co., 35 Wash. 600, 77 Pac. 1058.

⁴⁷ Kelly v. Commonwealth Ins. Co., 10 Bosw. 82.

⁴⁸ Weidenhoft v. Primm, 16 Wyo. 340, 94 Pac. 453.

⁴⁹ Dillard v. Olalla (Or.), 94 Pac. 966.

⁵⁰ Covillaud v. Tanner, 7 Cal. 38; Fountain v. Pettee, 38 N. Y. 184; Laber v. Cooper, 7 Wall. 565, 19 L.

Ed. 151; O’Connell v. Main etc. Hotel Co., 90 Cal. 515, 27 Pac. 323; Mora v. The People, 19 Colo. 255, 35 Pac. 179; Story v. Black, 5 Mont. 26, 51 Am. Rep. 37, 1 Pac. 1; Murray v. Silver City etc. R. R. Co., 3 N. Mex. 337, (580), 9 Pac. 369; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232; Austin v. Andrews, 71 Cal. 98, 16 Pac. 546.

⁵¹ Jones v. Love, 9 Cal. 70; Hobbs v. Duff, 43 Cal. 485.

⁵² First Nat. Bank v. Oregon Paper Co., 42 Or. 398, 71 Pac. 144.

⁵³ Pearson v. Snodgrass, 5 Cal. 478; Posten v. Rassette, 5 Cal. 467.

⁵⁴ Page v. O’Brien, 36 Cal. 559.

§ 1349. **Irrelevant testimony.**—If in a trial before the court, without a jury, irrelevant testimony is received, with the understanding that it is not to be considered by the court unless other testimony is afterwards introduced making it relevant, and such testimony is not afterwards introduced, the presumption will be that the court discarded the evidence in rendering judgment, and the error is without consequence.⁵⁵ To be considered, it must appear that a question objected to was answered unfavorably to appellant.⁵⁶ A conditional exception to evidence, subject to a future decision, must be repeated positively after decision made.⁵⁷ An exception is nullified where the defect excepted to is supplied during the trial.⁵⁸ A party cannot, by consenting to admit evidence "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the court below, and after fishing for a verdict, for the first time assign his objections in the supreme court.⁵⁹

§ 1350. **Insufficiency of evidence.**—The usual mode in which error in findings, on the ground of insufficiency of evidence to support them, is reached on appeal, is by making such insufficiency a ground of motion for a new trial; but it seems that under the code the party aggrieved may either move for a new trial on that ground or specify in a bill of exceptions in what respect the evidence did not justify the decision, and take up the evidence upon the point in question.⁶⁰

§ 1351. **Proving exceptions.**—If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner, and under such regulations, as that court may prescribe; and the bill, when proven, must be certified by the chief justice

⁵⁵ Jones v. Morse, 36 Cal. 205.

⁵⁶ Rio Grande etc. Ry. v. Utah Nursery Co., 25 Utah, 187, 70 Pac. 859.

⁵⁷ Bihin v. Bihin, 17 Abb. Pr. 19.

⁵⁸ Cronnse v. Fitch, 14 Abb. Pr. 346; Park Bank v. Tilton, 15 Abb. Pr. 384.

⁵⁹ Covillaud v. Tanner, 7 Cal. 38.

⁶⁰ Jones v. Shay, 50 Cal. 508. See Cal. Code Civ. Proc., § 648; Oregon Short Line v. Russell, 27 Utah, 457, 76 Pac. 345; Klenk v. Oregon S. L. Ry. Co., 27 Utah, 428, 76 Pac. 214; Robertson v. Longley, 28 Mont. 128, 72 Pac. 423.

as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.⁶¹

§ 1352. Special exception necessary.—Where a party objects to the admission of testimony on trial, he must state the point of his objection at the time. General objections will not do.⁶² The party should lay his finger on the point at the time of trial; otherwise, the appellate court cannot review it.⁶³ A party is confined to the objections raised upon the trial.⁶⁴ General objection is not good unless the evidence objected to be absolutely incompetent, in which case such general objection is available;⁶⁵ or where the testimony could not, under any possible circumstances, have been relevant.⁶⁶ So where error is alleged in the exclusion of testimony, it must clearly appear on the face of the exception that the testimony was, not that possibly it might have been, relevant.⁶⁷ Where a defendant's objection to the admission of testimony on the trial is general, he cannot be permitted to make it special for the first time in the appellate court.⁶⁸

§ 1353. When exception lies.—In New York, the comments of the judge upon the evidence are not subject to exception.⁶⁹ It is questionable whether an exception lies to an illegal question put by a juror.⁷⁰

§ 1354. Exceptions — Relative to matters of evidence — Generally.—The introduction of testimony without objection

⁶¹ As to the mode, etc., see Cal. Code Civ. Proc., § 652, as amended 1907.

⁶² *Petterson v. Stockton etc. Co.*, 134 Cal. 244, 66 Pac. 304; *People v. Apple*, 7 Cal. 290; *Kiler v. Kimbal*, 10 Cal. 267; *Martin v. Travers*, 12 Cal. 245; *Franz Falk Brewing Co. v. Mielenz*, 5 Dak. 136, 37 N. W. 728; *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271; *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845; *City of Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817; *Earles v. Bigelow*, 7 Wash. 581, 35 Pac. 390; *Ward v. Wilms*, 16 Colo. 86, 27 Pac. 247; *Rosina v. Trowbridge*, 20 Nev. 105, 17 Pac. 751;

Kleinschmidt v. Iler, 6 Mont. 122, 9 Pac. 901.

⁶³ *Id.*; *Sneed v. Osborn*, 25 Cal. 619.

⁶⁴ *Waterville Mfg. Co. v. Brown*, 9 How. Pr. 27; *Smith v. Floyd*, 18 Barb. 523. See, however, *Keyes v. Devlin*, 3 E. D. Smith, 518.

⁶⁵ *Nightingale v. Scannell*, 18 Cal. 315.

⁶⁶ *Dreux v. Domec*, 18 Cal. 83; *Sneed v. Osborn*, 25 Cal. 619.

⁶⁷ *Cohn v. Mulford*, 15 Cal. 50.

⁶⁸ *People v. Glenn*, 10 Cal. 32.

⁶⁹ *Nolton v. Moses*, 3 Barb. 31; *Gardner v. Barden*, 34 N. Y. 433.

⁷⁰ *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. 82.

under issues defectively framed is a waiver of such defects, and they will not be considered on appeal.⁷¹ If the record on appeal does not contain all the evidence, an objection that the judgment is not sustained by the evidence will not be considered.⁷² An objection to the admission of a judgment-roll in evidence, on the ground of variance between the averments of the complaint and the judgment-roll, where one named the amount of the judgment and costs *in solido*, and the other stated the amounts separately, is frivolous.⁷³ In an equitable action, under Washington practice, it is not necessary for either party to take an exception to a ruling as to the materiality or competency of testimony offered in the lower court.⁷⁴ But it is, nevertheless, the duty of the court to exclude testimony which is wholly irrelevant to the pleadings, when objection is made.⁷⁵

The conduct of an attorney in his argument before the jury, in referring to matters not in evidence, alleged as one of the grounds of a motion for a new trial, cannot be considered on appeal, where no objection was made, and no exception saved, to the statements when they were made.⁷⁶

§ 1355. Exceptions to findings—Defective findings.—Defective findings should be specially excepted to in the court below.⁷⁷ And the exceptions should point out wherein the defect consists.⁷⁸ A general exception to all the findings is of no avail unless all are erroneous.⁷⁹ But an exception to each and every part of the findings of facts and conclusions of law which are then enumerated is sufficient on appeal.⁸⁰ But where judgment is rendered upon general or special findings, and a new trial is moved for upon a statement containing the evidence, no special

⁷¹ Hogan v. Shuart, 11 Mont. 498, 28 Pac. 969.

⁷² York v. Fortenbury, 15 Colo. 129, 25 Pac. 163.

⁷³ Frevert v. Swift, 19 Nev. 400, 13 Pac. 6.

⁷⁴ Scully v. Book, 3 Wash. 182, 28 Pac. 556.

⁷⁵ Davis v. Hinchcliffe, 7 Wash. 199, 34 Pac. 915.

⁷⁶ Higley v. Gilmer, 3 Mont. 433.

⁷⁷ Troy v. Clarke, 30 Cal. 419; Green v. Clark, 31 Cal. 591; Hathaway v. Ryan, 35 Cal. 190; Logan v. Hale,

42 Cal. 646; Ogburn v. Connor, 46 Cal. 353, 13 Am. Rep. 213; McClusky v. Gerhauser, 2 Nev. 47, 90 Am. Dec. 512; Collier v. Ervin, 2 Mont. 335; Cogan v. Beard, 67 Cal. 303, 7 Pac. 738.

⁷⁸ Hidden v. Jordan, 28 Cal. 301; Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841.

⁷⁹ Robins v. Paulson, 30 Wash. 459, 70 Pac. 1113; Davies v. Cheadle, 31 Wash. 168, 71 Pac. 728.

⁸⁰ Young v. Borzone, 26 Wash. 4, 66 Pac. 135.

exception to presumed findings or motion in the court below is necessary.⁸¹

§ 1356. **Form, time for filing.**—No particular form of exception is required; but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them, may be made.⁸² Separate exceptions to the findings by numbers are sufficient without specification of the grounds of objection,⁸³ but a general exception to all of five findings of fact is insufficient.⁸⁴

§ 1357. **Want of findings.**—If there be a material fact in respect to which the findings are silent, the party aggrieved may except to them by pointing out the particular defect or omission complained of, and if the court refuse to correct them, the remedy is by appeal. But if, on any material fact, the court finds contrary to or without sufficient evidence, this is ground for a new trial only.⁸⁵ Where the findings are contrary to or unsupported by the evidence, the only proper proceeding to correct them is a motion for a new trial, and not an exception to the findings.⁸⁶ In case of a want of findings, objection cannot be taken unless a finding was asked for and the court omitted or refused the same, and exception was taken to such omission or refusal.⁸⁷

§ 1358. **When necessary.**—Exceptions need not be taken where the facts found do not warrant the judgment, or where they

⁸¹ Steinback v. Krone, 36 Cal. 303.

⁸² Cal. Code Civ. Proc., § 648. As to time of filing exceptions to findings, and serving of notice, see Cal. Code Civ. Proc., §§ 649, 650, 651. See, also, Gay v. Moss, 34 Cal. 125.

⁸³ Burrows v. Kinsley, 27 Wash. 694, 68 Pac. 332; Big Hatchet etc. Co. v. Colvin, 19 Colo. App. 405, 75 Pac. 605.

⁸⁴ Peters v. Lewis, 33 Wash. 617, 74 Pac. 815. But see Rice v. Williams, 18 Colo. App. 330, 71 Pac. 433.

⁸⁵ Hathaway v. Ryan, 35 Cal. 188. See Mulcahy v. Glazier, 51 Cal. 626.

⁸⁶ Hidden v. Jordan, 28 Cal. 304; Cowing v. Rogers, 34 Cal. 648; Rice v. Inskeep, 34 Cal. 224.

⁸⁷ Lucas v. City of San Francisco, 28 Cal. 591; Hidden v. Jordan, 28

are inconsistent with the judgment.⁸⁸ The office of exceptions to findings is to supply the want of findings where, upon any of the issues, the facts are insufficiently found, or not found at all.⁸⁹ A general exception to finding of mixed questions of law and fact does not raise the question whether the fact found is sustained by the evidence.⁹⁰ It is not necessary to take exceptions to the findings if the appellant attacks only the conclusions of law drawn from the facts found.⁹¹ It is not necessary to take exception to reasons given by the court for the ruling he makes.⁹²

§ 1359. Exceptions to instructions—Exception must be taken.—Appellant cannot avail himself of error in the court below in instructing the jury, or in modifying instructions asked, unless he excepts in the court below.⁹³ A party cannot take his chances for a verdict on instructions given or refused without exceptions taken, and then, after verdict, except to the action of the court upon motion for new trial.⁹⁴ Exception must be taken to both of two instructions where one is a logical deduction from the other,⁹⁵ or to both parts where there are two propositions of law in one instruction.⁹⁶ Exceptions must be taken at the time the decision is made, unless otherwise provided;⁹⁷ but the bill containing the exceptions may be presented to the judge for settlement, either at the time the decision is made, or afterwards, under section 650 of the California Code of Civil Procedure. If an exception to the charge of the court to the jury is taken after the jury have withdrawn to consider their verdict, and before the verdict is rendered, the question of allowing or disallowing the exception rests in the discretion of the court, and, whether

Cal. 301. See *Hicklin v. McClear*, 18 Or. 216, 22 Pac. 1057. As to exceptions to findings, under the statute of Washington, on a trial by the court, without a jury, see *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440. As to how findings of fact may be waived, see Cal. Code Civ. Proc., § 634.

⁸⁸ *Lucas v. City of San Francisco*, 28 Cal. 591.

⁸⁹ *Cowing v. Rogers*, 34 Cal. 648.

⁹⁰ *People v. Albright*, 14 Abb. Pr. 305.

⁹¹ *Solomon v. Reese*, 34 Cal. 28; *Gay v. Moss*, 34 Cal. 125; *Tomlinson v. Mayor of New York*, 23 How. Pr.

452; *Rogers v. Beard*, 20 How. Pr. 98.

⁹² *Chessman v. Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410.

⁹³ *Lightner v. Menzel*, 35 Cal. 452; *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846; *Lewis v. Dodge*, 3 Colo. App. 59, 31 Pac. 1022; *Taylor v. Buckley*, 3 Colo. App. 79, 33 Pac. 74.

⁹⁴ *Letter v. Putney*, 7 Cal. 423.

⁹⁵ *Williamson v. North Pacific Lumber Co.*, 43 Or. 337, 73 Pac. 7.

⁹⁶ *French v. Guyot*, 30 Colo. 222, 70 Pac. 683; *City of Denver v. Stobridge*, 19 Colo. App. 435, 75 Pac. 1076.

⁹⁷ Cal. Code Civ. Proc., §§ 646, 647.

allowed or disallowed, the supreme court will not interfere with the exercise of this discretion.⁹⁸

In a California case,⁹⁹ the court says: "Exceptions to the oral charge ought to point out the specific portions excepted to, and be made at the time, in order that the judge may have an opportunity before the jury retires to correct any error he may have inadvertently fallen into in the hurry and perplexities of the trial."¹⁰⁰ The real ground of objection is a matter of argument, and need not be set out in the exception.¹⁰¹ If a bill of exceptions is presented for settlement more than thirty days after the judgment is rendered, it must show an extension of time as an excuse for delay, or the bill cannot be considered by the appellate court, even if settled.¹⁰² A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle such bill of exceptions, or if no mode is provided by law therefor, it shall be settled in such manner as the supreme court may by its order or rules direct.¹⁰³

§ 1360. Must be specific.—Exceptions to the charge of a court should point out the specific portions of the charge excepted to.¹⁰⁴ An exception to part of a charge, setting out the language complained of, is sufficient.¹⁰⁵ A general exception to a charge to the jury will not be sustained, if any part of the charge is correct.¹⁰⁶ A general exception to the whole charge

⁹⁸ *St. John v. Kidd*, 26 Cal. 265. Whether section 646 of the California Code of Civil Procedure has changed the law in this respect, quære. Compare *Mallett v. Swain*, 56 Cal. 171.

⁹⁹ *Robinson v. Western Pacific R. R. Co.*, 48 Cal. 425.

¹⁰⁰ See, also, *Brown v. Kentfield*, 50 Cal. 131; *Jacobs v. Mitchell*, 2 Colo. App. 456, 31 Pac. 235; *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497.

¹⁰¹ *Denver & R. G. Ry. Co. v. Young*, 30 Colo. 349, 70 Pac. 688.

¹⁰² *Higgins v. Mahoney*, 50 Cal. 444.

¹⁰³ Cal. Code Civ. Proc., § 653.

¹⁰⁴ *Hicks v. Coleman*, 25 Cal. 123, 85 Am. Dec. 103; *Dale v. Purvis*, 78

Cal. 113, 20 Pac. 296; *Boyd v. Odous*, 97 Cal. 510, 32 Pac. 569; *Coleman v. Gilmore*, 49 Cal. 340.

¹⁰⁵ *Scott v. Astoria R. Co.*, 43 Or. 26, 99 Am. St. Rep. 710, 72 Pac. 594, 62 L. R. A. 543.

¹⁰⁶ *Lincoln v. Clafin*, 7 Wall. 132, 19 L. Ed. 106; *People v. Hart*, 10 Utah, 204, 37 Pac. 330; *People v. Berlin*, 10 Utah, 39, 36 Pac. 199; *Black v. City of Lewiston*, 2 Idaho 276, 13 Pac. 80; *Maling v. Crummy*, 5 Wash. 222, 31 Pac. 600; *Bowers v. Union Pacific R. R. Co.*, 4 Utah, 215, 7 Pac. 251; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *Schollay v. Moffitt-West Drug Co.*, 17 Colo. App. 126, 67 Pac.

will not lay ground for a review in detail. Even when taken to "each and every ruling, severally, separately, and distinctly," it was held to amount to nothing.¹⁰⁷ To an ambiguous charge, the exception must present the modification which will free it from ambiguity, or general objection will be untenable.¹⁰⁸

The rule relative to exceptions of this kind is thus declared:

1. When any part of a charge given is sound, a general exception to the charge as a whole cannot be sustained; 2. To maintain an exception to a refusal to charge an entire series of propositions, each one of the propositions must be sound; 3. An exception to such portions of a charge as are variant from the requests made by the party, not pointing out the variance, cannot be sustained.¹⁰⁹ Under the Washington statute,¹¹⁰ the grounds of objection to an instruction need not be stated in the exception thereto.¹¹¹ When instructions are not as full on some particular points as desired, the party objecting should ask the court to make them more specific, before he can except on that ground.¹¹² Where the giving or refusing of instructions is excepted to, all of the instructions given or refused should be contained in the record.¹¹³

182; *Adams Express Co. v. Aldridge*, 20 Colo. App. 74, 77 Pac. 6; *York v. Nash*, 42 Or. 321, 71 Pac. 59.

¹⁰⁷ *Magee v. Badger*, 34 N. Y. 247, 90 Am. Dec. 691; *Chamberlain v. Pratt*, 33 N. Y. 47, 52; *City of Pueblo v. Timbers*, 31 Colo. 215, 72 Pac. 1059.

¹⁰⁸ *Springstead v. Lawson*, 23 How. Pr. 302, 14 Abb. Pr. 328.

¹⁰⁹ *Murray v. Murray*, 6 Or. 17; approved, *Salomon v. Cress*, 22 Or. 177; *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944; *Whipple v. Preece*, 24 Utah, 364, 67 Pac. 1072. See, also, *as*

to the proper form and manner of taking exceptions to instructions, *Woods v. Berry*, 7 Mont. 195, 14 Pac. 758; *Gibbs v. Wall*, 10 Colo. 153, 14 Pac. 216; *Bell v. Washington Cedar Shingle Co.*, 8 Wash. 27, 35 Pac. 405.

¹¹⁰ Laws 1893, p. 112, § 4.

¹¹¹ *Sexton v. School District*, 9 Wash. 5, 36 Pac. 1052.

¹¹² *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105; *McQuillan v. City of Seattle*, 13 Wash. 600, 43 Pac. 893.

¹¹³ *Renshaw v. Switzer*, 6 Mont. 464, 13 Pac. 127.

CHAPTER L.

JUDGMENT IN GENERAL.

§ 1361. **What is a judgment.**—A judgment is a final determination of the rights of the parties in the action or proceeding.¹ A decision on motion to set aside an order of dismissal and for reargument of a demurrer is an order after final judgment, and not a judgment.² But judgment for defendant, upon sustaining demurrer and plaintiff's election to stand, is a final judgment.³ Every definite sentence or decision of a court, by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings are not capable of being enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law, and as such subject to the revisory jurisdiction of the appellate court.⁴ It should distinctly express what is given or denied.⁵ The opinion of the judge on collateral matters is no part of the judgment,⁶ nor his reasons given in his findings.⁷ An entry by the clerk, at the end of the trial, in the minutes of the court, of the decision of the judge, does not constitute a judgment, though it constitutes the rendition of judgment when findings are waived. When findings of fact are not waived, and are filed by the court, they constitute the rendition of judgment.⁸

§ 1362. **Jurisdiction of court.**—If the court has jurisdiction of the person of the defendant and the subject-matter, the judg-

1 Cal. Code Civ. Proc., § 577. See, also, *Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1092.

2 *Oliver v. Kootenai Co.*, 13 Idaho, 281, 90 Pac. 107.

3 *Wood v. Missouri Pacific Ry. Co.*, 152 Cal. 344, 92 Pac. 868.

4 *Belt v. Davis*, 1 Cal. 138. A judgment becomes "rendered" at the time the court pronounces its decision. *Estate of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567. See *McLaughlin v. Doherty*, 54 Cal. 519; *Young v. Wright*, 52 Cal. 407; *Har-*

mon v. Comstock Cattle Co., 9 Mont. 248, 23 Pac. 470.

5 14 Vin. Abr. 612; 6 Dane Abr. 90; *Lawes' Pl.* 669; *Whitaker v. Bramson*, 2 Paine, 209, Fed. Cas. No. 17526.

6 *Ward v. The Fashion*, 1 Newb. 41, 6 McLean, 195, Fed. Cas. No. 17155.

7 *Burke v. Table Mountain Water Co.*, 12 Cal. 403.

8 *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *San Joaquin Land etc. Co. v. West*, 99 Cal. 345, 33 Pac. 928.

ment is good against a collateral attack, however erroneous it may be.⁹ If it appear by the record or otherwise that the court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in issue, and a sale of property under it will be void also.¹⁰ A party against whom a judgment has been rendered by a court of general jurisdiction will be presumed to have been made a party to the suit in some of the ways provided by law, unless the contrary appears affirmatively by the record.¹¹ Death of a party pending suit does not oust the court of jurisdiction, and judgment is not void, but voidable only.¹² It is proper to enter judgment on the complaint in vacation, when defendant refuses to answer after his demurrer to the complaint has been overruled.¹³

The superior courts in California, by virtue of their organization and common-law powers, have full authority, except when limited by the constitution or Practice Act, to pronounce such judgment as the exigency of each case shall require.¹⁴ Jurisdiction will generally be presumed in the case of superior courts; but if the want of jurisdiction appears on the face of the record of the judgment of a superior court, the judgment is void, and it may be attacked in a collateral proceeding.¹⁵ The true test is whether the omission be of the form or of the substance of the act required to be performed. If of the substance, then the judgment is a nullity; if of form, only an irregularity.¹⁶ The presumption in favor of a judgment of a court of general jurisdiction is overthrown when the record of the entire case discloses a want of jurisdiction.¹⁷ But this presumption does not apply to judgments of inferior courts. In such case, the facts giving jurisdiction must be shown.¹⁸ The jurisdiction sufficient

⁹ *Moore v. Martin*, 38 Cal. 428, citing *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

¹⁰ *McMinn v. Whelan*, 27 Cal. 313; *Whitwell v. Barbier*, 7 Cal. 54; *Forbes v. Hyde*, 31 Cal. 342. See *Moyer v. Bucks*, 2 Ind. App. 571, 50 Am. St. Rep. 251, 28 N. E. 992, 16 L. R. A. 231.

¹¹ *Sharp v. Daugney*, 33 Cal. 505.

¹² *Todhunter v. Klemmer*, 134 Cal. 60, 66 Pac. 75.

¹³ *Hereford v. Benton*, 20 Colo. App. 500, 80 Pac. 499.

¹⁴ *Stewart v. Levy*, 36 Cal. 159.

¹⁵ *Forbes v. Hyde*, 31 Cal. 342; Affirmed in *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Drake v. Duv-enick*, 45 Cal. 464; *Coit v. Haven*, 30 Conn. 190, 79 Am. Dec. 244. See, also, Cal. Code Civ. Proc., § 1908.

¹⁶ *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

¹⁷ *Gray v. Hawes*, 8 Cal. 569.

¹⁸ *Rowley v. Howard*, 23 Cal. 404; *Jolley v. Foltz*, 34 Cal. 326.

to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.¹⁹ It is essential to the validity of a judgment that it be rendered by a court of competent jurisdiction at the time and place and in the form prescribed by law.²⁰ A judgment does not depend upon the clerk performing his duty in making up the judgment-roll, or in preserving the papers. If the facts necessary to give jurisdiction to the court exist, the judgment is good.²¹

§ 1363. **Final judgment.**—The correct rule appears to be that the words “final judgment” must be understood as applying to all judgments and decrees which determine the particular cause, and that it is not requisite that such judgment should finally decide upon the rights which are litigated.²² So an order setting aside a former judgment is a final judgment. Every definite sentence or decision of a court by which the merits of the case are determined is a final judgment.²³ But no question must be reserved.²⁴ So a judgment dismissing a suit in which a temporary injunction had been granted is a final judgment.²⁵ A judgment by an equally divided court, affirming the judgment of the court below, is a determination as final as if rendered by a unanimous court.²⁶ A judgment on default entered by a court commissioner, under the constitutional provision giving such commissioners the power of superior judges at chambers, subject to review by the superior court, is a final judgment, if no steps are taken for its review.²⁷ The judgment or decree of a court of competent jurisdiction is not only final as to matters actually determined, but as to every other matter which the parties might have litigated and had decided under the pleadings.²⁸ So a failure to plead a

¹⁹ Cal. Code Civ. Proc., § 1917.

²⁰ *Wicks v. Ludwig*, 9 Cal. 173.

²¹ *Lick v. Stockdale*, 18 Cal. 219; *Sharp v. Lumley*, 34 Cal. 611; *Hutchinson v. Bours*, 13 Cal. 50; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901.

²² *Belt v. Davis*, 1 Cal. 138; *Cooly v. Patterson*, 52 Me. 472; *Sheldon v. Williams*, 52 Barb. 183; *Klink v. Steamer Cusseta*, 30 Ga. 504.

²³ *Explaining Loring v. Illsley*, 1 Cal. 28; *Belt v. Davis*, 1 Cal. 135.

²⁴ *Belmont v. Ponvert*, 3 Robt. 693.

²⁵ *Dowling v. Polack*, 18 Cal. 625, in favor of the defendant; *Leese v. Sherwood*, 21 Cal. 151. As to order, as contradistinguished from a final judgment, see *Gilman v. Contra Costa County*, 8 Cal. 57, 68 Am. Dec. 290; *McKinley v. Tuttle*, 34 Cal. 235.

²⁶ *Durant v. Essex County*, 7 Wall. 107, 19 L. Ed. 154.

²⁷ *Peterson v. Dillon*, 27 Wash. 78 67 Pac. 397.

²⁸ *Phelan v. Gardner*, 43 Cal. 311; *Harris v. Harris*, 36 Barb. 88; *Clemens v. Clemens*, 37 N. Y. 59.

defense which the party was bound to present is a waiver by which the party is concluded.²⁹ So when a fact is necessarily found and determined, it is final and conclusive between the parties, not only when the subject-matter is the same, but when the point comes incidentally in question in regard to a different matter.³⁰ Although a judgment may be final with reference to the court that pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected, so long as it is subject to appeal and liable to be reversed.³¹ The court need not include in the judgment a statement of its effect upon other designated persons not parties to the action.³²

There can be but one final judgment in an action, and that is one which ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy.³³ The fact of a reference being had after judgment does not of itself determine that the judgment is not final. And if the reference be only for the purpose of executing the judgment after all the rights of the parties have been determined, then the judgment is final.³⁴ A judgment directing an accounting and not establishing any certain indebtedness is inter-

²⁹ *Dewey v. Peck*, 33 Iowa, 242; *Malloney v. Horan*, 49 N. Y. 115, 10 Am. Rep. 335; *Burwell v. Knight*, 51 Barb. 267.

³⁰ *Gray v. Dougherty*, 25 Cal. 272; *Caperton v. Schmidt*, 26 Cal. 493, 85 Am. Dec. 187; *Garwood v. Garwood*, 29 Cal. 521. See, as to effect of a judgment, Cal. Code Civ. Proc., § 1908. As to what judgments are final, consult, in ejectment, *Smith v. Trabue's Heirs*, 9 Pet. 4, 9 L. Ed. 30; by default on promissory notes, *Clements v. Berry*, 11 How. 398, 13 L. Ed. 745; in action on contract, *Whitaker v. Bramson*, 2 Paine, 209, Fed. Cas. No. 17526. The distinction between a judgment which is final and one which is definitive, explained in *United States v. The Peggy*, 1 Cranch, 103, 5 L. Ed. 49. As to what decrees are final, and when decrees become final, consult *Jenkins v. Eldredge*, 1 Woodb. & M. 61, Fed. Cas. No. 7269; *Porter v. United*

States, 2 Paine, 313, Fed. Cas. No. 11290. The distinction between decrees which are final and those which are interlocutory, discussed in *Chouteau v. Rice*, 1 Minn. 24. See, also, *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404; *Perkins v. Fourniquet*, 6 How. 206, 12 L. Ed. 406; *Pulliam v. Christian*, 6 How. 209, 12 L. Ed. 408; *De Armas' Heirs v. United States*, 6 How. 103, 12 L. Ed. 361.

³¹ *Hills v. Sherwood*, 33 Cal. 474.

³² *Field v. Leiter*, 16 Wyo. 1, 125 Am. St. Rep. 997; 92 Pac. 622.

³³ *Stockton Harvester Works v. Glen's Falls Ins. Co.*, 98 Cal. 559, 33 Pac. 633. As to judgment pro forma, finality of, see *Adams v. Smith*, 6 Dak. 94, 50 N. W. 720. Finality of judgment, ancillary provisions. *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

³⁴ *Arnold v. Sinclair*, 11 Mont. 556, 28 Am. St. Rep. 489, 29 Pac. 340. As to final decree ordering restitution,

locutory, and not final.³⁵ The interlocutory decree known to the old equity practice is not conclusive, like an interlocutory decree in partition, but may be modified by the final decree.³⁶ An order overruling a demurrer with leave to amend is not a final judgment.³⁷

§ 1364. **Judgment must follow allegations and proofs.**—The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata*, is fundamental in the administration of justice.³⁸ Not on the complaint alone, but on a reasonable construction of all the pleadings, does a judgment vest.³⁹ The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.⁴⁰ So of a decree in equity,⁴¹ as where the complaint fails in equity, but is sufficient to support money judgment.⁴² And resort may be had to the pleadings to explain and limit the language of a judgment.⁴³ Although the distinctions between proceedings at law and in equity have been abolished, yet it is evident that judgments at law and in equity cannot be assimilated.⁴⁴ But affirmative relief may be granted, though not asked for in the answer.⁴⁵ So held in an action for the fraudulent issue of stock, and to adjust claims growing out

see *Sprague v. Locke*, 1 Colo. App. 171, 28 Pac. 142.

³⁵ *Clarke v. Baird*, 98 Cal. 642, 33 Pac. 756.

³⁶ *Thompson v. White*, 76 Cal. 381, 18 Pac. 399.

³⁷ *Bode v. New England Investment Co.*, 1 N. Dak. 121, 45 N. W. 197.

³⁸ *Green v. Covillaud*, 10 Cal. 332, 70 Am. Dec. 725; *Tomlinson v. Monroe*, 41 Cal. 96; *Christian College v. Hendley*, 49 Cal. 349; *Bender v. Bender*, 14 Or. 353, 12 Pac. 713; *Woodward v. Oregon etc. Nav. Co.*, 18 Or. 299, 22 Pac. 1076; *Rankin v. Newman*, 107 Cal. 602, 40 Pac. 1024.

³⁹ *Chesney v. Chesney*, 33 Utah, 503, 94 Pac. 987.

⁴⁰ Cal. Code Civ. Proc., § 580; *Kelsey v. Western*, 2 N. Y. 506;

Bailey v. Ryder, 10 N. Y. 363; *Rome Exch. Bank v. Eames*, 1 Keyes, 588; *Wright v. Delafield*, 25 N. Y. 266; reversing, 23 Barb. 498; *Coleman v. Second Ave. R. R. Co.*, 38 N. Y. 201; *Gilmore v. Burch*, 7 Or. 374, 33 Am. Rep. 710.

⁴¹ *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388; *Jackson v. Ashton*, 11 Pet. 229, 9 L. Ed. 698.

⁴² *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49.

⁴³ *Pomona Land etc. Co. v. San Antonio Water Co.*, 152 Cal. 618, 93 Pac. 881; *Reaves v. Turner*, 20 Okla. 492, 94 Pac. 543.

⁴⁴ *Butler v. Lee*, 3 Keyes, 76, 33 How. Pr. 251; *Towle v. Jones*, 1 Robt. 87; *Mann v. Fairchild*, 2 Keyes, 106.

⁴⁵ Cal. Code Civ. Proc., § 666.

of the frauds.⁴⁶ A judgment for damages in excess of the amount prayed for is erroneous.⁴⁷

§ 1365. **Joint and several judgment.**—Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.⁴⁸ In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.⁴⁹ In an action against two defendants upon a joint contract, plaintiff may have a several judgment against one defendant who has been served, even if the other defendant has not been served; nor is it vitiated as to the defendant served by the fact that it is in form entered up against both.⁵⁰ Where an order of nonsuit is entered as to certain defendants, leaving others still before the court, the final judgment may include a nonsuit as to such defendants.⁵¹ Where two persons are sued for goods sold and delivered, judgment may be rendered against one of them and in favor of the other.⁵² In an action against defendants jointly and not severally liable, where a portion only of the parties are served with process, the clerk cannot, on the application of plaintiff, enter judgment upon default against parties served only. A judgment so entered is void.⁵³ Where the liability is joint or several, the clerk may enter default and judgment against those served, whether all are served or not.⁵⁴ The entry of judgment by the clerk is of course confined to actions arising upon contract for the recovery of money or damages only,⁵⁵ and service of sum-

⁴⁶ New York etc. R. R. Co. v. Schuyler, 34 N. Y. 30.

⁴⁷ Burke v. Koch, 75 Cal. 356, 17 Pac. 228.

⁴⁸ Cal. Code Civ. Proc., § 578.

⁴⁹ Cal. Code Civ. Proc., § 579. See Kelley v. Plover, 103 Cal. 35, 36 Pac. 1020; Fisk v. Henarie, 14 Or. 29, 13 Pac. 193, 15 Or. 90, 13 Pac. 760.

⁵⁰ Kelly v. Bandini, 50 Cal. 530. See, also, Cal. Code Civ. Proc., § 414; Shain v. Forbes, 82 Cal. 577, 23 Pac. 198; Ah Lep v. Gong Choy, 13 Or. 205, 9 Pac. 483; Hamm v. Basche, 22 Or. 518, 30 Pac. 501; Conklin v. Fox, 3 Mont. 208.

⁵¹ Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830.

⁵² Cal. Code Civ. Proc., § 578; Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323.

⁵³ Kelly v. Van Austin, 17 Cal. 564; Curry v. Roundtree, 51 Cal. 184. See, also, Brady v. Reynolds, 13 Cal. 31; People v. Frisbie, 18 Cal. 402.

⁵⁴ See Cal. Code Civ. Proc., §§ 414, 585, subd. 1; Bell v. Adams, 150 Cal. 772, 90 Pac. 118; Duncan v. Capehart, 40 Colo. 446, 90 Pac. 1033.

⁵⁵ Cal. Code Civ. Proc., § 585.

mons is not had by publication.⁵⁶ When a judgment has been recovered against one or more joint debtors, the others, who were not originally served and did not appear, may be summoned to show cause why they should not be bound by the judgment.⁵⁷ Where there is an appearance by both defendants, judgment should be against both.⁵⁸ The statute authorizing the entry of judgment against the joint property of the defendants, where two or more persons, associated in any business, transact such business under a common name, by which they are sued, and one or more, but not all the associates, were served with process, has been held unconstitutional in California.⁵⁹ When, in an action at law, a joint liability is charged, judgment cannot be entered separately against one of the parties.⁶⁰

§ 1366. **Entering judgment.**—The clerk shall keep with the records of the court a book to be called the “judgment-book,” in which judgments must be entered.⁶¹ Where judgments are required to be entered by the clerk in a record of the court to be called the “judgment-book,” the entry of a judgment in a book designated as “journal of proceedings,” though irregular, does not impair or invalidate the judgment, especially as between the parties to the action.⁶² It is not necessary for the clerk in entering up a judgment to insert therein recitals of his exposition of the preceding facts.⁶³ The recitals in a judgment are *prima facie* evidence only of the facts.⁶⁴ A recital of service of summons is conclusive against a collateral attack.⁶⁵ A judgment prematurely entered by the court of its own motion, after issue joined, and without any hearing, trial, or opportunity to be heard on the issues, is irregular, and will be reversed.⁶⁶ It is not error for the court to sign a judgment on the same day it renders its opinion without giving notice to plaintiff.⁶⁷ It is not necessary to give a party notice of the time and place of the signing of a judgment, or that

⁵⁶ Cal. Code Civ. Proc., § 585, subd. 3.

⁵⁷ Cal. Code Civ. Proc., §§ 414, 989. See, also, *Sneath v. Griffin*, 48 Cal. 438; *Tay v. Hawley*, 39 Cal. 93.

⁵⁸ *Flake v. Carson*, 33 Ill. 518.

⁵⁹ *Tay v. Hawley*, 39 Cal. 93.

⁶⁰ *Rupe v. Lumber Assoc.*, 3 N. Mex. 261 (393), 5 Pac. 730.

⁶¹ Cal. Code Civ. Proc., § 668.

⁶² *Work v. Northern Pacific R. R. Co.*, 11 Mont. 513, 29 Pac. 280; *Wolf*

v. Great Falls etc. Townsite Co., 15 Mont. 49, 38 Pac. 115.

⁶³ *Leese v. Clark*, 28 Cal. 33; *Green v. Swift*, 50 Cal. 455.

⁶⁴ *Id.*; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

⁶⁵ *Sharp v. Lumley*, 34 Cal. 611.

⁶⁶ *Hennessey v. Tacoma Smelting etc. Co.*, 33 Wash. 423, 74 Pac. 584.

⁶⁷ *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003.

it be served on him after filing.⁶⁸ Rendering a judgment after the ninety days' time allowed a judge in which to do so does not make it a void judgment.⁶⁹ Where the supreme court reverses the judgment of a district court, and directs the entry of final judgment, such judgment can be entered by the clerk of the district court in vacation.⁷⁰ So an action tried by the court without a jury may be entered in vacation.⁷¹ The judgment should date from the time of its rendition.⁷² A judgment is not a nullity because entered before exceptions to the findings are overruled and additional findings filed.⁷³ When a demurrer to the complaint is sustained, and the plaintiff's application to amend his complaint is denied, it is the duty of the clerk, without any further direction, to enter the appropriate judgment.⁷⁴

§ 1367. Judgment nunc pro tunc.—A judgment may be amended *nunc pro tunc*, either before or after the term has expired.⁷⁵ Where after the death of the appellants the appellate court, not being aware of the death, renders a judgment of affirmance, upon a subsequent suggestion of the fact the judgment will be vacated, and a judgment of affirmance rendered, as of a day previous to the death, *nunc pro tunc*.⁷⁶ If a party die after verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon.⁷⁷ Clerical errors and misprisions may be corrected *nunc pro tunc*.⁷⁸ The province of a *nunc pro tunc* judgment is to supply matters of evidence and to rectify clerical misprisions; and a judgment under section 1602 of the California Code of Civil Procedure, dismissing without prejudice a petition under section 1598, in the matter of an estate, for specific performance of a contract, which, as intended, makes no award of costs, the same being under the discretion of the court, it may not be amended by a *nunc pro tunc* judgment to

⁶⁸ Fisher v. Puget Sound Brick etc. Co., 34 Wash. 578, 76 Pac. 107.

⁶⁹ Demaris v. Barker, 33 Wash. 200, 74 Pac. 362.

⁷⁰ McMillan v. Richards, 12 Cal. 467.

⁷¹ People v. Jones, 20 Cal. 50; Cal. Code Civ. Proc., § 78. As to acts necessary, see Casement v. Ringgold, 28 Cal. 335.

⁷² Austin v. Austin, 42 Colo. 130, 94 Pac. 309.

⁷³ Haley v. Amestoy, 44 Cal. 135.

⁷⁴ Gallardo v. Reed, 49 Cal. 346.

⁷⁵ Morrison v. Dapman, 3 Cal. 255; Swain v. Naglee, 19 Cal. 127; Branger v. Chevalier, 9 Cal. 172; Hegeler v. Henckell, 27 Cal. 491; Mountain v. Rowland, 30 Ga. 929.

⁷⁶ Black v. Shaw, 20 Cal. 68.

⁷⁷ Cal. Code Civ. Proc., § 669.

⁷⁸ Hegeler v. Henckell, 27 Cal. 491; Egan v. Egan, 90 Cal. 15, 27 Pac. 22. See De Castro v. Richardson, 25 Cal. 49.

award costs.⁷⁹ The judgment against an administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim.⁸⁰ A court may at any time render or amend a judgment *nunc pro tunc*, when the record discloses that the entry on the minutes does not correctly give what was the judgment of the court,⁸¹ and the court may refuse to order a judgment entered as of the date it was rendered, though the only reason why it is not so entered is because of the clerk being behind with such work; such is not changing the record so as to make it speak the truth.⁸² But an alteration of a judgment by the court without notice, so as to include a party not served with process, if not void, is voidable at the election of the party.⁸³ The court may amend the judgment by inserting a clause showing who are personally liable for the debt.⁸⁴ It has the same force and effect as if made when judgment was rendered, except as to third persons having intervening rights; and the possessor of an inchoate right of dower at the time the judgment is rendered is not such an intervener.⁸⁵ The rule that a court has no power over its own judgments upon the expiration of the term has no application, except to final judgments, or while the proceedings are *in fieri*.⁸⁶ But where a judgment is rendered, and an appeal taken thereto, the court below loses control over the judgment, and an order amending the judgment is erroneous.⁸⁷

§ 1368. **The same—Continued.**—After the rendition of a judgment it is the ministerial duty of the clerk to enter it;⁸⁸ and he cannot, by neglecting to perform that duty, destroy or impair the effect of the judgment.⁸⁹ The judgment need not be signed by the judge or clerk. The presumption is that the judgment as entered by the clerk was authorized.⁹⁰ Entry of judgment may

⁷⁹ *In re Potter Estate*, 141 Cal. 424, 75 Pac. 850.

⁸⁰ *Chase v. Swain*, 9 Cal. 130.

⁸¹ *Morrison v. Dapman*, 3 Cal. 255.

⁸² *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950.

⁸³ *Chester v. Miller*, 13 Cal. 561; *Womack v. Sanford*, 37 Ala. 445.

⁸⁴ *Leviston v. Swan*, 33 Cal. 480.

⁸⁵ *Davidson v. Richardson*, 50 Or. 323, 126 Am. St. Rep. 733, 89 Pac. 742, 91 Pac. 1080, 17 L. R. A. (N. S.), 319.

⁸⁶ *Hastings v. Cunningham*, 35 Cal. 549.

⁸⁷ *Bryan v. Berry*, 8 Cal. 135.

⁸⁸ *Estate of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 83 Cal. 415, 23 Pac. 392.

⁸⁹ *In re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *Baker v. Brickell*, 102 Cal. 620, 36 Pac. 950.

⁹⁰ *California etc. R. R. Co. v. Southern Pacific R. R. Co.*, 67 Cal.

be performed at any time, even after the expiration of office of the judge rendering the decision.⁹¹ A judgment of divorce rendered in favor of a party during her lifetime may be entered after her death.⁹² Although a judgment may not be entered within the time provided by law, it is not thereby rendered void.⁹³ Failure to enter judgment until several days after a motion for a new trial is overruled constitutes no ground for error.⁹⁴ A court has no right to require as a condition precedent to the entry of final judgment that a part of the judgment be first paid.⁹⁵ Where the trial court has rendered a judgment, but the same has not been entered, whether in consequence of the neglect of the court or neglect or misprision of the clerk, an order may properly be made that the judgment rendered be entered *nunc pro tunc*, without regard to the lapse of time, where third persons are not injured thereby.⁹⁶ Under section 603 of the Idaho Civil Code, providing that, when trial is by the court, judgment must be entered at the close of the trial, the action of the probate court, in such case, in entering a formal judgment for plaintiff *nunc pro tunc* after an appeal had been taken to the district court, is void.⁹⁷ Facts found and required to be stated in the judgment should be stated therein specifically, and not by reference to matter in a pleading.⁹⁸ The clerk must include in the judgment interest on the amount of the verdict from the time it was rendered.⁹⁹ In an action in *assumpsit*, a judgment to enforce a mechanic's lien cannot be entered.¹⁰⁰ If judgment is entered for the amount prayed for, there is no error, although the verdict specified a greater sum.¹⁰¹ A clerical error in the entry of a judgment, where

59, 7 Pac. 123; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

⁹¹ *Id.* See *Franklin v. Merida*, 50 Cal. 289.

⁹² *Estate of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 83 Cal. 415, 23 Pac. 392.

⁹³ *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105; *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551; *Edwards v. Helings*, 103 Cal. 204, 37 Pac. 218. See *Bundy v. Maginess*, 76 Cal. 522, 18 Pac. 668.

⁹⁴ *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931.

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⁹⁵ *People v. Graham*, 16 Colo. 347, 26 Pac. 936.

⁹⁶ *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515.

⁹⁷ *Grey v. Cederholm*, 2 Idaho, 34, 3 Pac. 12.

⁹⁸ *Quigley v. Birdseye*, 11 Mont. 439, 28 Pac. 741.

⁹⁹ *Golden Gate Mill etc. Co. v. Joshua Hendy Machine Works*, 82 Cal. 184, 23 Pac. 45. Compare *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708.

¹⁰⁰ *Rupe v. New Mexico Lumber Assoc.*, 3 N. Mex. 261 (393), 5 Pac. 730.

¹⁰¹ *Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969.

it is shown by the record, may be corrected on motion at any time.¹⁰² When the record of a judgment itself affords satisfactory evidence not only of a mistake therein, but also of what the order of judgment really was, it may be corrected without any extraneous proof.¹⁰³ An error occasioned by the clerk wrongfully entering a judgment for a sum not found by the verdict nor warranted by the pleadings may be cured by *remittitur*.¹⁰⁴ And this may be done after an appeal and affirmance of the judgment.¹⁰⁵ A judgment entered at a former term may be amended by the trial court by inserting the plaintiff's true name, and may be entered *nunc pro tunc* as amended.¹⁰⁶ It is held error to enter judgment in a case when, after verdict, a stay of all proceedings has been ordered, if the entry was within the time in which the order is operative.¹⁰⁷ Courts have absolute power over their judgments during the term at which they were rendered, unless that jurisdiction has been lost by appellate or other proceedings.¹⁰⁸ But pending an appeal from a judgment, the court in which the judgment was entered has no power to amend or correct it.¹⁰⁹ A judgment entered as rendered, but rendered in excess of a stipulation therefor, is erroneous, and the error is one of law committed at the trial, the remedy for which is either by motion for a new trial, or by appeal, and is not a clerical misprision, which may be corrected by the record, and the court has no power to correct it after the expiration of six months from the date of its entry.¹¹⁰

¹⁰² San Joaquin etc. Water Co. v. West, 99 Cal. 345, 33 Pac. 928.

¹⁰³ People v. Ward, 141 Cal. 628, 75 Pac. 306.

¹⁰⁴ Redinger v. Jones, 68 Kan. 627, 75 Pac. 997.

¹⁰⁵ Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. 732. And see Kindel v. Beck etc. Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311.

¹⁰⁶ Barber v. Briscoe, 9 Mont. 341, 23 Pac. 726.

¹⁰⁷ Uhe v. Chicago etc. R. R. Co., 3 S. Dak. 563, 54 N. W. 601. As to erroneous entry of judgment before time to answer expires, see Gwillim v. First Nat. Bank, 13 Colo. 278, 22 Pac. 458. As to premature entry of judgment, see Sylph Min. etc. Co. v. Williams, 4 Colo. App. 345, 36 Pac. 80. As to validity of judgment en-

tered in vacation, see Sperling v. Calfee, 7 Mont. 514, 19 Pac. 204; Staab v. Atlantic R. R. Co., 3 N. Mex. 349 (606), 9 Pac. 381; Schenk v. Birdseye, 2 Idaho, 141, 6 Pac. 128. That judge may direct entry of judgment outside of his district, see Gould v. Duluth etc. Elevator Co., 3 N. Dak. 96, 54 N. W. 316.

¹⁰⁸ Pennington v. McNally, 11 Colo. 557, 19 Pac. 503; De Guile v. Alexander, 4 Colo. App. 516, 36 Pac. 620.

¹⁰⁹ Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237.

¹¹⁰ Dyerville Mfg. Co. v. Heller, 102 Cal. 615, 36 Pac. 928. See Egan v. Egan, 90 Cal. 15, 27 Pac. 22; Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580; Cosby v. Superior Court, 110 Cal. 45, 42 Pac. 460.

An application for an order directing the entry of a judgment, may be made *ex parte*. Notice is not necessary, unless a stay exists, or the court or judge, for some special reason, directs that such notice be given.¹¹¹

§ 1369. **Judgment-roll.**—Whether a judgment is void on its face is to be determined by an inspection of the judgment-roll.¹¹² An answer, notwithstanding an order to strike it out, is still entitled to its place in the judgment-roll.¹¹³ An affidavit upon which to base a motion to strike out an answer, and notice of such motion and affidavit of its service, constitute no part of the judgment-roll.¹¹⁴ A bill of exceptions made during the progress of a trial should be annexed to the judgment-roll.¹¹⁵ Until the amendment to the two hundred and third section of the Practice Act, the judgment-roll was not required to contain the order sustaining or overruling a demurrer.¹¹⁶ An order submitting a demurrer, where it is taken under advisement, forms no part of the judgment-roll.¹¹⁷

§ 1370. **Judgment-roll, what constitutes.**—Immediately after entering the judgment, the clerk must attach together and file the following papers, which shall constitute the judgment-roll: 1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service; the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons; 2. In all other cases, the pleadings, all orders striking out any pleadings in whole or in part, a copy of the verdict of the jury or finding of the court or referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the

¹¹¹ Gould v. Duluth etc. Elevator Co., 3 N. Dak. 96, 54 N. W. 316. See Estate of Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567.

¹¹² Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007.

¹¹³ Abbott v. Douglass, 28 Cal. 295.

¹¹⁴ Dimick v. Campbell, 31 Cal. 238. See Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92.

¹¹⁵ More v. Del Valle, 28 Cal. 170; Klauber v. San Diego Street Car Co., 98 Cal. 109, 32 Pac. 876.

¹¹⁶ Abadie v. Carrillo, 32 Cal. 172.

¹¹⁷ Anderson v. Fisk, 36 Cal. 625.

summons, with proof of its service on such defendant; and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of summons.¹¹⁸ An interlocutory judgment is properly a part of the judgment-roll.¹¹⁹ Neither a bill of particulars nor instructions of the court are any part of the judgment-roll.¹²⁰ So of an order appointing a guardian *ad litem* for minor defendants;¹²¹ of an order setting aside a default and judgment, and restoring an answer to the files;¹²² of notice of the overruling of a demurrer;¹²³ or of an order allowing an amendment to a complaint.¹²⁴ The affidavit of publication of summons is part of the judgment-roll.¹²⁵ So is the special verdict of a jury in an equity case.¹²⁶ It is only the finding of a referee upon the whole issue that must stand as the finding of the court, and form part of the judgment-roll.¹²⁷ On settlement of the accounts of an executor or administrator, the accounts and reports accompanying them, the objections or exceptions to the accounts, the findings of the court thereon, and the judgment or order settling the accounts, constitute the judgment-roll.¹²⁸ If two judgments are found in the judgment-roll, the later in point of time is the only one considered.¹²⁹ The register of actions is not a part of the judgment-roll.¹³⁰ A recital in a judgment that defendant has been regularly served with process is not rebutted where the judgment-roll merely contains the original summons with the return of the sheriff that he was unable to find defendant, and the affidavit of publication which does not show that an *alias* was not issued prior to the publication.¹³¹ If the clerk neglects to make up the judgment-roll,

118 Cal. Code Civ. Proc., § 670, as amended 1907. See *People v. Thomas*, 101 Cal. 571, 36 Pac. 9; *O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20.

119 *Packard v. Bird*, 40 Cal. 382.

120 *Paris v. Raynor*, 76 Cal. 647, 18 Pac. 788.

121 *Brady v. Page*, 66 Cal. 232, 5 Pac. 103.

122 *Von Schmidt v. Von Schmidt*, 104 Cal. 547, 38 Pac. 361.

123 *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899.

124 *Carter v. Paige*, 80 Cal. 390, 22 Pac. 188.

125 *People v. Thomas*, 101 Cal. 571, 36 Pac. 9.

126 *Goldman v. Rogers*, 85 Cal. 574, 24 Pac. 782.

127 *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021. See *Lee Sack Sam v. Gray*, 104 Cal. 243, 38 Pac. 85.

128 *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639. As to constituents of judgment-roll under Montana statute, see *Blessing v. Sias*, 7 Mont. 103, 14 Pac. 663.

129 *Colton etc. Water Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878.

130 Mont. Rev. Codes, § 6806; *Haupt v. Simington*, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672.

131 *People v. Davis*, 143 Cal. 673, 77 Pac. 651.

it does not vitiate the judgment or the proceedings under it.¹³² It must be presumed in the absence of evidence to the contrary, that the clerk, in making up the judgment-roll, regularly performed his official duty, and made it up within the proper time, including all papers then on file which should have gone into it.¹³³

§ 1371. Docketing judgment.—Immediately after filing a judgment-roll, the clerk shall make the proper entries of the judgment under appropriate heads in the docket kept by him.¹³⁴ If the judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the defendants shall be entered in the docket in alphabetical order. The docket is a book which the clerk keeps in his office, with each page divided into nine columns, and headed as follows: Date of entry in docket; judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment-book; appeals, when taken; judgment of appellate court; satisfaction of judgment, when entered.¹³⁵ The docketing of a judgment imparts constructive notice of the lien of the judgment on the real estate of the judgment debtor to strangers to the judgment.¹³⁶ It shall be open at all times during office hours for the inspection of the public without charge.¹³⁷ The judgment debtor cannot set up errors in docketing the judgment as destroying its lien, when the property has been sold on execution under the judgment; if the property sold is his, the levy operated as a lien; if not, he has no right to complain.¹³⁸

When the clerk enters the judgments and orders of the court, the record imports absolute verity, and can only be changed or modified by order of the court, and such records need not be signed by the judge to give them validity.¹³⁹ If there is a conflict between the terms of the decree and the recital of facts in the opinion, the decree governs.¹⁴⁰ A judgment rendered in the

132 *Sharp v. Lumley*, 34 Cal. 611; *Lick v. Stockdale*, 18 Cal. 219; *Sharp v. Daughney*, 33 Cal. 505.

133 *Gordon v. Donahue*, 79 Cal. 501, 21 Pac. 970.

134 Cal. Code Civ. Proc., § 671. As to ministerial duty of clerk as to entry of judgment, see *Baker v. Brickell*, 102 Cal. 621, 36 Pac. 950.

135 Cal. Code Civ. Proc., § 672.

136 *Page v. Rogers*, 31 Cal. 293.

137 Cal. Code Civ. Proc., § 673.

138 *Low v. Adams*, 6 Cal. 277.

139 *Boynton v. Crockett*, 12 Okla. 57, 69 Pac. 869.

140 *State v. Gray*, 42 Or. 261, 70 Pac. 904, 71 Pac. 978.

superior court on certification of a justice's judgment is subject to direct attack in the superior court.¹⁴¹

§ 1372. **Entry by clerk.**—When trial by jury has been had, judgment shall be entered by the clerk in conformity to the verdict within twenty-four hours, unless the court order the cause to be reserved for argument, or further consideration, or grant a stay of proceedings. If trial is had by the court, judgment must be entered by the clerk in conformity to the decision, immediately upon filing such decision, and the judgment has no effect until so entered.¹⁴² Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for new trial.¹⁴³ A judgment can be rendered upon a special verdict only when it is inconsistent with the general verdict.¹⁴⁴ No judgment can be entered on a general verdict rendered by a jury in an equity case, and a judgment thus entered will be reversed for a failure of the court to find upon the issues.¹⁴⁵ The fact that the delay to enter the judgment upon the verdict was the delay of the clerk, and not of the court, does not affect the right to have the judgment entered *nunc pro tunc*.¹⁴⁶ A judgment *non obstante veredicto* is always upon the merits, and is never granted but in a very clear case, as where it is apparent to the court from the defendant's own plea that he can have no merits.¹⁴⁷ Where allegations in an answer which constitute a complete defense to the plaintiff's cause of action are not denied by the reply, judgment will be rendered for the defendant, notwithstanding a verdict for the plaintiff.¹⁴⁸ If the verdict of the jury fails to find the lien, the court cannot render a judgment essentially different from the verdict, and the judgment so far will be re-

¹⁴¹ Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73.

¹⁴² Cal. Code Civ. Proc., § 664; Alaska Codes, pt. 4, ch. 29, §§ 251-259; Ariz. Civ. Code, pars. 1428, 1443; Idaho Rev. Codes, § 4450; Mont. Rev. Codes, § 7048; Nev. Comp. Laws, § 3294; N. Mex. Comp. Laws, §§ 2685, 3078-3086; N. Dak. Code Civ. Proc., §§ 5479, 5499; Or. B. & C. Codes, § 151; S. Dak. Code Civ. Proc., §§ 309, 327; Utah Rev. Stats., § 3191; Wash. Bal. Codes, § 5045; Wyo. Rev. Stats., §§ 3767-3780.

¹⁴³ Hutchinson v. Bours, 13 Cal. 51.

¹⁴⁴ Obersteller v. Commercial Assur. Co., 96 Cal. 645, 31 Pac. 587.

¹⁴⁵ Learned v. Castle, 67 Cal. 41, 7 Pac. 34.

¹⁴⁶ Marshall v. Taylor, 97 Cal. 422, 32 Pac. 515.

¹⁴⁷ Friendly v. Lee, 20 Or. 202, 25 Pac. 396.

¹⁴⁸ Benicia Agricul. Works v. Creighton, 21 Or. 495, 23 Pac. 775, 30 Pac. 676.

versed.¹⁴⁹ The court will presume after a verdict that facts imperfectly alleged in a complaint have been proved, but it will not presume that a material fact, not at all stated, has been proved.¹⁵⁰

§ 1373. **Gold-coin judgment.**—In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person.¹⁵¹ If the contract be to pay in gold and silver coin, the judgment must not be for gold coin only.¹⁵² The allegation that a contract was payable in a specified kind of money is an allegation of a material fact, and may be traversed.¹⁵³ A contract that if the obligation is not paid in gold coin, the debtor will pay the difference between the value of gold and currency, is not a contract of which specific performance in gold coin can be decreed.¹⁵⁴ Upon an accounting, a promise in writing by the defendant to pay the sum found due in gold coin justifies a judgment in gold coin.¹⁵⁵ In an action to recover possession of personal property, the plaintiff may recover its value in United States legal-tender notes. One unlawfully converting property does not sustain any injury, if the jury, in an action to recover possession of the same, find its value in United States legal-tender notes.¹⁵⁶

§ 1374. **Costs and interest in gold coin.**—Where a contract is made payable in a specific kind of money, the judgment enforcing

¹⁴⁹ *Walker v. Hauss-Hijo*, 1 Cal. 186.

¹⁵⁰ *Barron v. Frink*, 30 Cal. 486.

¹⁵¹ Cal. Code Civ. Proc., § 667.

¹⁵² *Burnett v. Stearns*, 33 Cal. 469.

¹⁵³ *Wallace v. Eldridge* (No. 2), 27 Cal. 499.

¹⁵⁴ *Lane v. Gluckauf*, 28 Cal. 289, 87 Am. Dec. 121. See, as to bill of exchange payable in gold coin, *Bank of Prince E. I. v. Trumbull*, 53 Barb. 459.

¹⁵⁵ *Carey v. Philadelphia etc. Petroleum Co.*, 33 Cal. 695. See *Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333; *Independent Ins. Co. v. Thomas*, 104 Mass. 192; *Chesapeake Bank v. Swain*, 29 Md. 506; *Watson v. San Francisco etc. R. R. Co.*, 50 Cal. 523; *North Pacific R. R. Co. v. Reynolds*, 50 Cal. 280.

¹⁵⁶ *Tarpey v. Shepherd*, 30 Cal. 180.

it may enforce the payment of costs and interest in the kind of money mentioned in the contract.¹⁵⁷ But it is error for the court to adjudge the costs in an action for forcible entry and detainer to be paid in gold coin.¹⁵⁸

§ 1375. **Ejectment.**—In ejectment, if the court finds the value of the use and occupation of the premises in both gold and currency, a general judgment may be rendered for the currency value.¹⁵⁹ As a matter of law, there is no possible difference in value between gold coin and legal-tender notes, nor can evidence be received to prove a difference.¹⁶⁰ Where the kind of money received by the defendant is not in issue, and he has received the same in a fiduciary capacity, or to the use of another, it is proper for the court, upon a verdict for the amount of money, to order judgment in the kind of money received by him.¹⁶¹

§ 1376. **Goods sold.**—If the complaint avers a contract in writing by defendant to pay for goods sold in gold coin, made before the sale, and such contract is made after suit commenced, but dated before the sale, judgment should be for gold coin.¹⁶²

§ 1377. **Lien of judgment.**—From the time the judgment is docketed, it becomes a lien upon all the real property of the judgment debtor (but not upon the real property standing in his wife's name),¹⁶³ not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases.¹⁶⁴ The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in the code, in which case the lien of the judgment, or any lien by virtue of an attachment that has been issued and levied in the action, ceases.¹⁶⁵ Where a judgment did not become a lien on real property for failure to state the time when it was docketed in the lien-book, the filing of a transcript of such lien-docket in another county was ineffectual

¹⁵⁷ *Carpentier v. Atherton*, 25 Cal. 569.

¹⁵⁸ *More v. Del Valle*, 28 Cal. 170.

¹⁵⁹ *Carpentier v. Small*, 35 Cal. 346.

¹⁶⁰ *Id.*; *Poett v. Stearns*, 31 Cal. 78.

¹⁶¹ *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

¹⁶² *Meyer v. Kohn*, 29 Cal. 278. See *Noonan v. Hood*, 49 Cal. 293.

¹⁶³ *Robinson v. Gumaer*, 43 Colo. 310, 95 Pac. 935.

¹⁶⁴ Cal. Code Civ. Proc., § 671, as amended 1895.

¹⁶⁵ *Id.* See *Riley v. Nance*, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315.

to create a lien on land in that county.¹⁶⁶ In Oregon, the judgment of a court of record becomes a lien on the real estate of the debtor from the first day of the term in which it is rendered, and does not become dormant for five years from the date of its rendition.¹⁶⁷ *Quære*: Upon affirmance of the judgment by the supreme court, and *remittitur* to the superior court, is the lien of the judgment revived or renewed, or does it exist at all? or must the judgment creditor rely solely upon his execution and upon the appeal-bond? There would seem to be no question that during the pendency of the appeal the judgment debtor may alien his real estate, and the purchasers take it discharged of the lien, inasmuch as the lien ceases upon filing the proper bond; but whether a new lien is created upon docketing the judgment of the appellate court is not clear. The lien of a judgment appealed from runs from the date of the final judgment rendered by the supreme court.¹⁶⁸ A lien on real estate commences to run from the docketing of the judgment, unless the judgment is stayed by an order of the court, pending a motion for new trial or a stay-bond on appeal.¹⁶⁹ In foreclosure cases, where there is a judgment *in personam*, and also a judgment enforcing a lien and directing a sale of the property, and the undertaking on appeal only stays the sale and provides for costs, the lien of the personal judgment on the judgment debtor's property in the county where it is docketed attaches at the time it is docketed, and expires at the end of two years from the time the personal judgment is docketed.¹⁷⁰ If the plaintiff does obtain a personal judgment, a decree enforcing the lien and directing a sale of the property does not become a judgment lien on the other property until after sale and deficiency docketed, and then only for the deficiency.¹⁷¹ A transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county; and from such filing, the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterwards, and before the lien expires, acquire. The lien continues for two years,

¹⁶⁶ Wood v. Fisk, 45 Or. 276, 77 Pac. 128, 738.

¹⁶⁷ Cramer v. Iler, 63 Kan. 579, 66 Pac. 617.

¹⁶⁸ Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046.

¹⁶⁹ Barroilhet v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193; Eby v. Foster, 61 Cal. 282.

¹⁷⁰ Englund v. Lewis, 25 Cal. 350.

¹⁷¹ Id.; Culver v. Rogers, 28 Cal. 520; Chapin v. Broder, 16 Cal. 421.

unless the judgment be previously satisfied or the lien be otherwise discharged.¹⁷² The fact that a lien has existed and expired in another county makes no difference. The lien commences upon filing the transcript in the recorder's office, and continues two years.¹⁷³

A judgment is not a lien on a leasehold estate acquired by the debtor under a lease executed subsequent to the judgment.¹⁷⁴ A judgment docketed against a mortgagor after sale of the real estate under foreclosure suit, but before expiration of the period for redemption, becomes a lien on the property, subject to defeat by execution and delivery of a sheriff's deed.¹⁷⁵ A deed being placed in escrow on sale of land, such land to the extent of the unpaid purchase price is subject to a judgment lien against the vendor.¹⁷⁶

§ 1378. Priorities of judgments.—General judgment creditors cannot acquire priorities of lien on lands covered by mortgages over judgments for the enforcement of the mortgage liens, for failure of the mortgage creditors to issue process for the enforcement of their judgments in one year after rendition.¹⁷⁷ Where a master's deed created a passive trust in favor of certain judgment debtors, which by the statute of uses was converted into an estate in fee in the *cestui que trust*, the lien of the judgment which attached to such property on the filing of the deed for record was superior to a parol secret lien existing between the *cestui que trust* and the trustee; and when a judgment creditor had no notice of an attorney's intention to claim a lien on certain lands belonging to the client at the time such judgment creditor filed his transcript of the judgment, the lien acquired through the transcript is superior to the attorney's right to a lien.¹⁷⁸

In some states, a distinction, or supposed distinction, is made between the general lien of a judgment as existing before levy of execution and the specific lien acquired by levy,¹⁷⁹ but in

¹⁷² Cal. Code Civ. Proc., § 674.

¹⁷³ Donner v. Palmer, 23 Cal. 45.
As to recording, etc., see Cal. Civ. Code, §§ 1159, 1165, 1169, 1170.

¹⁷⁴ Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243.

¹⁷⁵ Kaston v. Storey, 47 Or. 150, 114 Am. St. Rep. 912, 80 Pac. 217.

¹⁷⁶ May v. Emerson (Or.), 96 Pac. 454.

¹⁷⁷ Jackson v. King, 64 Kan. 886, 67 Pac. 1112.

¹⁷⁸ Teller v. Hill, 18 Colo. App. 509, 72 Pac. 811.

¹⁷⁹ Powell v. Macon, 40 Ark. 544; 2 Freeman on Judgments, § 338; Bouvier's Law Dict., title, "Liens."

California there is no room for such a distinction; for the judgment, when docketed, is by statute made a specific lien on all the lands of the judgment debtor, before as well as after levy.¹⁸⁰ Where, pending foreclosure of a mortgage, a creditor of the mortgagor recovered and docketed a judgment against him, and thereafter a subsequent grantee of the mortgagor redeemed the property from the foreclosure sale, the judgment creditor was thereupon entitled to enforce his judgment against the land.¹⁸¹

The priority of a judgment lien is not affected when property passes into the custody of the receiver, nor is it impaired by the fact that an execution thereon has not been taken out and levied before the expiration of one year next after its rendition; provided, no other judgments have been rendered against the same judgment debtor before the receiver is appointed.¹⁸² The statute providing that a judgment shall cease to operate as a lien on the estate of the judgment debtor when the judgment becomes dormant does not apply to a decree for the sale of specific real property.¹⁸³ An innocent purchaser from a judgment debtor who receives and conveys the property by her married name takes it free from a judgment docketed against her in her maiden name, and this even though such purchaser knew her as a single woman.¹⁸⁴

§ 1379. Extinguishment of lien.—A judgment which is a lien upon the estate of a judgment debtor prior to his death, and upon which suit is brought against the administrator of the debtor's estate, after his refusal to pay the judgment, is not merged in or destroyed by the judgment obtained against such administrator.¹⁸⁵ Before a judgment is enforced against one secondarily liable, credit must be given for the amount of any property of the judgment debtor primarily liable which has been released from levy by the judgment creditor.¹⁸⁶ A domestic judgment in Kansas which has been rendered for more than six years, and upon which no execution has ever been issued, and which has

¹⁸⁰ *Hibernia etc. Soc. v. London etc. Ins. Co.*, 138 Cal. 257, 71 Pac. 334.

¹⁸¹ *Kaston v. Storey*, 47 Or. 150, 114 Am. St. Rep. 912, 80 Pac. 217.

¹⁸² *Cramer v. Iler*, 63 Kan. 579, 66 Pac. 617.

¹⁸³ *Watson v. Keystone Iron Works*, 70 Kan. 43, 74 Pac. 269.

¹⁸⁴ *Huff v. Sweetser*, 18 Cal. App. 689, 97 Pac. 705.

¹⁸⁵ *In re Wiley's Estate*, 138 Cal. 301, 71 Pac. 441.

¹⁸⁶ *Mayberry v. Whittier*, 144 Cal. 322, 78 Pac. 16.

not been revived, is so far extinguished that no action can be maintained on it.¹⁸⁷

§ 1380. Effect of judgment lien—Death of party to judgment.
—If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate.¹⁸⁸ The continuance of the name of a deceased plaintiff, instead of that of his executor, in a judgment rendered after the substitution, is an error of form only, and does not make the judgment void.¹⁸⁹ The death of an appellant after argument of his case on appeal does not constitute any ground for delaying a decision, or a departing from the ordinary course of procedure, except as to the entry of the judgment which may be rendered. The entry should be of a day anterior to the appellant's death. The rule is different if the death occurs previous to the argument. In that event, further proceedings can only be had upon leave given after suggestion of the death is made.¹⁹⁰

§ 1381. Equitable liens.—The lien of a judgment against the holder of the legal estate is postponed in equity to an equitable right previously acquired.¹⁹¹ Where a creditor has obtained judgment, and caused execution to be delivered to the sheriff, and the same has been returned unsatisfied for the want of property, he does not acquire any lien by a bill in equity to discover assets upon his debtor's property.¹⁹² Where judgment and decrees in equity of state courts are by state laws liens upon land, decrees in admiralty of United States courts have the same character, and are equally binding.¹⁹³

§ 1382. Extension of lien.—The issuing and levying of an execution before the lien of the judgment upon which the execu-

¹⁸⁷ Smalley v. Bowling, 64 Kan. 818, 68 Pac. 630.

¹⁸⁸ Cal. Code Civ. Proc., § 669.

¹⁸⁹ Gregory v. Haynes, 21 Cal. 443; Stoetzell v. Fullerton, 44 Ill. 108.

¹⁹⁰ Black v. Shaw, 20 Cal. 68.

¹⁹¹ Brown v. Pierce, 7 Wall. 205, 19 L. Ed. 134. In what cases are

judgments and decrees of United States courts liens upon real estate, see Ward v. Chamberlain, 2 Black, 430, 17 L. Ed. 319.

¹⁹² Chase v. Searles, 45 N. H. 511.

¹⁹³ Ward v. Chamberlain, 2 Black, 430, 17 L. Ed. 319.

tion issued expires will not operate to prolong the lien of the judgment beyond the time limited in section 204 of the code. It required express words of the statute to create the lien, and it equally requires express words to continue it beyond the time specified.¹⁹⁴ The Washington statute of 1877, providing for the extension of the lien of a judgment was repealed by section 3319 of the code.¹⁹⁵

§ 1383. Property subject to the lien.—The lien of a judgment is purely the creature of statute; and when the statute says “property exempt from execution,” it means property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court.¹⁹⁶ As the lien of a judgment is purely statutory, neither its existence nor commencement can be proved by parol.¹⁹⁷ Docketing a judgment against a mortgagor after he has conveyed his equity of redemption creates no lien on the property.¹⁹⁸ The lien of an unrecorded mortgage given to secure a loan is created by the mere execution and delivery of the mortgage, and takes precedence over an attachment or judgment lien obtained after its execution.¹⁹⁹ Since the amendment of 1895 a conveyance will not stand against any judgment affecting the title, unless recorded prior to the record of notice of the action.^{199a} The lien of a judgment of foreclosure against a husband is subject to the interest of the wife, whether arising from a tenancy in common with the husband or out of a right of dower.²⁰⁰ A judgment rendered against a devisee pending administration of the estate becomes a lien upon that devisee’s interest in any real estate of the estate.²⁰¹ Property paid for by a parent, and taken in the name of a child, with no evidences of a trust, is subject to lien of judgment against the child.²⁰²

¹⁹⁴ *Isaac v. Swift*, 10 Cal. 71, 70 Am. Dec. 698.

¹⁹⁵ *Tacoma Nat. Bank v. Sprague*, 33 Wash. 285, 74 Pac. 393.

¹⁹⁶ *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516; *Bowman v. Norton*, 16 Cal. 213.

¹⁹⁷ *Eby v. Foster*, 61 Cal. 282.

¹⁹⁸ *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91.

¹⁹⁹ *Bank of Ukiah v. Petaluma*

Sav. Bank, 100 Cal. 590, 35 Pac. 170.

^{199a} Cal. Civ. Code, § 1214, as amended March 12, 1895, Stats. of 1895, p. 50.

²⁰⁰ *Manuel v. Turner*, 36 Mont. 512, 93 Pac. 808.

²⁰¹ *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459.

²⁰² *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501.

§ 1384. **Release of lien.**—The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien; and the fact that he takes a transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment.²⁰³ The perfecting an appeal does not release the lien acquired by docketing the judgment.²⁰⁴ But if the enforcement of the judgment be stayed on appeal by a sufficient undertaking, as provided in the code, the lien ceases.²⁰⁵

§ 1385. **Satisfaction of judgment—By levy under execution.**—The satisfaction of a judgment of record may be done by the judgment creditor or his attorney by indorsement on the margin of the record, or by acknowledgment in the manner of a conveyance.²⁰⁶ The attorney may do the same upon payment, and not otherwise.²⁰⁷ A levy under execution on sufficient property to satisfy it is a satisfaction of the judgment.²⁰⁸ Without making an attack upon the judgment, equity proceedings cannot be had to enjoin the execution.²⁰⁹ The return of a sheriff indorsed on an execution placed in his hands for collection, that the execution is satisfied by promissory notes received for the amount due on it, is not evidence of the satisfaction of the judgment on which it was issued, nor can it be admitted in evidence as tending to prove a satisfaction of the same.²¹⁰ The plaintiff in an execution may accept of promissory notes by a special agreement, as an absolute payment of the same, but the agreement must be proved by testimony other than the sheriff's certificate.²¹¹

§ 1386. **Satisfaction by part payment.**—A payment of part of the amount due upon a money judgment, under an agreement that it shall operate as satisfaction in full, will not discharge the judgment.²¹² The contrary is now, however, the rule in Cali-

²⁰³ *McCarty v. Christie*, 13 Cal. 79.

²⁰⁴ *Low v. Adams*, 6 Cal. 277.

²⁰⁵ Cal. Code Civ. Proc., § 671.

²⁰⁶ Cal. Code Civ. Proc., § 675; *Ariz. Civ. Code*, par. 286; *Idaho Rev. Codes*, § 4461; *Mont. Rev. Codes*, § 6811; *Nev. Comp. Laws*, § 3305; *N. Mex. Comp. Laws*, § 2685; *N. Dak. Code Civ. Proc.*, § 5497; *Or. B. & C. Codes*, § 2685; *S. Dak. Code Civ. Proc.*, §§ 309-327; *Utah Rev. Stats.*, §§ 115, 3207; *Wash. Bal. Codes*, § 4702.

²⁰⁷ Cal. Code Civ. Proc., § 286.

²⁰⁸ *People v. Chisholm*, 8 Cal. 30. See, also, *Mulford v. Estudillo*, 23 Cal. 95; Cal. Code Civ. Proc., § 675.

²⁰⁹ *Jones v. Messenger*, 40 Colo. 37, 90 Pac. 64.

²¹⁰ *Mitchell v. Hockett*, 25 Cal. 542, 85 Am. Dec. 151.

²¹¹ *Id.* See *Smith v. Reed*, 52 Cal. 345.

²¹² *Deland v. Hiatt*, 27 Cal. 611, 87 Am. Dec. 102.

fornia.²¹³ The receipt of a clerk of a court in which a judgment is docketed is not admissible as evidence to show receipt of money by the judgment creditor.²¹⁴ A judgment cannot be set off against an action of conversion, but defendant's remedy is by bill in equity or other proceeding to offset one judgment against the other.²¹⁵ A release of one joint judgment debtor, "so far as the same can be done without releasing" the other from paying the balance, does not discharge the latter.²¹⁶ Satisfaction of a judgment in unlawful detainer suit does not release liability on the appeal-bond, conditioned for payment of rents during the appeal.²¹⁷ Payment of a judgment operates as an irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements.²¹⁸ One plaintiff is only authorized to enter satisfaction of the judgment without the consent of his co-plaintiff on payment of the whole amount of the judgment.²¹⁹ If satisfaction of a judgment is entered without notice to the judgment creditor, the latter has his remedy by motion to set aside the order and entry of satisfaction.²²⁰ Injunction will lie to restrain the enforcement of a satisfied judgment.²²¹

§ 1387. Revival of judgment.—In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose founded upon supplemental pleadings.²²² This section applies to all judgments not barred in the year 1895.²²³ Notice of the motion for issuance of execution need not be given.²²⁴ Granting the motion is a matter of discretion with the court.²²⁵ Execution may issue on a judgment

²¹³ See Cal. Civ. Code, §§ 1521-1543. See, also, *Fuller v. Baker*, 48 Cal. 632.

²¹⁴ *Matushevitz v. Hughes*, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467.

²¹⁵ *Potter v. Lohse*, 31 Mont. 91, 77 Pac. 419.

²¹⁶ *Barnum v. Cochrane*, 139 Cal. 494, 73 Pac. 242.

²¹⁷ *Carmack v. Drum*, 32 Wash. 236, 73 Pac. 377, 785.

²¹⁸ *Estate of Baby*, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405.

²¹⁹ *Haggin v. Clark*, 61 Cal. 1.

²²⁰ *Thomas v. Rock Island etc. Min. Co.*, 54 Cal. 578.

²²¹ *Thompson v. Laughlin*, 91 Cal. 314, 27 Pac. 752.

²²² Cal. Code Civ. Proc., § 685.

²²³ *Doehla v. Phillips*, 151 Cal. 489, 91 Pac. 330.

²²⁴ *Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038; *Bryan v. Stidger*, 17 Cal. 270.

²²⁵ *Wheeler v. Eldred*, 121 Cal. 28, 66 Am. St. Rep. 20, 53 Pac. 431, 137 Cal. 37, 69 Pac. 619.

in foreclosure within five years and six months from the date of its entry, the six months being the time allowed for appeal.²²⁶ This section does not authorize an independent action after five years on a judgment rendered in a justice court.²²⁷ The administratrix of the judgment creditor,²²⁸ or his assignee,²²⁹ may enforce a judgment more than five years old by a motion for execution.

FORMS OF JUDGMENTS.

§ 1388. Judgment by the court. ▼

Form No. 442.

[TITLE.]

This cause came on regularly for trial on the . . . day of . . . , 19 . . . , E. F., Esq., appearing as counsel for the plaintiff, and G. H., Esq., for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury, whereupon J. K. and L. M. were examined as witnesses on the part of the plaintiff, and N. O. and P. Q. were examined as witnesses on the part of the defendant, and the evidence being closed, the cause was submitted to the court for consideration and decision; and after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered and adjudged that A. B., the plaintiff, do have and recover of and from C. D., the defendant, the sum of . . . dollars, with interest thereon at the rate of . . . per cent per month, from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of . . . dollars; and that said sum of . . . dollars and said interest be paid by said defendant in gold coin of the United States.

Judgment rendered . . . , 19 . . .

. . . Judge.

²²⁶ Harrier v. Bassford, 145 Cal. 529, 78 Pac. 1038.

²²⁷ John Heinlen Co. v. Cadwell, 3 Cal. App. 80, 84 Pac. 443.

²²⁸ Weldon v. Rogers, 151 Cal. 432, 90 Pac. 1062.

²²⁹ La Fitte v. Salisbury, 43 Colo. 248, 95 Pac. 1065.

§ 1389. Judgment of absolute divorce in wife's favor.

Form No. 443.

[Recitals of trial and findings according to the fact, and continuing:]

It is adjudged:

I. That the bonds of matrimony heretofore existing between the plaintiff, A. B., and the defendant, C. D. B., be and the same are hereby wholly dissolved, and the parties freed from the obligations thereof.

II. That the plaintiff's name be changed to [maiden name], by which name she was known and called prior to entering into the marriage hereby dissolved.

III. That the said defendant, C. D. B., pay to the plaintiff, A. D., the sum of . . . dollars a year, as a suitable allowance for her support; and that the same be paid in manner following: [specify times and places of payment], during the natural life of the plaintiff, and that said payments be charged as a lien upon the following-described real estate of the defendant, to-wit: [describe it; or, if the payment of the alimony is to be secured by bond, here specify the bond to be given and by whom approved].

IV. That the custody of the infant children of the parties, [name them], be and is hereby awarded to the plaintiff [with leave to defendant to see and visit them, as follows: [Specify particularly when and under what conditions defendant may visit them.]

V. That the defendant pay to the plaintiff as a suitable allowance for the support, maintenance, and education of said children, the following sums: [Specify amounts to be paid and when.]

VI. That the plaintiff have and recover her costs herein, taxed at . . . dollars, in addition to sums heretofore ordered to be paid.

Done this . . . day of . . . , 19 . . .

. . . , Judge of said court.

§ 1390. Interlocutory decree of divorce.

Form No. 444.

[TITLE.]

This cause having been brought on to be heard this . . . day of . . . , 19 . . . , upon the complaint of the plaintiff above named, and the answer and cross-complaint of the defendant above named,

and upon the proofs taken in said action, and upon the report of L. M., the court commissioner of this court and referee in this cause, to whom it was referred to take proofs of the facts set forth in the complaint and answer and cross-complaint respectively, and to report the same to the court, and the said referee having taken the testimony by written questions and answers, and reported the same to the court, from which it appears that none of the material allegations of the complaint, except those expressly admitted in the answer, are sustained by testimony, and that all the material averments of the answer and cross-complaint are sustained by testimony free from all legal exceptions as to its competency, admissibility, and sufficiency; that said matters so alleged and proved in behalf of defendant are sufficient in law to entitle the defendant to the relief prayed for in his answer and cross-complaint; that plaintiff was a resident of this city and county at the time of commencing this suit, and that both plaintiff and defendant were residents of this state for a period of one year immediately prior thereto—on motion of G. H., counsel for the defendant, it is ordered, adjudged, and decreed that the court, by virtue of the power and authority therein vested, and in pursuance of the statute in such case made and provided, does order, adjudge, and decree that the marriage between the said plaintiff, A. B., and the said defendant, C. D., be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony, and all the obligations thereof; and it is further ordered, adjudged, and decreed that the defendant, C. D., have, and he is hereby awarded, the sole charge, control, and custody of R. S. and T. U., the children, issue of said marriage, and mentioned in said answer and cross-complaint, and that the said plaintiff surrender the said children to the said defendant.

[DATE.]

[SIGNATURE.]

§ 1391. Decree of foreclosure and sale.

Form No. 445.

[TITLE.]

I. This cause having this day been brought on to be heard upon the complaint filed therein, taken as confessed by the defendant C. D. (whose default for not answering thereto has been duly entered), and upon the answers filed thereto by the

defendants A. D. and E. P., and upon due proof of the filing of notice of the pendency of this action, containing the names of the parties to and the object of the action, and a description of the property affected thereby, upon the . . . day of . . . , 19 . . . , [the time of filing said complaint], in the office of the county recorder of the . . . county of . . . , where said property is situated, and recording the same in said recorder's office, and upon the report of R. S., court commissioner of this court, which report is filed herein and is hereby confirmed, and the court having heard the proofs necessary to enable it to render judgment herein; and it appearing to the court from said report that there is now due to the plaintiff, from the said defendant C. D., for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of . . . dollars, which sum is to draw and bear interest from the date hereof at the rate of . . . per cent per month [or, annum], and that all the allegations in the said plaintiff's complaint contained are true—now, on motion of E. F., of counsel for the plaintiff:

II. It is adjudged and decreed, that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest, and costs in the suit and expense of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of the sheriff of the city and county of . . . , where said mortgaged premises are situate; that said sale be made in said city and county; that the said sheriff give public notice of the time and place of such sale, according to the course and practice of the court and the law relative to sales of real estate under execution; and that the plaintiff or any of the parties to this suit may become the purchaser at such sale; and that the said sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale.

III. That the said sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff or his attorney, out of said proceeds, his costs in this suit, taxed at . . . dollars, and the sum of . . . dollars, fixed by said mortgage and allowed by the court as counsel fee of foreclosure, with interest thereon from this date, at the rate

of . . . per cent per month [or, annum], and also the amount so found due as aforesaid to either, with interest thereon at the rate of . . . per cent per month [or, annum], from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same.

IV. That the defendant, and all persons claiming or to claim from or under him, and all persons having liens subsequent to said mortgage, by judgment or decree, upon the land described in said mortgage, and . . . or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the recorder as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of the said sheriff's deed.

V. And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the sheriff's deed for such premises, or any part thereof.

VI. And it is further adjudged and decreed that if the moneys arising from the said sale shall not be sufficient to pay the amount so found due to the plaintiff as above stated, with the interest and costs and expenses of sale, as aforesaid, the sheriff specify the amount of such deficiency and balance due the plaintiff in his return of said sale, and that, on the coming in of said return, a judgment of this court shall be docketed for such balance against the defendant C. D., and that the defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, pay to the said plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of . . . per cent per month [or, annum], from the date of said last-mentioned return and judgment; and that the plaintiff have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far

as the same can be ascertained from the mortgage referred to, or from the complaint filed in this action, are as follows, to-wit [describe it].

R. Q., Superior Judge.

§ 1392. Judgment enjoining maintenance of dam.

Form No. 446.

[TITLE.]

[Commence as in form No. 445.]

Wherefore it is ordered, adjudged, and decreed that the defendants, and each of them, their servants, agents, and employees be perpetually enjoined and restrained from maintaining, erecting, having, or keeping in the channel of . . . creek, at any point above the lands of plaintiff, and particularly at . . . , any dam or artificial obstruction. And it is further ordered, adjudged, and decreed that the permanent injunction of this court issue herein, directed to said defendants, their servants, agents, employees and attorneys, requiring them, and each of them, to perpetually refrain from having or keeping any dam or artificial obstruction in the channel of said stream, or from interfering with the free flow of the waters of said creek at any point above the plaintiff's lands aforesaid, and that plaintiff have judgment for his costs herein, taxed at the sum of . . . dollars.

[DATE.]

[SIGNATURE.]

§ 1393. Decree in actions to quiet title.

Form No. 447.

[TITLE.]

This cause having been regularly called and tried by the court, and the findings of fact and conclusions of law, and the decision thereon, in writing, having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of A. B., plaintiff, against all of the defendants, and for costs against such of the defendants only as have answered contesting the plaintiff's rights in the premises, on motion of E. F., plaintiff's attorney:

It is now, therefore, hereby ordered, adjudged, and decreed that the plaintiff have judgment, as prayed for in his complaint herein, against the defendants, and each and all of them; that all adverse claims of the defendants, and each of them, and all persons claiming or to claim said premises, or any part thereof, through or under

said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiff be and he is hereby declared and adjudged to be the true and lawful owner of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that his title thereto is adjudged to be quieted against all claims, demands, or pretensions of the defendants or either of them, who are hereby perpetually estopped from setting up any claims thereto, or any part thereof. Said premises are bounded and described as follows [here describe the premises].

And it is hereby further ordered, adjudged, and declared that the plaintiff do have and recover his costs, hereby taxed at . . . dollars, against the following-named defendants.

[DATE.]

[SIGNATURE.]

§ 1394. Judgment on verdict.

Form No. 448.

[TITLE.]

This day this action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons were regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider their verdict, and subsequently returned into court, and being called, answered to their names, and say they find a verdict for the plaintiff.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant the sum of . . . dollars, with interest thereon at the rate of . . . per cent per month, from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of . . . dollars.

Judgment rendered, . . . , 19..

[SIGNATURE.]

§ 1395. Judgment for double or treble damages.

Form No. 449.

[TITLE.]

This action being at issue, and having been brought on for trial before the court and a jury, and the issues having been tried, and

a verdict having been rendered in favor of the plaintiff and against the defendant, therefore:

It is adjudged, that the plaintiff recover of said defendant double [or, treble] the amount of the damages so as aforesaid found by said jury, together with . . . dollars, his costs of this action, amounting in the whole to . . . dollars.

[DATE.]

[SIGNATURE.]

§ 1396. Judgment for specific performance of land contract against vendor—Short form.

Form No. 450.

[TITLE.]

[Recite trial and findings as in form No. 449, and continuing:]
Now, on motion of G. H., attorney for plaintiff,

It is adjudged, that upon payment by the plaintiff to the defendant of the sum of . . . dollars [balance due on the contract], the defendant convey the premises described in the complaint, to-wit: [describe premises], to the plaintiff by a good and sufficient deed, in the usual form [or, by quitclaim deed in the usual form], and that in default thereof this judgment shall have the same effect and operation as such deed. And that the plaintiff recover from the defendant his costs herein, taxed at . . . dollars.

§ 1397. Interlocutory judgment denying specific performance, but retaining action for recovery of damages.

Form No. 451.

[TITLE.]

[Recitals as in forms Nos. 449 and 450.]

It is adjudged, that specific performance of the contract set forth in the complaint be and the same is hereby denied, but that this action be retained, to allow the plaintiff to establish his claim for damages suffered by reason of the defendant's breach of said contract.

It is further adjudged, that if within thirty days from the date of the entry of this judgment the plaintiff elect, in writing, to be filed with the clerk of this court, to proceed in this action to recover said damages, he be allowed so to proceed; but that in case of failure so to elect, final judgment shall be entered upon notice to the plaintiff dismissing the complaint upon the merits.

By the Court:

R. S., Clerk.

§ 1398. Judgment of strict foreclosure against junior incumbrancer who was not a party to original foreclosure action.

Form No. 452.

[TITLE.]

[After recitals showing trial of the action and the making of findings, which findings should show the fact of the prior mortgage and the previous foreclosure thereof, to which the defendant was not a party, and the sale thereunder to the plaintiff, and that the purchase money was insufficient to pay the said prior mortgage, continue:]

It is adjudged, that the defendant pay to the plaintiff the sum of . . . dollars, with interest from . . . , 19.., at . . . per cent, and the costs of this action, taxed at . . . dollars, within [six] months from the date of service upon him of notice of the entry of this judgment; and that if said payment is made, said plaintiff convey said premises by a good and sufficient deed of quitclaim to the defendant. But in default of the payment of said principal, interest, and costs within the time limited for that purpose, then said defendant and all persons claiming through or under him shall be forever barred and foreclosed of the equity of redemption and all rights or claims in and to said mortgaged premises.

The said premises are particularly described as follows: [Describe the same.]

[DATE.]

[SIGNATURE.]

§ 1399. Judgment ousting individuals from the exercise of usurped corporate powers in action of quo warranto brought on information of attorney-general.

Form No. 453.

[TITLE.]

[Recitals of trial, verdict, findings, etc., and continuing:]

It is therefore adjudged, that the said defendants, having acted within this state as a corporation under the name of the . . . company without being duly incorporated, be and they are hereby ousted and excluded from all corporate rights, privileges, and franchises under said corporate name so claimed and exercised by them.

[Add judgment for costs.]

[DATE.]

[SIGNATURE.]

§ 1400. Judgment annulling corporation for violation of its charter.

Form No. 454.

[TITLE.]

[Recitals of commencement of action, trial, and findings according to the facts, and continuing:]

Now, therefore, on motion of E. F., attorney-general of the state of . . . :

It is adjudged and decreed, that said defendant corporation has offended against the provisions of law under which it was created [or, has violated the provisions of section [naming section]; or, otherwise, state one of the causes of forfeiture, according to the fact], as determined in the findings of fact in this action, whereby the said defendant has forfeited [or, surrendered] its charter and its corporate rights, privileges, and franchises; and

It is further adjudged, that the said defendant has forfeited [or, surrendered] its corporate rights, privileges, and franchises, and that said corporation be and is hereby excluded from such corporate rights, privileges, and franchises, and that said corporation be and the same is hereby dissolved, and that the said defendant, its directors, officers, attorneys, and agents, be and they are hereby enjoined and restrained from exercising any of such corporate rights, privileges, or franchises, and from collecting or receiving any debts or demands due or owing to said defendant, and from paying out, interfering with, transferring, or selling any moneys, securities, property, or effects of the said corporation, or held by it.

It is further adjudged, that R. C., Esq., of . . . , be and he is hereby appointed receiver of all the property, real and personal, credits, moneys, things in action, and effects of said corporation, either owned or held by it, or in which it is in any way interested, with the usual powers, rights, and duties of receivers in such cases, according to the practice of this court and the statutes in such case made and provided.

It is further adjudged, that said receiver, before entering on the duties of his trust, give bond to the clerk of this court for the faithful performance of his duties as such receiver in the sum of . . . dollars [provide number of sureties and manner of approval], upon the approval of which bond said receiver is authorized and directed to take possession of and sell all the said property of said corporation and convert the same into money and distribute

the proceeds thereof, after paying the costs and expenses, in the following order: [Name order of payment.]

It is further adjudged, that said receiver may make such further application to this court, from time to time, as may be necessary and proper, for further directions and instructions as to the management of his said trust.

It is further adjudged, that the plaintiff recover of the said defendant the costs of this action, taxed at . . . dollars, and that said receiver pay said sum to the plaintiff's attorney out of the funds received by him.

Dated . . . , 19 . .

. . . Judge of said Court.

§ 1401. Judgment of reformation of a deed on ground of mistake.

Form No. 455.

[TITLE.]

[Recite trial and findings according to the facts.]

Now, on motion of G. H., attorney for the plaintiff,

It is adjudged, that the deed of conveyance executed by the defendant, C. D., to the plaintiff on the . . . day of . . . , 19.., and recorded in the office of the county recorder of . . . county, on the . . . day of . . . , 19.., in volume . . . of deeds, on page . . . , be and the same is hereby reformed and corrected according to the real intent of the parties, so the description therein shall read as follows: [insert true description]; and, so reformed, said deed shall convey said last-described premises as fully as if the same had originally been described therein, and that said defendant, C. D., within thirty days after the entry of this judgment and service upon him of notice of entry thereof, execute and deliver to the plaintiff a deed of said premises conforming to this judgment, and that in case of his failure so to do the title to said premises above described do pass by this judgment from said defendant to, and vest in, the plaintiff in fee simple, as fully as if properly conveyed in said deed.

That the plaintiff, A. B., recover of the defendant, C. D., the costs of this action, taxed at . . . dollars.

Dated . . . , 19 . .

. . . Judge of said Court.

§ 1402. Judgment of contribution between sureties.

Form No. 456.

[TITLE.]

[Recital of trial, verdict, or findings.]

On motion of G. H., plaintiff's attorney,

It is adjudged, that the plaintiff, A. B., do have and recover of the defendant, C. D., [surety], the sum of . . . dollars, together with the costs and disbursements of this action, taxed at . . . dollars.

[If the judgment be against two or more sureties, there should be a separate provision directing recovery of the proper share against each surety.]

Rendered . . . , 19 . .

Judge.

§ 1403. Judgment adopting advisory verdict of jury and reversing judgment of county court refusing probate of will.

Form No. 457.

[TITLE.]

[Recite appeal as in preceding forms, and proceed:]

And the court having taken the advisory verdict of a jury upon the issues herein, by which verdict it is found that said alleged will was executed under undue influence, [recite findings of verdict], and the court having adopted said verdict as its findings on the matters so submitted, and having filed its findings of fact and conclusions of law, which are of record:

On motion of G. H., attorney for A. B., proponent of said will,

It is adjudged, that the order and judgment of the county court of . . . county refusing probate to said will, dated . . . , 19.., be and the same is hereby reversed, and that the said instrument propounded as the last will and testament of E. F., deceased, be and the same is hereby admitted to probate, and that the papers and records herein be transmitted to said county court to proceed therein as provided by law.

[Direction as to costs.]

By the Court:

R. S., Clerk.

§ 1404. Judgment against receiver in his official capacity.

Form No. 458.

[TITLE.]

[Proceed with recitals of the trial and verdict or finding as in ordinary judgments, and continue:]

Now, therefore, on motion of E. F., attorney for plaintiff,

It is adjudged, that out of any funds now in or hereafter to come to his hands, which may, under the direction of the court by which he was appointed, be applicable to that purpose, the defendant R. S., as such receiver of C. D., pay to the plaintiff, A. B., the sum of . . . dollars, the damages found against said receiver in this action, together with . . . dollars, the costs and disbursements herein, as taxed.

[DATE.]

. . . , Judge.

§ 1405. Judgment in action to enforce lien on logs or timber, after jury trial.

Form No. 459.

[TITLE.]

This cause having been tried before the court, Hon. J. K., circuit judge, presiding, and a jury, and the jury having rendered their verdict, which is of record, wherein they find for the plaintiff, and assess his damages at the sum of . . . dollars, which sum is due for labor and services performed as charged in the complaint, and that the same is a lien upon the logs or timber described in the complaint [or, upon a part of the logs or timber described in the complaint], to-wit: upon [describe the part as in the verdict], and the court having directed judgment accordingly:

On motion of E. F., Esq., plaintiff's attorney,

It is adjudged, that A. B., the plaintiff, do have and recover of the defendant, C. D., the sum of . . . dollars, damages, together with the sum of . . . dollars and . . . cents, costs and disbursements of this action, and that the same is a lien upon [a part of] the property described in the complaint, to-wit: [Here describe the logs, timber, or lumber, subject to lien.]

By the Court:

R. S., Clerk.

§ 1406. Judgment dismissing appeal from justice court for failure to bring action to trial.

[TITLE.]

Form No. 460.

The return upon the appeal herein having been filed on the . . . day of . . . , 19.., and said appeal not having been brought to a hearing before the end of the second term of this court thereafter:

Now, on motion of G. H., attorney for [name respondent],

It is adjudged, that said appeal be and is hereby dismissed, and that said [name respondent] do have and recover of [name appel-

lant and his sureties on the appeal] the costs and disbursements upon said appeal, taxed at . . . dollars.

§ 1407. Judgment on appeal from justice court after trial de novo.

Form No. 461.

[TITLE.]

This action, being an appeal from a judgment rendered by and before L. M., Esq., a justice of the peace of said county, having been tried before the court and a jury, and a verdict having been duly rendered for the plaintiff, and his damages assessed at the sum of . . . dollars, [or, for the defendant; or, if the trial was by the court, insert: by the court, trial by jury having been waived, and the court having made and filed findings of fact and conclusions of law wherein judgment is ordered for the plaintiff for . . . dollars, damages and costs; or, for the defendant]:

Now, on motion of . . . , attorney for . . . ,

It is adjudged, that the plaintiff, A. B., have and recover of C. D., the defendant, and E. F., [surety on appeal-bond], the said sum of . . . dollars damages, and his costs and disbursements, taxed at . . . dollars, making in all the sum of . . . dollars [or, that the defendant, C. D., have judgment dismissing the complaint and recover of A. B., the plaintiff, his costs and disbursements, taxed at . . . dollars].

§ 1408. Satisfaction of judgment.

Form No. 462.

[TITLE.]

For and in consideration of the sum of . . . dollars, to me paid by . . . , the defendant in the above-entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered in said . . . court in the said action, on the . . . day of . . . , A. D. 19.., in favor of . . . , the plaintiff in the said action, and against the said defendant, for the sum of . . . dollars, with interest thereon from the . . . day of . . . , A. D., 19.., at the rate of . . . per cent per month until paid, together with said plaintiff's costs and disbursements, amounting to the sum of . . . dollars, and recorded in book . . . of judgments, at page . . . And I hereby authorize the clerk of said court to enter satisfaction of record of said judgment in the said action.

[DATE.]

E. F., Attorney for Plaintiff.

CHAPTER LI.

JUDGMENT BY DEFAULT.

§ 1409. Default—When authorized.—Upon failure to answer within the time specified in the summons, in an action on contract for money or damages, the clerk, upon application of plaintiff, must enter a default, and immediately thereafter the judgment. In other actions, the clerk must enter the default, and the plaintiff thereafter apply to the court for the relief demanded. The court may, and in case of service of summons by publication must, require proof of the demands made in the complaint, and render judgment for the amount to which plaintiff is entitled, not in excess of the demands made in the complaint.¹

In case where the complaint and summons state that the action is one for an accounting, that various sales had been made, and that the quantities and prices were unknown, and defendant fails to make answer in time, the clerk cannot enter a judgment by default, but plaintiff must apply to the court.² Where an answer is filed which does not controvert the material allegations of the complaint, the plaintiff is entitled to a judgment for failure to answer, although the plaintiff may have filed a reply to the defective answer.³

§ 1410. Default, what admits and cures.—A default admits only the facts alleged in the complaint.⁴ So where title as administrator is averred.⁵ So of title in ejectment.⁶ A default on a complaint containing special counts defectively stated, and also the common counts in *assumpsit* properly stated, will support a judgment—the default being a confession of the indebtedness

1 Cal. Code Civ. Proc., § 585; Alaska Codes, pt. 4, ch. 2, §§ 51-59; Ariz. Civ. Code, pars. 1435-1441; Idaho Rev. Codes, § 4360; Mont. Rev. Codes, § 6719; Nev. Comp. Laws, § 3247; N. Mex. Comp. Laws, §§ 2685-3068; N. Dak. Code Civ. Proc., §§ 5412-5414; Or. B. & C. Codes, § 185; S. Dak. Code Civ. Proc., §§ 237, 238; Utah Rev. Stats., § 3179;

Wyo. Rev. Stats., §§ 3761-3766; Wash. Bal. Codes, § 5090.

2 Crossman v. Vivienda Water Co., 136 Cal. 571, 69 Pac. 220.

3 Port v. Parfit, 4 Wash. 369, 30 Pac. 328.

4 Harlan v. Smith, 6 Cal. 173; McGregor v. Shaw, 11 Cal. 47.

5 Curtis v. Herrick, 14 Cal. 117, 73 Am. Dec. 632.

6 Smith v. Billett, 15 Cal. 23.

for the causes and on the accounts alleged in the complaint.⁷ A default cures a defective allegation of fact, but not an entire absence of any allegation.⁸

§ 1411. Order of court required.—Where a frivolous demurrer is filed, and no leave is asked to file an answer, it is not error for the court to enter a default and judgment upon overruling the demurrer.⁹ Where demurrer is overruled, and the defendant fails to file an answer within the time granted him, the clerk is authorized to enter his default, and judgment for the amount specified in the summons.¹⁰ But if the notice of the decision required by the statute¹¹ is not given or waived, the time to answer does not run, and judgment by default cannot properly be entered.¹² Judgment entered by default before time for answering has expired is voidable.¹³ Under the code of Colorado, a default for want of answer cannot be entered pending a motion filed by the defendant;¹⁴ nor until the expiration of forty days after the completion of constructive service of summons by publication.¹⁵ If an answer is filed raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it cannot then strike the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint.¹⁶ A default judgment is not void for failure to comply with a statute requiring a statement of the evidence to be filed as part of the record, since it is not enumerated as one of the papers making up the judgment-roll.¹⁷ In California, prior to 1895, the affidavit and order for publication of summons were not a part of the judgment-roll, and were conclusively presumed, in an attack on the judgment, to be sufficient.¹⁸ Judgment on default, entered

⁷ *Hunt v. City of San Francisco*, 11 Cal. 250.

⁸ *Hentsch v. Porter*, 10 Cal. 555; *Barron v. Frink*, 30 Cal. 489.

⁹ *Seale v. McLaughlin*, 28 Cal. 668.

¹⁰ *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349; *Wall v. Heald*, 95 Cal. 364, 30 Pac. 551; *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000.

¹¹ Cal. Code Civ. Proc., § 476.

¹² *Chamberlain v. County of Del Norte*, 77 Cal. 150, 19 Pac. 271. See *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863.

¹³ *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888.

¹⁴ *Atchison etc. R. R. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512; *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212; *Dillon v. Rand*, 15 Colo. 372, 25 Pac. 185.

¹⁵ *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. 621.

¹⁶ *Abbott v. Douglass*, 28 Cal. 295.

¹⁷ *Steinfeld v. Montijo*, 9 Ariz. 250, 80 Pac. 325.

¹⁸ *People v. Davis*, 143 Cal. 673, 77 Pac. 651.

by a court commissioner, if no objection is entered in the trial court thereto, nor steps taken to review the same, is a final judgment.¹⁹

§ 1412. **Process to sustain default judgment.**—The court must have jurisdiction to make a valid order for publication of summons.²⁰ Where the statute provides that certain actions must be brought in the county in which the defendant resides or is summoned, a judgment based upon service of summons issued to and served by the sheriff of another county is null and void.²¹ Service of summons by publication, directing defendants to appear within sixty days after the date of the first publication, which gives but nineteen days between the date of the last publication and the day of judgment, does not give the court jurisdiction to enter a default judgment foreclosing a tax lien.²² A person sued and served under a wrong name, permitting judgment to be rendered against him by default, cannot restrain a levy of execution thereunder.²³

§ 1413. **Pleadings to sustain default judgment.**—An allegation that “there is now due and owing” a certain sum is a sufficient allegation of non-payment of a note and mortgage sued on to sustain a judgment by default. Allegation of legal conclusions, implying an assignment to plaintiff of a note and mortgage, is sufficient to sustain judgment by default.²⁴ On appeal from a judgment on default, the sufficiency of the complaint is to be tested as on demurrer, and, if the allegations of the complaint are insufficient to sustain the judgment, it will be reversed.²⁵ In allowing a default judgment against plaintiff for failure to demur to or answer defendant’s cross-complaint, the complaint is not to be considered.²⁶

Where leave to amend a complaint to recover money is general, default will not be entered as to a cause of action for a certain amount alleged in the original but omitted in the amended com-

19 Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397.

20 People v. Wrin, 143 Cal. 11, 76 Pac. 646.

21 Foster v. Cimarron Valley Bank, 14 Okla. 24, 76 Pac. 145.

22 Bailey v. Hood, 38 Wash. 700, 80 Pac. 559.

23 Brum v. Ivins, 154 Cal. 17, 96 Pac. 876.

24 Penrose v. Winter, 135 Cal. 289, 67 Pac. 772.

25 Dame v. Cochiti Reduction etc. Co., 13 N. Mex. 10, 79 Pac. 296.

26 State v. Quantie, 37 Mont. 32, 94 Pac. 491.

plaint.²⁷ A special appearance for the purpose of moving to quash the service of summons does not extend the time for a general appearance and answering to the merits.²⁸ Where plaintiff fails to amend a complaint after leave of court to do so, and is in default on such pleading, the court must dismiss the case on motion of defendant.²⁹ Denial of motion for default for want of answer is largely a matter of discretion with the trial court.³⁰ Where no reply is filed to an equitable counterclaim, judgment thereon should, by the Utah practice, be granted on motion.³¹

§ 1414. **Proof required on default.**—Judgment for damages cannot be given without proof, other than the allegations of the complaint.³² An authenticated copy of a foreign judgment sued on may be taken as sufficient proof, in case of default by defendant.³³ If the defendant is a non-resident and served by publication, the court must examine the plaintiff or his agent on oath respecting any payments that have been made to the plaintiff on account of such demand, and in any event, where service is by publication, must require proof; also, if the demand is in the nature of an accounting, or is for damages, the court may refer it to a referee or leave the damages to be assessed by a jury.³⁴

§ 1415. **Against whom entered.**—A judgment by default may as well be taken against an administrator as any other party;³⁵ also, against a municipal corporation as well as against a private person.³⁶ Where the action is against defendants severally liable, a portion only being served with process, the clerk can, on application of plaintiff, enter judgment, upon default, against the parties served, without regard to the other parties named in the complaint.³⁷ But otherwise, if they are jointly liable.³⁸ If persons are served with summons who are not named in the

²⁷ *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40.

²⁸ *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591.

²⁹ *Lasswell v. Kitt*, 11 N. Mex. 459, 70 Pac. 561.

³⁰ *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536.

³¹ *Dunham v. Travis*, 25 Utah, 65, 69 Pac. 468.

³² *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278.

³³ *Godding v. Rossiter*, 20 Colo. App. 245, 77 Pac. 1094.

³⁴ Cal. Code Civ. Proc., § 585.

³⁵ *Chase v. Swain*, 9 Cal. 130.

³⁶ *Hunt v. City of San Francisco*, 11 Cal. 250.

³⁷ *Kelly v. Van Austin*, 17 Cal. 564.

³⁸ *Id.*; *Junkans v. Bergin*, 64 Cal. 203, 30 Pac. 627; *Curry v. Roundtree*, 51 Cal. 184. Compare *Wharton v. Harlan*, 68 Cal. 422, 9 Pac. 727;

complaint either by real or fictitious names, it is error to render judgment against them by default.³⁹ Judgment entered by the clerk by default where there has been no service of summons or appearance is utterly void.⁴⁰ The entry of judgment against a defendant who has been served after the overruling of his demurrer to the complaint, without at the same time entering judgment against a co-defendant not served, is in accordance with the statute.⁴¹ A default judgment in ejectment against a non-resident, vacated under a code section, cannot be relied on by a purchaser of the property, where the purchase was made in ignorance of such judgment, and on strength of a chain of title wholly independent of it.⁴²

§ 1416. Default against one not personally served.—A party not personally served with summons may answer on the merits to the original action at any time within one year after rendition of the judgment.⁴³ And upon making a motion and filing an affidavit or answer showing a defense which would bar the action, the judgment will be set aside as to such party.⁴⁴

§ 1417. Effect of.—Where the summons has been duly served, a judgment by default amounts to a confession on the part of the defendant of all the material facts in the complaint,⁴⁵ even though he be erroneously named in such pleading and process.⁴⁶ The fact that one defendant who suffered judgment by default is not estopped as to an issue made by the other defendants, upon which they succeeded, does not prevent the judgment upon this issue from being an estoppel between the plaintiff and the defendants who pleaded it.⁴⁷ In an action upon a joint contract, if one

Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218.

³⁹ Lamping v. Hyatt, 27 Cal. 102.

⁴⁰ Lyons v. Cunningham, 66 Cal. 42, 4 Pac. 938. See Hyde v. Redding, 74 Cal. 493, 16 Pac. 380; Norton v. Atchison etc. R. R. Co., 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452; Reinhart v. Lugo, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089; Spokane Falls v. Curry, 2 Wash. 541, 27 Pac. 477; Yentzer v. Thayer, 10 Colo. 63, 3 Am. St. Rep.

563, 14 Pac. 53; Howard v. Clark, 43 Mo. 344.

⁴¹ Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218.

⁴² Randall v. Barker, 67 Kan. 774, 74 Pac. 240.

⁴³ Cal. Code Civ. Proc., § 473.

⁴⁴ San Diego Realty Co. v. McGinn, 7 Cal. App. 264, 94 Pac. 374.

⁴⁵ Rowe v. Table Mountain Water Co., 10 Cal. 441.

⁴⁶ Brum v. Ivins, 154 Cal. 17, 96 Pac. 876.

⁴⁷ Jackson v. Lodge, 36 Cal. 28.

be defaulted and the other go to trial on a plea that is peculiar to himself, a judgment in his favor will not discharge the defaulted defendant; otherwise, if the matter pleaded be a defense common to both defendants.⁴⁸

§ 1418. Entry of.—The clerk of a court, in entering a judgment after default, acts in a mere ministerial capacity, and cannot render a judgment granting any relief beyond that warranted by the facts stated in the complaint.⁴⁹ A judgment entered by the clerk, upon default, for a sum greater than is demanded in the prayer of the complaint and specified in the summons is not void, but is simply erroneous, and may be enforced until modified on motion or on appeal.⁵⁰ Judgment by default which grants relief other and different from that prayed for in the complaint and specified in the summons is improper.⁵¹ If a default is prematurely entered, defendant may have it set aside, and, having tendered his answer before default is legally entered, is entitled to defend.⁵²

§ 1419. Clerk's duty.—The entry of a default in a case authorized by law is a ministerial act, to be performed by the clerk, and the disqualification of the judge of the court to try the cause does not disqualify the clerk for the performance of this duty.⁵³ When the law declares what the judgment shall be, a judgment on default is not the judgment of the clerk.⁵⁴ A valid judgment by default may be rendered by the court, though no formal default has been entered.⁵⁵ The clerk derives all his power in entering a default, without an order of the court, from the statute, and when he enters a default it must appear that all the facts existed which the law requires to authorize it.⁵⁶

§ 1420. Errors, how reviewed.—There may be error in a judgment by default as well as in a judgment rendered upon issue

⁴⁸ *Swanzy v. Parker*, 50 Pa. St. 441, 88 Am. Dec. 549.

⁴⁹ *Gray v. Palmer*, 28 Cal. 416; *Wallace v. Eldredge* (No. 1), 27 Cal. 495; *Kelly v. Van Austin*, 17 Cal. 564; *Willson v. Cleaveland*, 30 Cal. 192; *Leese v. Clark*, 28 Cal. 26.

⁵⁰ *Bond v. Pacheco*, 30 Cal. 531.

⁵¹ *Mudge v. Steinhart*, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147.

⁵² *Waymire v. Shipley* (Or.), 97 Pac. 807.

⁵³ *People v. De Carrillo*, 35 Cal. 37.

⁵⁴ *Harding v. Cowing*, 28 Cal. 212.

⁵⁵ *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509.

⁵⁶ *Providence Tool Co. v. Prader*, 32 Cal. 634, 91 Am. Dec. 598. See, also, *Reinhart v. Lugo*, 86 Cal. 395,

joined in the pleadings and tried by a jury; and in the former as well as the latter case the error may be corrected on appeal.⁵⁷ Judgment by default before the expiration of the full time will be reversed on appeal.⁵⁸ If the summons be radically defective, it will not support a judgment by default.⁵⁹ So where the record shows that the defendant has not been legally served with process.⁶⁰ A notice in summons that a money judgment would be taken will not support a judgment for fraud.⁶¹ Where the complaint shows no legal cause of action, a judgment by default can no more be taken than it can be over a general demurrer.⁶² A judgment rendered upon a complaint radically defective may be treated as a nullity.⁶³ Where, on the overruling of a demurrer to the complaint, no notice was given to the defendant, and a judgment was entered by default against the defendant, it is proper to set aside such judgment.⁶⁴

§ 1421. **Proof, when required.**—In all actions in equity, and at law, when not arising upon contract, for the recovery of money or damages only, and the defendant has defaulted, the clerk must enter the default of the defendant, but before the entry of judgment the court may take proof therefor, or refer the same, or may order damages to be assessed by a jury; and in cases of service by publication, the court must require proof, and, if the defendant is a non-resident of the state, must require the plaintiff or his agent to be examined on oath as to any payments on account of the demand, and may then render judgment for the amount the plaintiff is entitled to recover.⁶⁵ A judgment in ejectment awarding damages rendered on a default will not be reversed because it does not appear that the court examined witnesses upon the question of damages.⁶⁶

§ 1422. **Relief granted.**—If judgment is rendered in favor of plaintiff by default, the court cannot grant any greater relief

21 Am. St. Rep. 52, 24 Pac. 1089;
Graydon v. Thomas, 3 Or. 250; Kelly
v. Van Austin, 17 Cal. 564.

57 Stevens v. Ross, 1 Cal. 94.

58 Burt v. Scrantom, 1 Cal. 416.

59 People v. Woodlief, 2 Cal. 242.

60 Joyce v. Joyce, 5 Cal. 449;
People v. Pearson, 76 Cal. 400, 18 Pac.
424; Barney v. Vigoureux, 75 Cal.
376, 17 Pac. 433.

61 Porter v. Herman, 8 Cal. 619.

62 Abbe v. Marr, 14 Cal. 210.

63 Reynolds v. Harris, 9 Cal. 338.

64 Winchester v. Black, 134 Cal.
125, 66 Pac. 197.

65 Cal. Code Civ. Proc., § 585,
subds. 2, 3; Tuolumne Redemption
Co. v. Patterson, 18 Cal. 416; Lick v.
Stockdale, 18 Cal. 219.

66 Dimick v. Campbell, 31 Cal. 238.

than is demanded in the prayer of the complaint and specified in the summons;⁶⁷ and allegations appearing in replication only will not support judgment for affirmative relief.⁶⁸ If the prayer for judgment asks for interest to accrue after the complaint is filed, and neither the prayer nor summons mentions the rate of interest, the clerk should not render judgment for a rate greater than the legal rate of interest.⁶⁹ Interest is to be allowed on cash advances as a matter of law.⁷⁰ In an action in Massachusetts on a note made payable in New York, interest at the legal rate of the former state only will be allowed.⁷¹

§ 1423. Waiver of default.—An acceptance by plaintiff's attorney of service of a demurrer, filed by a defendant after his default has been entered, is a waiver of the default.⁷² Plaintiff is not precluded from asking to have defendant's default set aside by reason of the fact that it was entered on plaintiff's motion.⁷³ Grounds for vacating the judgment found by the court to be sufficient are also sufficient to authorize vacation of the default and a time fixed for defendant to plead.⁷⁴

§ 1424. When to be entered.—If no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, in an action arising upon contract for the recovery of money or damages only, the clerk upon application of the plaintiff shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant. In other actions, the clerk shall enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the

⁶⁷ Cal. Code Civ. Proc., § 580; *Lamping v. Hyatt*, 27 Cal. 102; *Gage v. Rogers*, 20 Cal. 91; *Lattimer v. Ryan*, 20 Cal. 628.

⁶⁸ *Manuel v. Turner*, 36 Mont. 512, 93 Pac. 808.

⁶⁹ *Lamping v. Hyatt*, 27 Cal. 102; *Gautier v. English*, 29 Cal. 165; Cal. Civ. Code, § 1917.

⁷⁰ *Field v. Burnam*, 3 Bush, 518. As to interest generally, as a part of the relief granted, see *Skillman v. Lachman*, 23 Cal. 199, 83 Am. Dec. 96; *Estate of Isaacs*, 30 Cal. 105;

Bibend v. London etc. Ins. Co., 30 Cal. 78; *Dunne v. Mastick*, 50 Cal. 247; *Brady v. Wilcoxson*, 44 Cal. 245; *Goldsmith v. Sawyer*, 46 Cal. 213; *Lander v. Castro*, 43 Cal. 498. See, also, Cal. Civ. Code, §§ 1916, 1917, 3287.

⁷¹ *Ayer v. Tilden*, 15 Gray, 178, 77 Am. Dec. 355.

⁷² *Hestres v. Clements*, 21 Cal. 425.

⁷³ *Thompson v. Alford*, 135 Cal. 52, 66 Pac. 983.

⁷⁴ *Id.*

relief demanded in the complaint. Where the service of the summons was by publication, the plaintiff upon the expiration of the time designated in the order of publication may, upon proof of the publication and that no answer has been filed, apply for judgment; but proof of the demand, and of any payments thereon, in such case shall be required.⁷⁵ The provision that the clerk must enter the judgment *immediately* after entering default is merely directory, and does not render void a judgment subsequently entered upon such default; nor can the defendant against whom the judgment is entered invoke such failure for the purpose of annulling a judgment to which he has no other defense.⁷⁶

§ 1425. **Setting aside judgment, grounds of.**—A party against whom an unjust judgment has been obtained, through accident, mistake, or fraud, may, after the adjournment of the term at which judgment was rendered, and where no want of diligence is imputable to him in seeking relief, maintain an equitable action to set aside the judgment.⁷⁷ The mere existence of a good defense alone will not warrant the setting aside of such a judgment.⁷⁸ In cases of fraud in obtaining the judgment, the party aggrieved must proceed by a bill to impeach the original decree for fraud, etc.⁷⁹ If a judgment is erroneous, the defendant has his remedy by appeal; if void upon its face, he has, in addition, his remedy by motion, at any time, in the court by which the judgment was rendered.⁸⁰

§ 1426. **California procedure.**—The California Code of Civil Procedure now provides as follows: A judgment or decree of a superior court, when based upon findings of fact made by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such

⁷⁵ Cal. Code Civ. Proc., § 585.

⁷⁶ Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218.

⁷⁷ Bibend v. Kreutz, 20 Cal. 109.

⁷⁸ Brum v. Ivins, 154 Cal. 17, 96 Cal. 876; Beek v. Lavin, 15 Idaho, 363, 369, 97 Pac. 1028.

⁷⁹ Robb v. Robb, 6 Cal. 21; City of Guthrie v. McKennon, 19 Okla. 306, 91 Pac. 851. Insufficient grounds:

See Markley v. Rand, 12 Cal. 275; Alderson v. Bell, 9 Cal. 315.

⁸⁰ Chipman v. Bowman, 14 Cal. 157; Logan v. Hillegass, 16 Cal. 200; Bell v. Thompson, 19 Cal. 706; Sanchez v. Carriaga, 31 Cal. 170; cited in Murdock v. De Vries, 37 Cal. 527. See Norton v. Atchison etc. R. R. Co., 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452; De La Mon-

party and entitling him to a different judgment: 1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case, when the judgment is set aside, the conclusions of law shall be corrected and amended; 2. A judgment or decree not consistent with or not supported by the special verdict.⁸² The party intending to make the motion mentioned in the above section must, within ten days after notice of the rendition of judgment or decree, serve upon the adverse party and file with the clerk of the court a notice of his intention, designating the grounds upon which and the time at which the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the findings of facts, or in which the judgment or decree is not consistent with the special verdict. The time designated for the making of the motion must not be more than sixty days from the time of service of the motion.⁸³

§ 1427. Form of motion to set aside default.—A motion to set aside a judgment by default against a surety, reciting that defendant's neglect to plead was because of negotiations looking toward a settlement, and to enable defendant to locate his principal and secure his presence, is insufficient without a statement of the facts.⁸⁴

§ 1428. Jurisdiction.—All courts having chancery jurisdiction have power to set aside a judgment improperly obtained.⁸⁵ A party is not confined to his remedy by statute, but may resort to a court of equity for relief against a judgment obtained by fraud or surprise.⁸⁶ The assistance of equity to set aside a judgment cannot be invoked in a distinct action, so long as the remedy by motion in the original case exists.⁸⁷

§ 1429. Motion, when to be made.—A judgment void upon its face may be set aside at any time.⁸⁸ At common law, after the

tanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345, 32 L. R. A. 82.

⁸² Cal. Code Civ. Proc., § 663.

⁸³ Cal. Code Civ. Proc., § 663a.

⁸⁴ Barra v. People, 18 Colo. App. 16, 69 Pac. 1074.

⁸⁵ People v. Lafarge, 3 Cal. 130.

⁸⁶ Carpentier v. Hart, 5 Cal. 406.

See Dunlap v. Steere, 92 Cal. 344, 27 Am. St. Rep. 143, 23 Pac. 563, 16 L. R. A. 361.

⁸⁷ Bibend v. Krentz, 20 Cal. 109.

⁸⁸ People v. Davis, 143 Cal. 673, 77 Pac. 651.

adjournment of the term, the court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time; but in most states there are special statutes fixing the time within which a motion to set aside a judgment must be made. In California, where the party has failed to apply for relief during the term, relief may be granted in vacation within a reasonable time, not exceeding six months after the close of the term.⁸⁹ A default judgment void on its face is properly set aside on a motion made while the action is pending, and by a party thereto.⁹⁰ But mere error of the court cannot be taken advantage of on motion to vacate a default judgment where the motion was made nearly five years after judgment.⁹¹ The invalidity not being apparent on the face of the judgment-roll, and no application having been made within the year, the sole remedy is a new action in equity, and a purported order attempting to open the judgment is void upon its face, upon either direct or collateral attack.⁹²

Application to open a default made after the adjournment of the term at which the judgment by default was rendered cannot be entertained, unless the moving party makes a showing of reason why he failed to make the application during the term.⁹³ The court may at any time set aside a judgment by default entered by the clerk when it appears upon the face of the judgment-roll that the clerk had no power to enter it.⁹⁴ A judgment by default rendered upon a constructive service of summons by publication, without any affidavit or order for the publication, is void, and a motion by the defendant to vacate such a judgment is in time, although made more than ten years after its entry.⁹⁵ If the summons has not been personally served on the defendant, he may be allowed, on such terms as may be just, to answer to the merits of the action at any time within one year after the rendition of the judgment.⁹⁶ During the term at which a judgment was rendered, a district

⁸⁹ Cal. Code Civ. Proc., § 473. As to construction of this provision, see *Wolff v. Canadian Pacific Ry. Co.*, 89 Cal. 332, 26 Pac. 825; *Wharton v. Harlan*, 68 Cal. 422, 9 Pac. 727; *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55; *Howard v. McChesney*, 103 Cal. 536, 37 Pac. 523.

⁹⁰ *Crossman v. Vivienda Water Co.*, 136 Cal. 571, 69 Pac. 220.

⁹¹ *People v. Wrin*, 143 Cal. 11, 76 Pac. 646 and 1127.

⁹² *People v. Davis*, 143 Cal. 673, 77 Pac. 651.

⁹³ *Mahoney v. Mahoney*, 51 Cal. 118.

⁹⁴ *Wharton v. Harlan*, 68 Cal. 422, 9 Pac. 727.

⁹⁵ *People v. Pearson*, 76 Cal. 400, 18 Pac. 424.

⁹⁶ Cal. Code Civ. Proc., § 473.

court may perhaps, even without a statement or affidavits, upon motion of a party injured, amend or set aside an erroneous judgment; but to continue full and complete jurisdiction in the court over the case beyond the term, some order must be made or proceedings taken in accordance with statute.⁹⁷ In New York, two years is allowed for opening up a judgment, and no more.⁹⁸ But not a limitation where summons was not served.⁹⁹

§ 1430. Parties not concluded by the record.—In a direct proceeding in the same action to set aside a judgment, under section sixty-eight of the Practice Act, the parties are not concluded by the record in any respect; on the contrary, they are allowed to show the true facts of the case by any competent evidence; *aliter*, if the question had arisen collaterally.¹⁰⁰ A petition to open a judgment may be made by a party or his assignee in interest.¹⁰¹ Grounds for vacating a judgment are also sufficient to authorize a vacation of the default and a setting of a time to make answer, and the party who asks for the default may also ask to have it set aside.¹⁰² The interest of stockholders, who were made parties, and who succeeded to the property before entry of judgment, is sufficient to sustain their motion to set aside the judgment as void and unauthorized.¹⁰³ An application under section 473 of the California Code of Civil Procedure must be by proceeding in the cause wherein the default was taken, and not by separate suit for relief against the judgment.¹⁰⁴

§ 1431. Answer to the merits.—The better practice is to prepare and exhibit to the court the defendant's answer at the hearing of a motion to set aside a default.¹⁰⁵ A copy of the answer should be served with the notice of motion. Where the merits are shown by affidavit, counter-affidavits on that question will not be heard.¹⁰⁶ When the record does not show that a default

⁹⁷ *State v. First Nat. Bank*, 4 Nev. 358. See *Horton v. New Pass Co.*, 21 Nev. 184, 27 Pac. 376, 1018.

⁹⁸ *Hendricks v. Carpenter*, 2 Robt. 625.

⁹⁹ *Weeks v. Merritt*, 5 Robt. 610.

¹⁰⁰ *McKinley v. Tuttle*, 34 Cal. 235.

¹⁰¹ *Brown v. Massey*, 13 Okla. 670, 76 Pac. 226.

¹⁰² *Thompson v. Alford*, 135 Cal. 52, 66 Pac. 983.

¹⁰³ *Crossman v. Vivienda Water Co.*, 136 Cal. 571, 69 Pac. 220.

¹⁰⁴ *Estate of Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381.

¹⁰⁵ *Bailey v. Taaffe*, 29 Cal. 422.

¹⁰⁶ *Gracier v. Weir*, 45 Cal. 54; *Douglass v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623.

was not properly entered, the presumption arises that the required notice was given.¹⁰⁷

§ 1432. **Discretion of court.**—The granting or refusing a motion to set aside a default based upon affidavits is a matter within the proper discretion of the court, and unless that discretion has been abused the appellate courts will not interfere.¹⁰⁸ Although an order of the court below setting aside or refusing to set aside a judgment by default rests much in the discretion of the court, and will not be disturbed by the appellate court unless plainly erroneous, yet the discretion of the court below is not a mental discretion, to be exercised *ex gratia*, but is a legal discretion to be exercised in conformity with the law.¹⁰⁹

§ 1433. **Motion, when to be made.**—A motion may be made to set aside a default entered by the clerk, at any time before final judgment is rendered in the action, notwithstanding the court had adjourned for the term at which the default was entered before the motion is made to vacate it.¹¹⁰ A motion to set aside a judgment by default may be withdrawn upon leave of the court without notice to the adverse party.¹¹¹

§ 1434. **Motion will be refused.**—A judgment by default should not be set aside on the ground of excusable neglect, because the preparation of the answer required more time than ordinary cases, and during a portion of the time the attorney was absent from town.¹¹² A defendant having answered, and asked for more time

¹⁰⁷ Evans v. Young, 10 Colo. 316, 3 Am. St. Rep. 583, 15 Pac. 424.

¹⁰⁸ Woodward v. Backus, 20 Cal. 137; Roland v. Kreyenhagen, 18 Cal. 455; Howe v. Independence etc. Co., 29 Cal. 72; Winchester v. Black, 134 Cal. 125, 66 Pac. 197; Walton v. Hartman, 38 Wash. 34, 80 Pac. 196; Bannerot v. McClure, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. (N. S.) 126.

¹⁰⁹ Bailey v. Taaffe, 29 Cal. 422; Cutler v. Haycock, 32 Utah, 354, 90 Pac. 897. As to exercises of discretion by court in opening defaults, see Dougherty v. Nevada Bank, 68 Cal. 275, 9 Pac. 112; Buell v. Emerich, 85 Cal. 116, 24 Pac. 644; Wolff v. Canadian Pacific Ry. Co., 89 Cal. 332, 26

Pac. 825; Garner v. Erlanger, 86 Cal. 60, 24 Pac. 805; Reinhart v. Lugo, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089; Youngman v. Tonner, 82 Cal. 611, 23 Pac. 120; Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621; Burns v. Scooffy, 98 Cal. 271, 33 Pac. 86; Haggin v. Lorentz, 13 Mont. 406, 34 Pac. 607; Martin v. De Loge, 15 Mont. 343, 39 Pac. 312; Spokane Falls v. Curry, 2 Wash. 541, 27 Pac. 477; Haynes v. Schwartz Co., 5 Wash. 433, 32 Pac. 220.

¹¹⁰ Willson v. Cleaveland, 30 Cal. 192.

¹¹¹ Jensen v. Barbour, 12 Mont. 566, 31 Pac. 592.

¹¹² Bailey v. Taaffe, 29 Cal. 422.

to resist a motion to strike his answer from the files, cannot have his default set aside because he is a non-resident.¹¹³ A judgment by default cannot be set aside upon a mere abstract allegation of inadvertence of the attorney in serving or filing the answer, but the reason for the inadvertence must be stated.¹¹⁴

§ 1435. On terms.—The court may, upon such terms as may be just, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. An order to release a party from a judgment taken against him by default under the sixty-eighth section of the Practice Act (section 473 of the Code of Civil Procedure), should only be granted upon the terms, as a condition precedent of payment of all costs accruing to the adverse party to the time of service and filing of notice of motion thereof.¹¹⁵ It is not an abuse of discretion for the trial court to vacate a judgment by default when the circumstances warrant it, without imposing terms as a condition to granting such relief.¹¹⁶ This does not give the court power to refuse relief when statutory conditions are met, and failure to appear is excused by lack of personal service, though service is had by publication.¹¹⁷ Where a motion to set aside judgment is granted "on payment of all costs," the judgment remains in force until the costs are paid.¹¹⁸

§ 1436. Affidavit—By whom made.—An affidavit on a motion to set aside a default should be made by the defendant, unless

See, also, *People v. O'Connell*, 23 Cal. 282; *Parrott v. Den*, 34 Cal. 79; *Haight v. Green*, 19 Cal. 113; *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218; *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652, 30 Pac. 762; *Sanborn v. Centralia etc. Mfg. Co.*, 5 Wash. 150, 31 Pac. 466; *Haley v. Eureka County Bank*, 20 Nev. 410, 22 Pac. 1098.

¹¹³ *Zobel v. Zobel*, 151 Cal. 98, 90 Pac. 191.

¹¹⁴ *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863. As to instances of excusable neglect, see *Craig v. San Bernardino Investment Co.*, 101 Cal. 122, 35 Pac. 558; *Fulweiler v.*

Hogs etc. Min. Co., 83 Cal. 126, 23 Pac. 65; *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86; *Bast v. Hysom*, 6 Wash. 170, 32 Pac. 997; *Douglass v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623.

¹¹⁵ *Howe v. Independence etc. Co.*, 29 Cal. 72; *Bailey v. Taaffe*, 29 Cal. 422; *Leet v. Grants*, 36 Cal. 288. See *Wolff etc. Co. v. Canadian Pacific Ry. Co.*, 89 Cal. 332, 26 Pac. 825.

¹¹⁶ *Robinson v. Merrill*, 80 Cal. 415, 22 Pac. 260.

¹¹⁷ *Gray v. Lawlor*, 151 Cal. 352, 90 Pac. 691.

¹¹⁸ *Gregory v. Haynes*, 21 Cal. 443; *Hartman v. Olvera*, 49 Cal. 101.

good reason exists for having it made by some one else.¹¹⁹ The affidavit is not objectionable on the ground solely that it was made by counsel for the defendant.¹²⁰ The affidavit may properly be made by one of two or more co-defendants for the benefit of all.¹²¹ A motion to set aside a judgment and for leave to answer will be overruled if there is no affidavit of merits.¹²² A verified answer answers the same purpose as an affidavit of merits.¹²³ An affidavit of merits is not sufficient if it fails to state in what the defense consists, and why the affidavit is not made by a party to the action in place of by his attorney.¹²⁴ The affidavits of plaintiffs are properly admitted as to whether or not default, which was entered on stipulation of the attorneys, was made without authority.¹²⁵ An affidavit of defense, filed upon a motion to set aside a default, should set forth the facts relied upon, so that the court can judge of the merits of the defense.¹²⁶ The motion to set aside judgment where there is a false return of service of summons is based upon irregularity and want of jurisdiction in fact, and not upon the mistake, inadvertence, surprise, or excusable neglect of the moving party, and it is not necessary that the motion be accompanied by an affidavit of merits.¹²⁷ The filing of an answer after the entry of default does not affect the default, and it will not be set aside without the showing of some ground therefor.¹²⁸

§ 1437. **Counter-affidavits.**—The court cannot consider counter-affidavits on a motion to vacate a judgment by default, since these

¹¹⁹ *Bailey v. Taaffe*, 29 Cal. 422. As to when it may be made by purchaser under decree, see *Boggs v. Hargrave*, 16 Cal. 559, 76 Am. Dec. 561.

¹²⁰ *In re Weringer*, 100 Cal. 345, 34 Pac. 825; *Byrne v. Alas*, 68 Cal. 479, 9 Pac. 850; *Horton v. New Pass Co.*, 21 Nev. 184, 27 Pac. 376, 1018.

¹²¹ *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226.

¹²² *Parrott v. Den*, 34 Cal. 79; *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. 61; *Gauthier v. Rusicka*, 3 N. Dak. 1, 53 N. W. 80. See *Mulkey v. Mulkey*, 100 Cal. 91, 34 Pac. 621.

¹²³ *Montijo v. Robert Sherer & Co.*,

6 Cal. App. 558, 91 Pac. 261; *Schaeffer v. Gold etc. Min. Co.*, 36 Mont. 410, 93 Pac. 344.

¹²⁴ *Copper King of Arizona v. Johnson*, 195 U. S. 627, 49 L. Ed. 351, 25 Sup. Ct. 793, 76 Pac. 594, 9 Ariz. 67.

¹²⁵ *Security Loan etc. Co. v. Estudillo*, 134 Cal. 166, 66 Pac. 257.

¹²⁶ *Florez v. Uhrig's Admr.*, 35 Mo. 517; *Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887.

¹²⁷ *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452. See *Clarke v. Baird*, 98 Cal. 642, 33 Pac. 756.

¹²⁸ *Irvine v. Davy*, 88 Cal. 495, 26 Pac. 506.

must be tried in the regular way,¹²⁹ except upon issues of excuse for permitting the default.¹³⁰

§ 1438. **Default by fraud.**—To entitle a person to relief against a decree on the ground of fraud, it must appear that he had a defense on the merits, and that he was prevented from interposing it by the fraud of the prevailing party without fault on his part.¹³¹ But it seems the charges of fraud need not be direct.¹³² The fraud must be in procuring the judgment, and not fraud relating to the issues involved.¹³³

§ 1439. **Diligence must be shown.**—A defendant who, having suffered a default, has obtained from the plaintiff a stipulation that the default may be set aside, must use reasonable diligence in applying to the court for the relief contemplated, or his right to relief will be lost. An unexplained delay of four months after notice,¹³⁴ or of seven years in making the application, will justify the court in refusing to enforce the stipulation.¹³⁵

§ 1440. **Form of affidavit and notice.**—An affidavit on motion to vacate a judgment by default, under the sixty-eighth section of the Practice Act, must show: 1. That the default occurred through mistake, inadvertence, surprise, or excusable neglect; and 2. That the defendant has a meritorious defense.¹³⁶ The affidavit should be made by the party, or else show why it is not.¹³⁷ An affidavit by the defendant that he was under the impression when he retained counsel in a cause that the time to answer had not expired; that he did not recollect the precise day upon which the summons and complaint were served; that he was quite ill at the time, and did not as carefully note the time as he otherwise would, is insufficient to open a judgment by default.¹³⁸ A notice

¹²⁹ *Cutler v. Haycock*, 32 Utah, 354, 90 Pac. 897.

¹³⁰ *Beck v. Lavin*, 15 Idaho, 363, 369, 97 Pac. 1028.

¹³¹ *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

¹³² *Riddle v. Quinn*, 32 Utah, 341, 90 Pac. 893.

¹³³ *Boldenweck v. King*, 40 Colo. 253, 90 Pac. 634.

¹³⁴ *Smith v. Pelton W. W. Co.*, 151 Cal. 394, 90 Pac. 934.

¹³⁵ *Reese v. Mahoney*, 21 Cal. 305. As to diligence generally, see *People v. Frisbie*, 26 Cal. 135; *Lewis v. Rigney*, 21 Cal. 268; *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55.

¹³⁶ *Bailey v. Taaffe*, 29 Cal. 422.

¹³⁷ *Copper King of Arizona v. Johnson*, 195 U. S. 627, 49 L. Ed. 351, 25 Sup. Ct. 793, 9 Ariz. 67, 76 Pac. 594; *Security Loan etc. Co. v. Estudillo*, 134 Cal. 166, 66 Pac. 257.

¹³⁸ *Elliott v. Shaw*, 16 Cal. 377. As to insufficiency of affidavit consult

of motion to set aside a default judgment which states the grounds on which it is made is sufficient, and it is not necessary to state the facts in detail.¹³⁹

§ 1441. **Excuse for default.**—Misunderstanding between counsel,¹⁴⁰ or the excusable neglect or inadvertence of an attorney, is as much ground for setting aside a default judgment against his client as that of the client himself.¹⁴¹ Where, by the neglect of defendant's attorney in not appreciating that an action for conversion was against both members of a firm, he did not attend the trial, and judgment was recovered against both of them, and no affidavit of merits or defense other than a general denial was filed, and one of them intended to contest the suit, the court's refusal to vacate the judgment is not an abuse of discretion.¹⁴² Neglect or delay of defendant's attorney to serve an answer, caused by reliance on information from a reliable attorney, whom he had requested to make inquiry, after being unable to reach plaintiff's attorney by letter or telephone, to the effect that plaintiff's attorney was ill and did not desire to press the matter, and told him he could have all the time he wanted to answer, was excusable neglect within the meaning of the statute requiring a default to be set aside when taken through the excusable neglect of the other party.¹⁴³ Failure of plaintiff's attorney to file an answer to a cross-complaint, due to his belief that the counterclaim and cross-complaint constituted a single defense, and that the cross-complaint did not require an answer, is excusable negligence.¹⁴⁴ One defendant may rely upon the statement of a co-defendant that a defense will be made for him.¹⁴⁵

It being apparent that the omission of parties to plead to a cross-petition, or to appear and defend, was not intentional, they should

Bailey v. Taaffe, 29 Cal. 422; People v. Rains, 23 Cal. 128; Elliott v. Shaw, 16 Cal. 377; People v. Lafarge, 3 Cal. 130; Nickerson v. California Raisin Co., 61 Cal. 268; Morgan v. McDonald, 70 Cal. 32, 11 Pac. 350. As to sufficient affidavits, see Will v. Lytle Creek Water Co., 100 Cal. 344, 34 Pac. 830; Fulweiler v. Hog's etc. Min. Co., 83 Cal. 126, 23 Pac. 65.

¹³⁹ O'Brien v. Leach, 139 Cal. 220, 96 Am. St. Rep. 105, 72 Pac. 1004.

¹⁴⁰ Elliott v. Quinn, 40 Colo. 328, 90 Pac. 607.

¹⁴¹ O'Brien v. Leach, 139 Cal. 220, 96 Am. St. Rep. 105, 72 Pac. 1004.

¹⁴² Alferitz v. Cahen, 145 Cal. 397, 78 Pac. 878.

¹⁴³ Savings Bank of Santa Rosa v. Schell, 142 Cal. 505, 76 Pac. 250.

¹⁴⁴ Langford v. Langford, 136 Cal. 507, 69 Pac. 235.

¹⁴⁵ Montijo v. Robert Sherer & Co., 6 Cal. App. 558, 91 Pac. 261.

be granted a new trial.¹⁴⁶ The failure of defendant's counsel to know that a special appearance to move to quash the service of summons did not extend the time for a general appearance and answer is not such surprise or excusable neglect as is contemplated by the code as a reason for setting aside a default.¹⁴⁷ Where an amended complaint was served on the stenographer of defendant's attorney and lost, and never brought to the attention of the attorney, and the plaintiff's attorney, though meeting defendant's attorney nearly every day, did not mention it, but went and took default, such default may be set aside on ground of excusable neglect.¹⁴⁸ Where defendant gets several extensions of time in which to make answer, he must make a strong showing to get a judgment by default set aside on grounds of excusable neglect.¹⁴⁹

Where one of the parties lives in another county, and writes several times to the clerk of the court to learn when the cause is set for trial, and does not receive a reply until after default is entered, such default should be set aside on grounds of excusable neglect.¹⁵⁰ Where there was a misunderstanding on the part of the attorneys, and they did not thereby make an appearance for a part of the defendants, and those defendants did not learn of it until after default was taken, such default should be set aside and those defendants be allowed to answer.¹⁵¹ The opening of a default is proper where defendant relies on a settlement made with plaintiff after the filing of the suit, whereby plaintiff waives further demand and agrees to dismiss the action.¹⁵² But where the only excuse is that of inability to talk English well and to explain his defense to counsel it is not sufficient, especially when defendant has been in default for fourteen months, and has been notified twice that a default would be taken.¹⁵³ Where ten days after notice of overruling of demurrer is allowed in which to make answer and no notice is given, the judgment taken thereon, by default, should be set aside upon motion.¹⁵⁴

146 *Johnson v. Ware*, 67 Kan. 840, 73 Pac. 99.

147 *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591.

148 *Greene v. Montana Brewing Co.*, 32 Mont. 102, 79 Pac. 693.

149 *Nye v. Bill Nye etc. Co.*, 46 Or. 302, 80 Pac. 94.

150 *Western Loan etc. Co. v. Berg*, 24 Utah, 278, 67 Pac. 669.

151 *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103.

152 *McBride v. McGinley*, 31 Wash. 573, 72 Pac. 105.

153 *Moody v. Reichow*, 38 Wash. 303, 80 Pac. 461.

154 *Winchester v. Black*, 134 Cal. 125, 66 Pac. 197.

FORMS IN JUDGMENT BY DEFAULT.

§ 1442. Judgment by default—Entry of default by clerk.

Form No. 463.

In this action, the defendant, C. D., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant, C. D., in the premises is hereby duly entered according to law.

Attest my hand, and the seal of said court, this . . . day of . . . , 19..

[SEAL.]

[SIGNATURE.]

§ 1443. Judgment by default.

Form No. 464.

[TITLE.]

In this action the defendant C. D., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint herein, and the legal time for answering having expired, and the default of the said defendant in the premises having been duly entered according to law; now, at this day, on application of E. F., attorney for said plaintiff:

It is ordered, that judgment be entered herein against the said defendant C. D., as well as against the defendant E. D., not served with process, in accordance with the prayer of said plaintiff's complaint on file herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered and adjudged, that A. B., plaintiff, do have and recover of and from the said defendants, C. D. and E. D., the sum of . . . dollars, with interest thereon, at the rate of . . . per cent per annum, from the date hereof until paid; together with said plaintiff's costs and disbursements incurred in said action, amounting to the sum of . . . dollars.

And it is further ordered and adjudged, that said plaintiff do have execution against the separate property of the defendant C. D., as well as against the joint property of all the said defendants.

Judgment rendered on the . . . day of . . . , 19..

[SIGNATURE.]

§ 1444. Judgment against joint debtor not originally served.

Form No. 465.

[TITLE.]

On reading and filing the summons issued herein, whereby the defendant G. H. was required to show cause why he should not be bound by the judgment herein rendered in form by this court against all the defendants above named on the . . . day of . . . , 19.., and upon reading and filing the affidavit of the plaintiff, accompanying said summons, that to his knowledge said judgment has not been satisfied in whole or in part, and that the amount actually due thereon is . . . dollars, with interest from the date of said judgment, and it appearing by due proof that said summons and affidavit have been duly and personally served on said G. H. on the . . . day of . . . , 19.., and no copy of an answer or demurrer thereto having been served on the plaintiff or his attorney, as appears by the affidavit of M. N., on file, and the said defendant not appearing to show cause pursuant to said summons; and the time for answering said summons having expired;

And it appearing to the court that the plaintiff is entitled to judgment, that said defendant G. H. be bound by the judgment heretofore rendered in form against all the defendants, in the same manner as if he had been originally summoned in this action, and that the sum of . . . dollars is still due and unpaid on said judgment:

Now, on motion of J. K., attorney for plaintiff,

It is adjudged, that the said judgment is a valid judgment against the said G. H., and that the defendant G. H. should be and is hereby adjudged to be bound by said judgment in the same manner as if originally summoned, in the full sum of . . . dollars [name amount unpaid on the judgment], with interest from . . . , 19.., with costs of this proceeding, taxed at . . . dollars, and that the plaintiff have execution therefor.

[DATE.]

. . . , Judge.

§ 1445. Notice of motion to set aside a judgment by default.

Form No. 466.

[TITLE.]

[ADDRESS.]

Take notice, that upon the affidavit, a copy of which is herewith served, I will move said court, at the city hall [or other place, design-

nating it], on the . . . day of . . . , 19.., at the hour of . . . o'clock, A. M., of said day, or as soon thereafter as counsel can be heard, that the judgment entered by default against the defendant in this action, and all subsequent proceedings therein, be set aside, for the reasons following [state reasons in full].

[DATE.]

[SIGNATURE.]

§ 1446. Affidavit to set aside judgment by default.

Form No. 467.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. The summons and complaint in this action were served on me on the . . . day of . . . , 19..

III. Through mistake [inadvertence, surprise, or neglect, as the case may be] of . . . , [state the circumstances], I was prevented from appearing and answering this action.

IV. I further say that I have fully and fairly stated the facts of the case in this cause to G. H., my counsel, who resides at No. . . . , . . . street, in the city of . . . , and after such statement I am advised by him that I have a good and substantial defense on the merits of the action, and verily believe the same to be true.

[JURAT.]

[SIGNATURE.]

CHAPTER LII.

JUDGMENT ON PLEADINGS.

§ 1447. **In general.**—If a complaint be itself sufficient, the plaintiff may apply for judgment on the pleadings,¹ if the defendant has filed an answer which expressly admits the material facts stated in the complaint, or when the answer leaves all the material allegations of the complaint undenied. This practice is constantly pursued when denials in verified answers are literal, conjunctive, evasive, or the like; and is equally applicable where an answer which merely sets up new matter is found substantially insufficient.² Judgment on the pleadings cannot be had if there is an issue framed by such pleadings;³ and an answer negating an essential averment raises an issue for trial.⁴

§ 1448. **Defective pleading.**—When an answer is put in defective form only, plaintiff should demur, and not move for judgment on the pleadings.⁵ A motion for judgment upon the pleadings based upon a clerical error which loses its force by the correction of the error is properly denied.⁶ Nor can defendant have judgment on the pleadings on the ground that several causes of action have been improperly joined in the complaint, or a cause of action alleged which is against public policy.⁷ If, instead of demurring, advantage be taken of a defective pleading by motion for judg-

1 *Dame v. Cochiti Reduction etc. Co.*, 13 N. Mex. 10, 79 Pac. 296.

2 *Felch v. Beaudry*, 40 Cal. 439; *Corwin v. Patch*, 4 Cal. 204; *Gay v. Winter*, 34 Cal. 153; *Fitzgibbon v. Calvert*, 39 Cal. 261. See, also, *N. Y. Code Civ. Proc.*, § 537; *Lomme v. Kintzing*, 1 Mont. 290; *Sands v. Mac-lay*, 2 Mont. 42; *Hemme v. Hays*, 55 Cal. 337; *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942; *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844; *City & County of San Francisco v. Staude*, 92 Cal. 560, 28 Pac. 778; *Kendall v. San Juan etc. Min. Co.*, 9 Colo. 349, 12 Pac. 198.

3 *Moore v. Murray*, 30 Mont. 13, 75 Pac. 515; *Noland v. Owens*, 14 Okla. 408, 74 Pac. 954.

4 *Moffet v. Oregon etc. R. Co.*, 46 Or. 443, 80 Pac. 489.

5 *Gallagher v. Dunlap*, 2 Nev. 326; *Childs v. Griswold*, 15 Iowa, 438. See *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720.

6 *Raker v. Bucher*, 100 Cal. 214, 34 Pac. 654, 849.

7 *Watson v. San Francisco etc. R. R. Co.*, 50 Cal. 523; *Redding v. Puget Sound Iron M. Co.*, 36 Wash. 642, 79 Pac. 308.

ment, the court should permit an amendment of the pleading, where an amendment will cover the defect, the same as if a demurrer had been interposed.⁸

§ 1449. **Denial.**—It does not follow because defendant makes no denial of any allegation in the complaint that this is such an admission of the cause of action that a judgment contrary to the admission is erroneous, if affirmative matter of defense is stated.⁹ If the answer contains a denial of the material facts alleged as a cause of action in the complaint, and a special defense stated separately, the plaintiff is not entitled to a judgment on the pleadings, even if the entire cause of action is confessed in the special defense.¹⁰ In a suit against a former administrator by his successor, who alleges a final settlement of the former's accounts, and a final decree as to his administration, a denial of these allegations is sufficient to prevent a judgment on the pleadings.¹¹ In a suit on a promissory note, a denial that anything remains due, coupled with an allegation of payment to original holder, without notice of an alleged assignment, raises an issue of fact, and judgment for plaintiff should not be given on the pleadings.¹² Where the facts constituting a cause of action are specially admitted by the answer, a judgment may be entered against the defendant on the pleadings, notwithstanding the complaint contains an allegation of non-payment and the answer denies it.¹³ If plaintiff treats the denials as sufficient, and goes to trial and introduces evidence in support of his complaint, he cannot afterwards move for judgment on the pleadings.¹⁴

Where the defendant in an action on an account demanded a certain sum, and the answer set out an itemized account admitting responsibility for part of the sum demanded, the correctness of the account being denied in the reply, it was proper to refuse the plaintiff judgment on the pleadings for the full amount demanded

⁸ California State Tel. Co. v. Paterson, 1 Nev. 151.

⁹ Newell v. Doty, 33 N. Y. 83.

¹⁰ Nudd v. Thompson, 34 Cal. 39; Amador County v. Butterfield, 51 Cal. 526.

¹¹ Craig v. Bateman, 49 Cal. 71.

¹² Farmers etc. Bank v. Christensen, 51 Cal. 571.

¹³ Esbensen v. Hover, 3 Colo. App. 467, 33 Pac. 1008.

¹⁴ Tevis v. Hicks, 41 Cal. 123. As to what admissions are conclusive against the defendant, see Burke v. Table Mountain Water Co., 12 Cal. 403; Fremont v. Seals, 18 Cal. 433; Mathewson v. Fitch, 22 Cal. 86; Dodge v. Walley, 22 Cal. 229, 83 Am. Dec. 61; Blood v. Light, 31 Cal. 115; Numan v. City and County of San Francisco, 38 Cal. 689.

and to confine the judgment to the amount admitted in the answer.¹⁵

§ 1450. Two causes of action.—If a good plea of former adjudication is made to one cause of action, the court cannot grant judgment on the pleadings as to both causes.¹⁶

§ 1451. Demurrer must be disposed of.—When a demurrer is filed to a defendant's answer, it is irregular for plaintiff to take judgment before some disposition is made of the demurrer,¹⁷ as the demurrer must be disposed of before the issue of fact is tried,¹⁸ and before judgment on the merits can be rendered.¹⁹ But if no objection is made at the time of trial, it is not such an irregularity as entitles the plaintiff to a new trial.²⁰

§ 1452. Discretion.—Motions for judgment on the pleadings are allowed in the discretion of the court.²¹ Such motions can be allowed only where the answer wholly fails to deny any material allegation of the complaint.²² A motion for judgment on the pleadings is not in harmony with the spirit of code procedure, and is not favored.²³ And when any of the material allegations of the complaint are denied by the answer, it is error to render judgment on the pleadings.²⁴ But where a complaint states a cause of action, and proof of the affirmative averments in the answer would be immaterial, and the denials of the answer are merely of matters of law, it is proper to render a judgment for the plaintiff upon the pleadings.²⁵ Where the complaint states facts sufficient to constitute a cause of action, a motion by the defendant for judg-

15 Griffith v. Maxwell, 25 Wash. 658, 66 Pac. 106.

16 Fouts v. Pettigrew, 68 Kan. 289, 74 Pac. 1107.

17 Huse v. Moore, 20 Cal. 115; Calderwood v. Tevis, 23 Cal. 335.

18 Ellis v. Loumier, 1 Mo. 260.

19 Manifee v. D'Lashmutt, 1 Mo. 258.

20 Calderwood v. Tevis, 23 Cal. 335.

21 Fitzgerald v. Neustadt, 91 Cal. 600, 27 Pac. 936; Willson v. McDonald, Cal. Sup. Ct., July Term, 1869.

22 Id.; and see, to same effect, Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072; McDonald v. Pincus, 13

Mont. 83, 32 Pac. 283; Wallace v. Baisley, 22 Or. 572, 30 Pac. 432.

23 Currie v. Southern Pacific Co., 23 Or. 400, 31 Pac. 963.

24 Willis v. Holmes, 28 Or. 265, 42 Pac. 989; Johnson v. Manning, 3 Idaho, 352, 29 Pac. 101; Botto v. Vandament, 67 Cal. 332, 7 Pac. 753; Widmer v. Martin, 87 Cal. 88, 25 Pac. 264; Hastings v. Bank of Longmont, 4 Colo. App. 419, 36 Pac. 618.

25 Heydenfeldt v. Jacobs, 107 Cal. 373, 40 Pac. 492; Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; Simpson v. Prather, 5 Or. 86. Motion by defendant for judgment upon the pleadings, when grant-

ment upon the pleadings cannot properly be granted.²⁶ Vagueness is not visited by judgment.²⁷ A motion for judgment on the pleadings ought not to be granted where material matters denied on information and belief were not presumptively within the knowledge of the defendants.²⁸

§ 1453. Admission in answer.—If the answer set out an itemized account, admitting liability for part of plaintiff's claim, and plaintiff, by reply, denies correctness of the account, the court should not grant judgment to plaintiff on the pleadings for the full amount, but only for the amount admitted in the answer.²⁹ Upon motion for judgment on the pleadings, plaintiff admits not only all allegations of defendant's answer, but that all allegations of his own complaint which are denied are untrue;³⁰ and if the bar of the statute of limitations is pleaded, judgment for defendant cannot be granted, though the complaint show on its face that the action is barred.³¹ The admission in an answer of an assignment to plaintiff, happening of the specified contingency, and non-payment entitle plaintiff to a judgment on the pleadings.³² A matter pleaded as both a defense and a counterclaim, but constituting neither, permits judgment on pleadings.³³ An answer admitting the contract, denying a substituted contract, and alleging a breach of plaintiff, makes an issue to be tried.³⁴

§ 1454. Frivolous answer.—It seems that the plaintiff cannot move for a judgment, on a frivolous plea, unless the answer as an entirety is frivolous. If it contains several defenses, some well pleaded and some insufficient, the latter should be demurred to, or moved to be stricken out, as the case may be.³⁵ But if parts only are bad, relief is to be had by a motion to strike out.

ed, see *Hindman v. Oregon etc. Nav. Co.*, 17 Or. 614, 22 Pac. 116; *De Toro v. Robinson*, 91 Cal. 371, 27 Pac. 671; *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. 129.

²⁶ *Denis v. Velati*, 96 Cal. 223, 31 Pac. 1. See *Dexter v. Sparkman*, 2 Wash. 165, 25 Pac. 1070.

²⁷ *Kelly v. Barnett*, 16 How Pr. 135.

²⁸ *Wickersham v. Comerford*, 104 Cal. 494, 38 Pac. 101.

²⁹ *Griffith v. Maxwell*, 25 Wash. 658, 66 Pac. 106.

³⁰ *Walling v. Bown*, 9 Idaho, 184, 72 Pac. 960.

³¹ *Chemung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226.

³² *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063.

³³ *Rensberger v. Britton*, 31 Colo. 77, 71 Pac. 379.

³⁴ *Stratton's Independence v. Stark*, 20 Colo. App. 452, 79 Pac. 745.

³⁵ *Van Valen v. Lapham*, 13 How. Pr. 240.

It is true that there may be no objection to combining both of these applications in one motion; but in that case, whether judgment on the whole answer can be granted must depend on whether the parts of the pleading objected to are stricken out, and, if they are, whether the whole answer, as it then remains, be frivolous.³⁶ In an action to quiet title, an answer which denies that plaintiff is the owner or in possession of the property, except as tenant in common with defendant, and alleges that the deed set out in the plaintiff's complaint, and under which he claims, was not intended as a conveyance, but simply to enable him to sell the property, and that the grantor therein had subsequently conveyed an interest in the property to defendant, presents a defense, and plaintiff is not entitled to judgment on the pleadings.³⁷ When an answer sets up four defenses, two of which tendered issues with the complaint, and two of which in hypothetically admitting the averments of the complaint averred matter in avoidance, upon motion, it was held: 1. That the two hypothetical defenses must be stricken out; 2. That as there was enough left in the answer to put the plaintiff to proof of his case, it was unnecessary to allow an amendment.³⁸ Vagueness in pleading is not frivolousness, and is to be corrected by amendment.³⁹ A frivolous answer is one which denies no material averment in the complaint and sets up no defense, and when such an answer is filed the plaintiff may apply for judgment on the pleadings.⁴⁰ When the complaint in the second action states a cause of action, and the answer contains no denials of its allegations, but relies wholly upon the bar of the former judgment, it is proper to render judgment against the defendant upon the pleadings.⁴¹

§ 1455. **Election.**—When the defendants serve a pleading containing matter in answer and matter in demurrer to the complaint, they should be compelled to elect between the two.⁴² So where a demurrer to a plea is overruled, and the plaintiff does not obtain leave to withdraw it and file a replication, it amounts to an election to stand on the demurrer, and judgment should

36 *Lockwood v. Salhenger*, 18 Abb. Pr. 136.

37 *Garvey v. Willis*, 50 Cal. 619.

38 *Hamilton v. Hough*, 13 How. Pr. 14.

39 *Kelley v. Barnett*, 16 How. Pr. 135.

40 *Hemme v. Hays*, 55 Cal. 337. See *Montgomery v. Merrill*, 62 Cal. 385.

41 *Johnson v. Vance*, 86 Cal. 110, 24 Pac. 862.

42 *Slocum v. Wheeler*, 4 How. Pr. 373; *Struver v. Ocean Ins. Co.*, 16 How. Pr. 422.

be rendered for the defendant.⁴³ If plaintiff, instead of proceeding to trial upon the merits, announces that he will stand upon the motion for judgment on the pleadings, the court may enter judgment for defendant.⁴⁴

§ 1456. **Verified answer.**—A verified answer which in any part contains a distinct denial of a fact material to plaintiff's recovery cannot, whatever its defects, be treated as a nullity, so as to entitle plaintiff to judgment on the pleadings.⁴⁵ Technically, a motion for judgment upon the pleadings, when there is a verified complaint and an unverified answer, is not good practice. The motion should be to strike the answer from the files, and for judgment as by default.⁴⁶

§ 1457. **Notice of motion for judgment on the pleadings.**

Form No. 468.

[TITLE.]

Please take notice that the plaintiff will, on the . . . day of . . . , 19.., at the courthouse, in the city of . . . and at the hour of . . . o'clock of said day, or as soon thereafter as counsel can be heard, move the court for judgment on the pleadings in said action, on the ground that the answer filed therein is frivolous [or, state other grounds]. This motion will be based upon the pleadings on file in said action.

⁴³ Marshall v. Platte Co., 12 Mo. 88.

⁴⁴ Moore v. Murray, 30 Mont. 13,
75 Pac. 515.

⁴⁵ Ghirardelli v. McDermott, 22
Cal. 539.

⁴⁶ Speer v. Craig, 16 Colo. 478,
27 Pac. 891; Tullock v. Belleville etc.
Skein Works, 17 Colo. 579, 31 Pac.
229.

CHAPTER LIII.

JUDGMENT BY CONFESSION.

§ 1458. **In general.**—A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed in the code. Such judgment may be entered in any court having jurisdiction for like amounts.¹ A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect: 1. It must authorize the entry of judgment for a specified sum; 2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due; 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.² The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment-book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed, thereupon becomes the judgment-roll.³ Judgment by confession may also be entered in a justice's court for any amount within its jurisdiction.⁴ The confession must specify the justice's court in which it is to be entered.⁵ The statement and affidavit in all other respects is the same as in superior courts. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it.⁶

¹ Cal. Code Civ. Proc., § 1132; Alaska Codes, pt. 4, ch. 21, §§ 241-247; Ariz. Civ. Code, par. 1437; Idaho Rev. Codes, § 5060; Mont. Rev. Codes, §§ 7250-7253; Nev. Comp. Laws, §§ 3454-3456; N. Mex. Comp. Laws, §§ 3077-3084; N. Dak. Code Civ. Proc., § 6130; Or. B. & C. Codes, §§ 186, 192, 199, 201; S. Dak. Code Civ. Proc., §§ 309, 784-786;

Utah Rev. Stats., §§ 3213-3215; Wash. Bal. Codes, §§ 5094, 5095. 5099; Wyo. Rev. Stats., §§ 3617, 3763, 3764.

² Cal. Code Civ. Proc., § 1133.

³ Cal. Code Civ. Proc., § 1134.

⁴ Cal. Code Civ. Proc., §§ 889, 1132, 1135.

⁵ Cal. Code Civ. Proc., § 889.

⁶ Cal. Code Civ. Proc., § 1135.

§ 1459. **Who may confess judgment.**—A confession of judgment against a corporation, based upon appearance by its vice-president and presiding officer and an affidavit setting out his capacity and the facts as to the indebtedness, is not void on its face.⁷ Though a director of a school district is authorized to appear for and on behalf of the district in all suits wherein the district is a party, he cannot confess judgment for the school district, and such confession, unless authorized by the board, is void.⁸ A city council may authorize the city attorney to appear in court and confess judgment in a proceeding wherein the city has been served as defendant.⁹

§ 1460. **Confession by attorney.**—In Oklahoma, in absence of previous process or proceeding, an attorney can confess judgment only when authorized by warrant of attorney, acknowledged or proved as a conveyance of land, the defendant having previously filed his affidavit stating concisely the facts on which the indebtedness arose and the amount justly due.¹⁰

§ 1461. **Collateral attack.**—Every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolved, in trust for the benefit of others than the debtor.¹¹ A confession of judgment made for such a purpose will be held void as to such creditor upon a direct proceeding taken by him to avoid it.¹² If confessions of judgment are prohibited by the insolvent laws, the assignee in insolvency can have them adjudged void upon a proper proceeding for that purpose; but attaching creditors cannot assail them in equity, if the judgments confessed were for debts justly due.¹³ It is not necessary that the plaintiff in such action should be either a judgment or execution creditor. A lien acquired by attachment suffices.¹⁴ Where a judgment was rendered by con-

⁷ *Manley v. Mayer*, 68 Kan. 377, 75 Pac. 550.

⁸ *Moore v. School District*, 11 Okla. 332, 66 Pac. 279.

⁹ *Smith v. State*, 64 Kan. 730, 68 Pac. 641.

¹⁰ Okla. (Wilson's) Rev. & Annot. Stats., §§ 4592-4594; *Harn v. Cole*, 20 Okla. 553, 95 Pac. 415.

¹¹ Cal. Civ. Code, § 3439.

¹² *Ryan v. Daly*, 6 Cal. 239; *Lee v. Figg*, 37 Cal. 328, 99 Am. Dec. 271.

¹³ *Pehrson v. Hewitt*, 79 Cal. 594, 21 Pac. 950.

¹⁴ *Scales v. Scott*, 13 Cal. 76; *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519.

fession in open court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot, at the instance of one not a party to the judgment, be invoked to set aside or show the judgment was a nullity.¹⁵ Where judgment is taken by confession in good faith and for value, it cannot be impeached for fraud between other parties.¹⁶ To be vacated, the judgment must be wholly void. One sufficient item will not avoid it, if the rest be good.¹⁷ But if for the purpose of defrauding other creditors one creditor obtains judgment against the debtor for a larger sum than is due, such judgment is void as to the other creditors.¹⁸ Judgment cannot be impeached by attaching creditors; only by the holder of a judgment.¹⁹

§ 1462. **Insufficient statements.**—A statement for confession of judgment, to the effect that the indebtedness is upon a note, etc., is insufficient. So where the statement is that the indebtedness is for goods sold and delivered and money had and received, it is insufficient in this, that it does not show the kind or quantity or price of the goods, or time of sale, or when the money was received, or under what circumstances, or how much of the indebtedness is for money and how much for goods; and the judgment confessed is *prima facie* fraudulent.²⁰ For cash loaned, without giving particulars of loans, was held insufficient.²¹ So for balance of account, without stating any facts as to sales out of which it arose.²² It should appear by some form of direct statement that at the very instant the judgment was confessed the relation of debtor and creditor existed, and to the extent stated in the judgment.²³ To rebut the presumption of fraud, the facts proved must be consistent with the averments of the statement, and in support of them.²⁴

¹⁵ Cloud v. El Dorado County, 12 Cal. 133, 73 Am. Dec. 526.

¹⁶ Kirby v. Fitzgerald, 31 N. Y. 417.

¹⁷ Frost v. Koon, 30 N. Y. 428.

¹⁸ Anderson v. Bank of Lassen County, 140 Cal. 695, 74 Pac. 287.

¹⁹ Bentley v. Goodwin, 15 Abb. Pr. 82. As to impeachment of judgment by confession, see Miller v. Bank, 2 Or. 291; Miller v. Oregon etc. Mfg. Co., 3 Or. 24; Allen v. Norton, 6 Or. 344.

²⁰ Cordier v. Schloss, 18 Cal. 576. See, also, Wilcoxon v. Burton, 27 Cal. 233, 87 Am. Dec. 66; Richardson v. Fuller, 2 Or. 179; Puget Sound Nat. Bank v. Levy, 10 Wash. 499, 45 Am. St. Rep. 803, 39 Pac. 142.

²¹ McDowell v. Daniels, 38 Barb. 143.

²² Miller v. Earle, 24 N. Y. 110, 112.

²³ Denver v. Burton, 28 Cal. 549.

²⁴ Pond v. Davenport, 44 Cal. 487.

§ 1463. **Joint debtor.**—A judgment by confession of one joint debtor will not reach the joint property, but be effective only against him who authorizes its entry, as such a judgment is unauthorized.²⁵ In an action on a joint contract, if one be defaulted and the other go to trial on a plea peculiar to himself, judgment in his favor will not discharge the defaulting defendant; but if the defense be a common one it will release all defendants.²⁶

§ 1464. **Judgment creditor, proceedings by.**—A judgment creditor, made such by confession of judgment, who seeks to reach money in the hands of the junior judgment creditors, upon the ground that he has a prior lien upon the same, must aver in his complaint that at the time his judgment was rendered the amount for which it was rendered was unpaid and due.²⁷

§ 1465. **On award.**—A judgment may be entered by confession for the amount specified in the award, in the same way that it may for the sum mentioned in a bond, note, or other instrument; but that is a judgment by confession.²⁸

§ 1466. **Promissory note.**—Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void against creditors.²⁹ That notes specified were given for purchase of a described indebtedness, without specifying original consideration, was held sufficient.³⁰

§ 1467. **Setting aside confessions.**—An application by a defendant, or by a judgment creditor, to set aside his confession of judgment, should show that the claim was not just, and that the judgment ought not to have been confessed. Whether he could thus impeach his former acts is doubtful. A junior judgment creditor has no right to join with the defendant in such

²⁵ *Flannery v. Anderson*, 4 Nev. 437; Nev. Pr. Act, § 32.

²⁶ *Swanzy v. Parker*, 50 Pa. St. 441, 88 Am. Dec. 549.

²⁷ *Denver v. Burton*, 28 Cal. 549.

²⁸ *Gunter v. Sanchez*, 1 Cal. 48.

²⁹ *McKenty v. Gladwin*, 10 Cal.

227. As to sufficiency of statement on a promissory note, see *Acker v. Acker*, 1 Keyes, 291; *Puget Sound Nat. Bank v. Levy*, 10 Wash. 499, 45 Am. St. Rep. 803, 39 Pac. 142.

³⁰ *Kirby v. Fitzgerald*, 31 N. Y. 417.

application.³¹ In a suit to set aside a judgment confessed by a party to defraud his creditors, it is not necessary that plaintiff should be either a judgment or execution creditor. A lien acquired by attachment suffices. A slight mistake in the computation of interest, the date being given, is no evidence of fraud.³² A judgment by confession upon a statement which does not sufficiently state the facts out of which the indebtedness arose, nor that the amount confessed was justly due, is not a nullity on its face, and can only be called in question by the creditors of the defendant on the ground of fraud in a direct proceeding for that purpose.³³ A general allegation that the confession of judgment was to hinder, delay, and defraud is not sufficient; where fraud is alleged, the facts must be set forth.³⁴ A debtor may prefer a particular creditor by giving a confession of judgment, unless prohibited by statute. It is not necessary to annex a statement on which a confession of judgment is rendered in a proceeding to set aside the confession upon the ground of insufficiency of such statement.³⁵

Where, in an action against a school district, a director, assuming to act for the district, appears and confesses judgment, such judgment will be set aside upon motion of the treasurer, upon a showing that all authority to appear for the district had been taken from the director and vested in the treasurer, that the director knew that fact, and that the judgment had been obtained by collusion between the claimant and the director.³⁶

§ 1468. **Several judgments.**—Where the same fraudulent debtor confesses several fraudulent judgments in several courts, it would not be necessary for a creditor to bring a different suit in each different court.³⁷ In such cases the question of fraud, if there be any proof, is for the jury; otherwise, for the court.³⁸

§ 1469. **Sufficiency of statement.**—The statute requires the debtor to state enough of facts to enable creditors to inquire into the transaction.³⁹ General specification of loans and purposes

31 Arrington v. Sherry, 5 Cal. 513.

32 Scales v. Scott, 13 Cal. 76.

33 Lee v. Figg, 37 Cal. 328, 99 Am. Dec. 271.

34 Meeker v. Harris, 19 Cal. 289, 79 Am. Dec. 215.

35 Vannice v. Greene, 14 Iowa, 262.

36 Moore v. School District, 11 Okla. 332, 66 Pac. 279.

37 Uhlfelder v. Levy, 9 Cal. 615.

38 King v. Davis, 34 Cal. 100.

39 McDowell v. Daniels, 38 Barb. 143.

for which they were made was held sufficient;⁴⁰ so a general statement that indebtedness was in respect of sale of interest in partnership property.⁴¹ So as to facts as to numerous sales, conducing to a balance, for which judgment is confessed.⁴² So as to general statement as to notes indorsed for accommodation of confessor.⁴³

§ 1470. **Void judgments.**—A judgment confessed for the purpose of hindering, delaying, or defrauding creditors is void as to such creditors.⁴⁴ A judgment by confession is void, unless the statement authorizing its entry is signed by the person against whom the judgment is rendered.⁴⁵ The authority given by statute for entering judgment by confession must be strictly pursued.⁴⁶

§ 1471. **Judgment by confession—Miscellaneous.**—Under section 416 of the Washington Code of Procedure, in an action upon a contract against copartners, when one of the partners confesses judgment without the consent of the others, judgment is authorized against all the partners, to be enforced against the partnership property, and against the separate property of the partner making the confession.⁴⁷ Strangers to a judgment by confession are not concluded by its date nor by its recitals.⁴⁸ The enforcement of a judgment entered by confession, without a substantial compliance with the statute authorizing such entry, may be enjoined at the suit of a third party prejudiced thereby.⁴⁹ No Colorado statute authorizes a clerk to enter a judgment in vacation by confession in any cause against a county, and a

⁴⁰ *Frost v. Koon*, 30 N. Y. 428.

⁴¹ *Thompson v. Van Vechten*, 27 N. Y. 568. Confession sustained stating facts sufficient to sustain liability by necessary implication. *Read v. French*, 28 N. Y. 285. Confession specifying consideration of notes in general terms upheld. *Ely v. Cooke*, 28 N. Y. 365; *Kellogg v. Cowing*, 33 N. Y. 408.

⁴² *Neusbaum v. Keim*, 24 N. Y. 325. See, also, *Curtis v. Corbit*, 25 How. Pr. 58.

⁴³ *Hopkins v. Nelson*, 24 N. Y. 518.

⁴⁴ *Ryan v. Daly*, 6 Cal. 238; *Scales v. Scott*, 13 Cal. 76.

⁴⁵ *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

⁴⁶ *Chapin v. Thompson*, 20 Cal. 681; *Richards v. McMillan*, 6 Cal. 419, 65 Am. Dec. 521; *Cordier v. Schloss*, 18 Cal. 576; *Bacon v. Raybould*, 4 Utah, 357, 10 Pac. 481, 11 Pac. 510; *Schuster v. Rader*, 13 Colo. 329, 22 Pac. 505.

⁴⁷ *Bank of Shelton v. Willey*, 7 Wash. 535, 35 Pac. 411. Compare *Richardson v. Fuller*, 2 Or. 179.

⁴⁸ *Schuster v. Rader*, 13 Colo. 329, 22 Pac. 505.

⁴⁹ *Id.* See *Ling v. King*, 91 Ill. 571; *Brown v. Hathaway*, 10 Minn. 303.

judgment so entered against a county will not furnish a basis for the issue of bonds.⁵⁰

§ 1472. Judgment by consent.—A judgment by consent, in an action in which the court has jurisdiction of the subject-matter and of the parties, will bind them and their privies as effectually as if it had been entered after a trial of the issues.⁵¹ Judgment entered on the stipulation of the parties is in fact a judgment by consent.⁵² Such a stipulation is of no avail if entered after expiration of three years.⁵³ Appeal will not lie from a judgment by consent.⁵⁴ But it will not be presumed in support of a judgment that it was given by consent. This must be shown affirmatively.⁵⁵ If the agreement of the parties to obtain a judgment settling conflicting claims to the use of water does not express the intention of the parties, the remedy is by an action to correct the agreement, as the court cannot frame a decree differing from the agreement.⁵⁶

§ 1473. Statement and confession of judgment.

Form No. 469.

[TITLE.]

I, C. D., defendant in the above-entitled action, do hereby confess judgment therein, in favor of A. B., the plaintiff in the said action, for the sum of . . . dollars, and authorize judgment to be rendered therefor against me, with legal interest thereon from this date.

This confession of judgment is for a debt justly due and owing to the said plaintiff, arising upon the following facts, to-wit: [State facts specifically, with circumstances, date, place, etc.]

[SIGNATURE.]

STATE OF . . . }
COUNTY OF . . . } ss.

C. D., being duly sworn, deposes and says as follows:

I am the person who signed the above statement, and I am

⁵⁰ Abbott v. Board of Commrs., 18 Colo. 6, 30 Pac. 1031.

⁵¹ Partridge v. Shepard, 71 Cal. 470, 12 Pac. 480. See McCreery v. Fuller, 63 Cal. 30.

⁵² Corby v. Abbott, 28 Mont. 523, 73 Pac. 120.

⁵³ Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

⁵⁴ Corby v. Abbott, 28 Mont. 523, 73 Pac. 120.

⁵⁵ San Francisco Sav. Union v. Myers, 76 Cal. 624, 18 Pac. 686.

⁵⁶ People's Ditch Co. v. Fresno etc. Irr. Co., 152 Cal. 87, 92 Pac. 77; Andrews v. Moore, 14 Idaho, 465, 94 Pac. 579.

indebted to the said A. B. in the sum of . . . dollars in said statement mentioned; and the facts stated in the above confession and statement are true.

[JURAT.]

[SIGNATURE.]

§ 1474. Judgment by confession in open court.

Form No. 470.

[TITLE.]

On this . . . day of . . . , 19 . . . , come the above-named parties in open court, and the said defendant, C. D., says that he is justly indebted to the said plaintiff in the sum of . . . dollars, upon a certain promissory note executed by said defendant to the plaintiff for borrowed money, of which the following is a copy: [Insert copy of note, or statement showing the indebtedness.]

And the said plaintiff being present in court and consenting thereto, the said defendant, C. D., confesses judgment for said demand, and asks that judgment be rendered against him therefor in favor of the plaintiff for said sum of . . . dollars:

It is adjudged, that the plaintiff, A. B., do have and recover of the defendant, C. D., the sum of . . . dollars, with costs, taxed at . . . dollars, making in all the sum of . . . dollars.

Dated . . . , 19..

By the Court:

R. S., Clerk.

[In Oklahoma, if an attorney confesses judgment, he must produce the warrant and file the same or a copy, in which case the above form should be waived by reciting the fact of confession.]

CHAPTER LIV.

JUDGMENT ON DISMISSAL AND NONSUIT.

§ 1475. **Dismissal of action—Nonsuit.**—An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff himself, at any time before trial, upon the payment of his costs, if a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of defendant, or if the cross-complaint has been stricken from the files by order of the court.¹ Where the landowner files a cross-complaint against his co-defendant, the mortgagee, disputing the validity of his foreclosure, such is not a counterclaim, it being a claim between two defendants and not between plaintiff and defendant.² If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon. The argument and submission of a motion for judgment on the pleadings and plaintiff's failure to reply to defendant's answer is a "trial," under the terms of this section.³ 2. By either party, upon the written consent of the other; 3. By the court, when either party fails to appear on the trial, and the other appears and asks for the dismissal; 4. By the court, when upon the trial, and before the final submission of the case, the plaintiff abandons it; 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.⁴ A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when upon his facts he is entitled to no relief, either at law or in equity. If, then, upon the facts stated in his complaint, the plaintiff would have been entitled to

¹ *Alpers v. Bliss*, 145 Cal. 565, 79 Pac. 171.

² *Long v. McGowan*, 16 Colo. App. 540, 66 Pac. 1076.

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³ *Mont. Rev. Codes*, § 6714; *State v. District Court*, 32 Mont. 37, 79 Pac. 546.

⁴ *Cal. Code Civ. Proc.*, § 581.

relief in equity under the old system of practice, the action cannot be dismissed.⁵

§ 1476. A dismissal of an action by a stipulation signed by both parties, which provides that each party shall pay his own costs, is such a determination of the action in favor of the defendant as will enable him to maintain an action for malicious prosecution.⁶ Allowing an action to rest without service of summons for two years and eight months after the summons is issued is such a want of diligence as to justify the court in dismissing the action.⁷ Provision is now made for the dismissal of an action unless summons shall have been issued within one year, or if the summons be not served and return thereon made within three years after the commencement of the action.⁸

§ 1477. Dismissal by consent.—After an action has been tried and submitted, the plaintiff has no right to dismiss it, nor has the court any authority to enter an order of dismissal without the consent of the defendant.⁹ Where a defendant, on mortgage foreclosure, seeks by cross-complaint to establish his own mortgage as prior to plaintiff's, he cannot dismiss his cross-complaint without plaintiff's consent.¹⁰

§ 1478. Dismissal by the court.—The court has authority to grant a nonsuit only in cases specified in section 581 of the Code of Civil Procedure.¹¹ When an action is impertinent, vexatious, and contemptuous because of having been prohibited by a former decree, it should be dismissed.¹² Courts should, of their own motion, dismiss a case based upon a consideration which contravenes public policy, whether the parties to the suit take the objection or not.¹³ But the court cannot arbitrarily dismiss an

5 Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Peters v. Foss, 20 Cal. 587; People v. Loewy, 29 Cal. 264.

6 Kinsey v. Wallace, 36 Cal. 463.

7 Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213.

8 Cal. Code Civ. Proc., § 581a.

9 Heinlin v. Castro, 22 Cal. 100. As to dismissal by consent, see Stoutenborough v. Board of Education, 104 Cal. 664, 38 Pac. 449.

10 Rogers v. Parker, 136 Cal. 313, 68 Pac. 975.

11 Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830.

12 Kirby v. Pease, 33 Wash. 511, 74 Pac. 665.

13 Valentine v. Stewart, 15 Cal. 387. As to the power of court in compulsory nonsuits, see Ringgold v. Haven, 1 Cal. 108; Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303; Silsby v. Foote, 14 How. 218, 14 L. Ed. 394; Castle v. Bullard, 23 How. 172, 16 L. Ed. 424; Folger v. The Robert G. Shaw, 2 Woodb. & M. 531, Fed.

action at issue of its own motion, without notice and without consent of the parties.¹⁴ Where plaintiff relies on the complaint after demurrer thereto is sustained, a judgment of dismissal or for defendant is proper.¹⁵ In Oregon, there is no special provision for dismissing a suit or action because the summons has not been served, and a proper manner of raising the question of lack of jurisdiction not appearing on the face of the complaint is by a special appearance.¹⁶ When the plaintiff closes his evidence, if the court is of opinion that it would not sustain a verdict in favor of plaintiff upon the testimony, a nonsuit should be granted.¹⁷ In deciding whether the plaintiff has made a sufficient case, the cross-examination as well as the examination is to be considered.¹⁸ On defendant's motion for a nonsuit, the court will permit the plaintiff to supply the defect, if he can do so.¹⁹

§ 1479. **Rights of interveners.**—Plaintiff in an action to have certain taxes and bonds and sale of land for taxes declared void and certificate of sale enjoined may dismiss as against interveners as well as defendants, the interveners being the holders of the bonds and purchasers at the sale.²⁰ Where an action is dismissed as to plaintiff, it cannot be retained to litigate questions between defendants in which plaintiff has no interest.²¹

§ 1480. **By plaintiff.**—Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter-

Cas. No. 4899; *Tompson v. Campbell*, Hempst. 8, Fed. Cas. No. 13944a; *Hyde v. Barker*, Burn. 148. Compare *Linthicum v. Remington*, 5 Cranch C. C. 546, Fed. Cas. No. 8377. As to power of court to dismiss action for want of prosecution, see *Hassey v. South San Francisco Homestead etc. Assoc.*, 102 Cal. 611, 36 Pac. 945; *Kubli v. Hawkett*, 89 Cal. 638, 27 Pac. 57; *Saville v. Frisbie*, 70 Cal. 87, 11 Pac. 502; *Kreiss v. Hotaling*, 99 Cal. 383, 33 Pac. 1125; *Murray v. Gleeson*, 100 Cal. 511, 35 Pac. 88; *McDonald v. Swett*, 76 Cal. 257, 18 Pac. 324; *Diggins v. Thornton*, 96 Cal. 417, 31 Pac. 289; *Fanning v. Foley*, 99 Cal. 336, 33 Pac. 1098; *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78.

¹⁴ *Teller v. Sievers*, 20 Colo. App. 109, 77 Pac. 261.

¹⁵ *Litch v. Kerns*, 8 Cal. App. 747, 97 Pac. 897.

¹⁶ *Belknap v. Charlton*, 25 Or. 41, 34 Pac. 758.

¹⁷ *Ensminger v. McIntire*, 23 Cal. 593; *Geary v. Simmons*, 39 Cal. 232.

¹⁸ *Masten v. Griffing*, 33 Cal. 116.

¹⁹ *Gardiner v. Schmaelzle*, 47 Cal. 588; *Abbey Homestead v. Willard*, 48 Cal. 617. As to nonsuit in an action for negligence, see *Watson v. San Francisco etc. R. R. Co.*, 50 Cal. 523.

²⁰ *Henry v. Vineland Irr. Dist.* 140 Cal. 376, 73 Pac. 1061.

²¹ *Long v. McGowan*, 16 Colo. App. 540, 66 Pac. 1076.

claim.²² So in ejectment. Nor, under section 148 of the California Practice Act, is he bound to tender costs before the nonsuit,²³ and the court has no jurisdiction to require that he pay the costs embraced in defendant's cost-bill, but he may be required to pay the clerk's costs.²⁴ Upon defendant's refusal to accept the costs paid into court by plaintiff and tendered to defendant, it is not error for the court to permit the withdrawal of such money.²⁵ But the plaintiff has not the absolute right to take a nonsuit after the case has been finally submitted and the jury has retired; but such right does exist at any time before such final submission and retirement.²⁶ In ejectment, the plaintiff may at any time before trial dismiss the action as to some of the defendants and proceed against the others alone.²⁷ If one of several defendants in ejectment answers, and the others make default, the plaintiff may before trial dismiss the action as to the defendant answering, and take judgment against the others.²⁸ In an action upon a joint and several bond, where all the persons who sign it are made defendants in the complaint, the plaintiff may go to trial, if he elects so to do, before all the defendants are served, and may dismiss as to some of the defendants and take judgment against the others.²⁹ If the defendant set up a counterclaim asking for affirmative relief, the plaintiff cannot before trial have a dismissal of his own motion.³⁰ Refusal of plaintiff to amend his complaint, upon demurrer being sustained, may be considered as a voluntary dismissal.³¹ Where a court is considering a demurrer to plaintiff's evidence, and

²² Hancock Ditch Co. v. Bradford 13 Cal. 637; Currie v. Southern Pacific Co., 23 Or. 400, 31 Pac. 963.

²³ Cal. Code Civ. Proc., § 581, subd. 1; Dimick v. Deringer, 32 Cal. 488; Stewart v. Gray, Hempst. 94, Fed. Cas. No. 13428a. See Gordon v. Goodell, 34 Ill. 429; Folger v. The Robert G. Shaw, 2 Woodb. & M. 531, Fed. Cas. No. 4899; Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46, 7 L. Ed. 47; Tobey v. Chafin, 3 Sumn. 379, Fed. Cas. No. 14066.

²⁴ Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299.

²⁵ Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

²⁶ Brown v. Harter, 18 Cal. 76; Sanders v. Sanders, 24 Ind. 133. See

Casey v. Jordan, 68 Cal. 246, 9 Pac. 92, 305; Thompson v. Sprraig, 66 Cal. 350, 5 Pac. 506; Hinkel v. Donohue, 90 Cal. 389, 27 Pac. 301; Waite v. Wingate, 4 Wash. 324, 30 Pac. 81.

²⁷ Reed v. Calderwood, 22 Cal. 464.

²⁸ Dimick v. Deringer, 32 Cal. 488.

²⁹ People v. Evans, 29 Cal. 429. See, also, Hamm v. Basche, 22 Or. 513, 30 Pac. 501.

³⁰ Thompson v. Sprraig, 66 Cal. 350, 5 Pac. 506; Hinkel v. Donohue, 90 Cal. 389, 27 Pac. 301; Denver etc. Ry. Co. v. Copley, 9 Colo. 152, 10 Pac. 669; Robinson v. Placerville etc. R. R. Co., 65 Cal. 263, 3 Pac. 878.

³¹ Long v. McGowan, 16 Colo. App. 540, 66 Pac. 1076.

giving reasons why it will have to be sustained, the plaintiff may, even at that point, dismiss without prejudice.³²

§ 1481. **Dismissal of action—Continued.**—An action will not be dismissed on the ground that at the time it was commenced there was another action pending between the same parties for the same cause of action, if prior to the second action the former had been dismissed by stipulation of the parties.³³ An action is properly dismissed if the complaint therein has been stricken out by the consent of both parties.³⁴ An intervener against whom no relief is prayed can dismiss his complaint in intervention.³⁵ The court has discretionary power to entertain and pass upon a motion made by *amici curiæ* to dismiss a suit which has been pending for years, without an effort by either party to bring it to trial, and which is a cloud upon the title to land, in which the moving parties are interested, though they are not parties to the action.³⁶ No notice of motion is necessary before an *amicus curiæ* moves to dismiss an action on the ground that it is fictitious and collusive.³⁷ The filing by the plaintiff of a motion to dismiss his action after the sustaining of a demurrer to the complaint is a waiver of any error of the court in ruling upon the demurrer.³⁸ A motion to dismiss, made by the defendant at the close of the plaintiff's case, is waived unless renewed after all the evidence is in.³⁹ An action which is directed to be dismissed is not dismissed until the judgment of dismissal has been entered in the judgment-book and an entry of dismissal made in the register of actions. Mere entry in the clerk's register does not constitute dismissal.⁴⁰

§ 1482. **Dismissal, effect of.**—A dismissal of an action is in effect a final judgment in favor of the defendant. It is a final

³² Kan. Code, § 397; Pugsley v. Chicago etc. Ry. Co., 69 Kan. 599, 77 Pac. 579.

³³ Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327.

³⁴ Smith v. Ling, 73 Cal. 72, 14 Pac. 390. As to dismissal for neglect to enter judgment for six months, see Gardner v. Tatum, 77 Cal. 458, 19 Pac. 879; Marshall v. Taylor, 97 Cal. 422, 32 Pac. 515; Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121.

³⁵ Sheldon v. Gunn, 56 Cal. 582.

³⁶ Tomkin v. Harris, 90 Cal. 201, 27 Pac. 202.

³⁷ Haley v. Eureka etc. Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

³⁸ Lowman v. West, 7 Wash. 407, 35 Pac. 130.

³⁹ Illstad v. Anderson, 2 N. Dak. 167, 49 N. W. 659.

⁴⁰ Page v. Page, 77 Cal. 83, 19 Pac. 183; Acock v. Halsey, 90 Cal. 215, 27 Pac. 193; Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209;

decision of that action as against all claims made by it, although it may not be a final determination of the rights of the parties, as they may be presented in some other action.⁴¹ The dismissal of a joint defendant does not affect the liability of his co-defendant.⁴² When plaintiff before trial files a dismissal with the clerk, and the same is entered, the case is dismissed and beyond the jurisdiction of the court, save for the purpose of entering a judgment for defendant, for the costs.⁴³ If an action is improperly dismissed by the plaintiff, defendant's remedy is by appeal from the judgment, and not by motion to set it aside.⁴⁴

§ 1483. **The same—Continued.**—The voluntary dismissal of an action, without any agreement of the parties, or other circumstances tending to show that such dismissal was intended as a final disposition of the case, is not a bar to another action.⁴⁵ A dismissal of an election contest before citation is served upon the defendant, and before any appearance has been made in the action, does not operate as a *retraxit*, and is no bar to the institution of another contest.⁴⁶ A judgment dismissing an action because of the failure of the plaintiff, who was a non-resident of the state, to give security for costs, is not upon the merits, and only concludes the matter then directly adjudged, and is not a bar to a subsequent action, founded upon the same cause of action, by the same plaintiff, after becoming a resident of the state.⁴⁷ A judgment dismissing an action for want of prosecution may be set aside by the trial court upon good cause being shown therefor.⁴⁸ An order of court dismissing the proceedings on a motion for a new trial cannot be set aside on an *ex parte*

Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Rochat v. Gee, 91 Cal. 355, 27 Pac. 670.

⁴¹ Leese v. Sherwood, 21 Cal. 151; Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46, 7 L. Ed. 47; Amis v. Smith, 16 Pet. 303, 10 L. Ed. 973; Jay v. Almy, 1 Woodb. & M. 262, Fed. Cas. No. 7236, 3 Black. Com. 295; Episcopal etc. Society v. Episcopal Church etc., 1 Pick. 372; Homer v. Brown, 16 How. 354, 14 L. Ed. 970. See Merritt v. Campbell, 47 Cal. 542; Crossman v. Davis, 79 Cal. 603, 21 Pac. 963.

⁴² Carper v. Risdon, 19 Colo. App. 530, 76 Pac. 744.

⁴³ Mont. Rev. Codes, § 6714; Miller v. Northern Pacific Ry., 30 Mont. 289, 76 Pac. 691.

⁴⁴ Higgins v. Mahoney, 50 Cal. 444.

⁴⁵ Parks v. Dunlap, 86 Cal. 189, 25 Pac. 916; Pierce v. Hilton, 102 Cal. 276, 36 Pac. 595.

⁴⁶ Lord v. Dunster, 79 Cal. 477, 21 Pac. 865.

⁴⁷ Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121.

⁴⁸ Lodtman v. Schluter, 71 Cal. 94, 16 Pac. 540.

application.⁴⁹ Though the dismissal of an action may not be warranted on the ground stated in the judgment order, yet if the record discloses other grounds which, as a matter of law, show that the plaintiff was not entitled in any event to recover in the action, a judgment of dismissal may be upheld.⁵⁰

§ 1484. Ejectment.—In ejectment, upon disclaimer of possession or interest in the property, a judgment for the plaintiff cannot be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit.⁵¹ When the evidence and the presumption reasonably arising therefrom tend to prove the facts in controversy, a nonsuit is improper. The case should be submitted to the jury.⁵² A nonsuit should not be granted if there is evidence tending to prove all the material allegations of the complaint.⁵³ It will not be granted where there is some evidence tending to show prior possession.⁵⁴ It is error to refuse in an action of ejectment a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action.⁵⁵

§ 1485. Judgment on nonsuit.—A judgment on nonsuit must not be entered as a judgment on the merits, for the reason that the defendant might proceed with his own case, and obtain judgment on the merits, and by moving for a nonsuit he waives this right.⁵⁶ A judgment of nonsuit is a final judgment within the meaning of the Idaho code.⁵⁷ The taking of a nonsuit in a case tried before the court does not affect defendant's right to judgment on his cross-complaint.⁵⁸

§ 1486. Nonsuit—Nature of.—A motion for a nonsuit is in the nature of a demurrer to the evidence. It admits the truth of the plaintiff's testimony, together with every inference of fact which the jury may legally draw from it.⁵⁹ Like a demurrer to

⁴⁹ Greehn v. Marker, 67 Cal. 364,
7 Pac. 783.

⁵⁰ Wadsworth v. Union Pacific Ry.
Co., 18 Colo. 600, 36 Am. St. Rep. 309,
33 Pac. 515, 23 L. R. A. 812.

⁵¹ Noe v. Card, 14 Cal. 576; Pioche
v. Paul, 22 Cal. 106.

⁵² De Ro v. Cordes, 4 Cal. 117.

⁵³ McKee v. Greene, 31 Cal. 418.

⁵⁴ Sharon v. Davidson, 4 Nev. 416.

⁵⁵ Garner v. Marshall, 9 Cal. 268.

⁵⁶ Wood v. Ramond, 42 Cal. 645.

⁵⁷ Lalande v. McDonald, 2 Idaho,
307, 13 Pac. 347.

⁵⁸ Smith v. King, 9 Ariz. 228,
1905, 80 Pac. 357.

⁵⁹ Brown v. Oregon Lumber Co.,
24 Or. 315, 33 Pac. 557; Warner v.
Darrow, 91 Cal. 309, 27 Pac. 737;
Butler v. Hyland, 89 Cal. 575, 26

evidence under the old English procedure, it is purely a question of law for the courts.⁶⁰ When at the close of all the testimony on behalf of both plaintiff and defendant the court directs the jury to find a verdict in favor of the defendant, which is accordingly done, this is in effect a judgment of nonsuit.⁶¹ A voluntary nonsuit taken by the plaintiff at any time before trial does not estop him from bringing a new action.⁶²

§ 1487. **Motion.**—A party moving for a nonsuit should state in his motion precisely the grounds upon which he relies, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case.⁶³ Where it is made without stating the grounds, it is not error to overrule it.⁶⁴ But this rule does not apply where the plaintiff's case could not be cured, even if attention had been called to its defects by a specification of the grounds of the motion for nonsuit.⁶⁵ Defendant will not be allowed to raise new points afterwards in the supreme court.⁶⁶ If the grounds of the motion do not appear of record, the supreme court will not consider it.⁶⁷ Where an affidavit for attachment set out that a mortgage securing the note sued on had become worthless as security, and such affidavit was not offered in evidence, it cannot affect the action of the court on motion for a nonsuit.⁶⁸

Pac. 1108; *Messenger v. Woge*, 20 Colo. App. 275, 78 Pac. 314; *Small v. Harrington*, 10 Idaho, 499, 79 Pac. 461; *Rauh v. Oliver*, 10 Idaho, 3, 77 Pac. 20.

⁶⁰ *Kleinschmidt v. McAndrews*, 4 Mont. 8, 223, 5 Pac. 281, 12 Pac. 286.

⁶¹ *Powers v. Klenzie*, 15 Mont. 177, 38 Pac. 833; *Mayer v. Carothers*, 14 Mont. 274, 36 Pac. 182; *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675; *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906. See *Marshall v. Manufacturing Co.*, 1 S. Dak. 350, 47 N. W. 290; *Sanford v. Duluth etc. Co.*, 2 N. Dak. 6, 48 N. W. 434; *Gurley v. Tomkins*, 17 Colo. 437, 30 Pac. 344.

⁶² *Martin v. McCarthy*, 3 Colo. App. 37, 32 Pac. 551. See *Lambert v. Sandford*, 2 Blackf. 137, 18 Am. Dec. 149.

⁶³ *People v. Banvard*, 27 Cal. 474.

⁶⁴ *Kiler v. Kimbal*, 10 Cal. 267; *Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; *Silva v. Holland*, 74 Cal. 530, 16 Pac. 385; *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230; *Coffey v. Greenfield*, 62 Cal. 602; *Milner v. Luco*, 80 Cal. 257, 22 Pac. 195; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198; *Palmer v. Marysville etc. Pub. Co.*, 90 Cal. 168, 27 Pac. 21; *Belcher v. Murphy*, 81 Cal. 39, 22 Pac. 264; *Carter v. Hopkins*, 79 Cal. 82, 21 Pac. 549.

⁶⁵ *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867.

⁶⁶ *Raimond v. Eldridge*, 43 Cal. 506; *Johnson v. Moss*, 45 Cal. 518.

⁶⁷ *Poehlmann v. Kennedy*, 48 Cal. 201.

⁶⁸ *Brophy v. Downey*, 26 Mont. 252, 67 Pac. 312.

§ 1488. When and when not granted.—Nonsuit is not proper where there is any evidence tending to prove the indebtedness.⁶⁹ Nonsuit is properly denied when there is any evidence tending to sustain the plaintiff's case.⁷⁰ On motion for nonsuit that which the evidence tends to prove will be regarded as proved.⁷¹ If the evidence of the plaintiff would not authorize a jury to find a verdict for him, or if the court would set it aside, if so found, as contrary to evidence, it is the duty of the court to nonsuit the plaintiff.⁷² Where plaintiff's own evidence shows he ought not to recover, a nonsuit should be granted.⁷³ So if he fails to offer any evidence.⁷⁴ A plaintiff should not be nonsuited for the non-payment of the costs of two former suits for the same cause of action.⁷⁵ Where leave has been obtained to file an amended complaint to correspond with the proofs, it is error to direct a nonsuit for insufficiency of the original complaint, if the proofs show a cause of action.⁷⁶ So, in an action to recover a balance due upon account, it is error to nonsuit the plaintiff

⁶⁹ Cravens v. Dewey, 13 Cal. 40.

⁷⁰ Warren v. McGill, 103 Cal. 153, 37 Pac. 144; Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; Low v. Warden, 70 Cal. 19, 11 Pac. 350; Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; Catlin Land etc. Co. v. Best, 2 Colo. App. 481, 31 Pac. 391; Ferrera v. Parke, 19 Or. 141, 23 Pac. 883; Salomon v. Cress, 22 Or. 177, 29 Pac. 439; Blue v. McCabe, 5 Wash. 125, 31 Pac. 431; Bowers v. Union Pacific R. R. Co., 4 Utah, 215, 7 Pac. 251; Black v. City of Lewiston, 2 Idaho, 276, 13 Pac. 80.

⁷¹ State v. Benton, 13 Mont. 306, 34 Pac. 301; Soyer v. Great Falls Water Co., 15 Mont. 1, 37 Pac. 838. See Whitney Mfg. Co. v. Richmond etc. R. R. Co., 38 S. C. 365, 37 Am. St. Rep. 767, 17 S. E. 147; Wallace v. Suburban R. R. Co., 26 Or. 174, 37 Pac. 477, 25 L. R. A. 663; Williams v. Norton, 3 Kan. 295.

⁷² Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303. See, also, to same effect, Denver etc. R. R. Co. v. Pickard, 8 Colo. 163, 6 Pac. 149; City of Denver v. Solomon, 2 Colo. App. 534, 31 Pac. 507; Guldager v. Rock-

well, 14 Colo. 459, 24 Pac. 556; Wanner v. Kindel, 4 Colo. App. 168, 34 Pac. 1014; Brasher v. Denver etc. Ry. Co., 12 Colo. 384, 21 Pac. 44; Lord v. Pueblo etc. Refining Co., 12 Colo. 390, 21 Pac. 148; Union Pacific Ry. Co. v. Sternberg, 13 Colo. 141, 21 Pac. 1021; Grant v. Baker, 12 Or. 329, 7 Pac. 318; Herbert v. Dufur, 23 Or. 462, 32 Pac. 302 Williams v. Williams, 1 Colo. App. 281, 28 Pac. 726; Hogelev. Wilson, 5 Wash. 160, 31 Pac. 469; Garver v. Lynde, 7 Mont. 108, 14 Pac. 697; Linkauf v. Lombard, 137 N. Y. 417, 33 Am. St. Rep. 743, 33 N. E. 472, 20 L. R. A. 48.

⁷³ Cummings v. Helena etc. Co., 26 Mont. 434, 68 Pac. 852; Briggs v. Collins, 27 Mont. 405, 71 Pac. 307; Nord v. Boston & M. etc. Co., 30 Mont. 48, 75 Pac. 681.

⁷⁴ Kohler v. Wells Fargo & Co., 26 Cal. 607; Langhoff v. Milwaukee etc. R. R. Co., 19 Wis. 489.

⁷⁵ Janeway v. Skerritt, 1 Vroom, (30 N. J. L.) 97.

⁷⁶ Richardson v. Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338.

when it appears from the evidence that he had given an order to a third party for the sum due from the defendant, on the supposition that it was a certain amount, but in fact, as the evidence showed, there was a further balance due him.⁷⁷ Where the evidence makes out a sufficient *prima facie* case to entitle the plaintiff to go to the jury, a judgment of nonsuit is erroneous.⁷⁸ It is error to grant a nonsuit, unless the grounds therefor are called to the attention of the trial judge and the plaintiff at the time the motion is made.⁷⁹ Where a motion for nonsuit is improperly denied, and the defendant subsequently introduces testimony supplying the defect in the plaintiff's evidence, the error is thereby cured.⁸⁰ If a motion for a nonsuit is made and overruled, and thereupon the defendant proceeds and puts in testimony, the error, if any, in refusing the nonsuit is waived.⁸¹

§ 1489. Effect of motion for nonsuit.—On motion for nonsuit, every fact which the evidence tends to prove will be deemed proved,⁸² but it does not admit that a counterclaim set up by defendant is without merit.⁸³ The evidence will be regarded in the light most favorable to plaintiff, and the court cannot base a nonsuit on extrinsic facts, such as a judgment in another case.⁸⁴

§ 1490. Nonsuit—Miscellaneous.—If a complaint states several causes of action, and the answer admits one, a nonsuit as to that one should not be granted.⁸⁵ If an answer is in the nature of a confession and avoidance, and the only issue in the case arises between it and the denials of the reply, a judgment of nonsuit on motion of the defendant is not authorized by the

⁷⁷ Patchen v. Parke etc. Machinery Co., 6 Wash. 486, 33 Pac. 976.

⁷⁸ Milton v. Denver etc. R. R. Co., 1 Colo. App. 307, 29 Pac. 22.

⁷⁹ Palmer v. Marysville etc. Pub. Co., 90 Cal. 168, 27 Pac. 21.

⁸⁰ Higgins v. Ragsdale, 83 Cal. 219, 23 Pac. 316. See Cattell v. Fergusson, 3 Wash. 541, 28 Pac. 750; Weil v. Nevitt, 18 Colo. 10, 31 Pac. 487; Woodbury v. Hinckley, 3 Colo. App. 210, 32 Pac. 860.

⁸¹ Brown v. Southern Pacific Co., 7 Utah, 288, 26 Pac. 579; Railroad Co. v. Mares, 123 U. S. 710, 31 L.

Ed. 296, 8 Sup. Ct. 321; Insurance Co. v. Smith, 124 U. S. 405, 31 L. Ed. 497, 8 Sup. Ct. 534.

⁸² McCabe v. Montana Cent. Ry. Co., 30 Mont. 323, 76 Pac. 701; Greene v. Duvergey, 146 Cal. 379, 80 Pac. 234; In re Morgan Estate, 46 Or. 233, 77 Pac. 608, 78 Pac. 1029.

⁸³ Davenport v. Dose, 40 Or. 336, 67 Pac. 112.

⁸⁴ Cummings v. Helena etc. Co. 26 Mont. 434, 68 Pac. 852; Wood v. Earls, 39 Wash. 21, 80 Pac. 837.

⁸⁵ Gans v. Woolfolk, 2 Mont. 458.

Oregon code.⁸⁶ It is not error to permit a defendant to renew a motion for a nonsuit after introducing evidence in his own behalf, when the entire evidence is such that if the motion had been denied and a verdict found for the plaintiff, it would have been the duty of the court to set the verdict aside as not supported by the evidence.⁸⁷ The right to take a nonsuit remains with the plaintiff throughout the entire proceeding.⁸⁸ A nonsuit can be properly granted after all the evidence on both sides is closed.⁸⁹ And findings are not required nor proper in a case of nonsuit.⁹⁰ It is within the discretion of the trial court to allow a plaintiff to introduce further evidence after a motion for nonsuit is made and before it is decided;⁹¹ or after the denial of a motion for a nonsuit, to supplement his case by additional proof.⁹² Where there is a variance between the proof and the complaint in an action, the proof having been received without objection, the court should, upon a motion for a nonsuit, consider the complaint amended to correspond with the facts proven.⁹³ In an action to quiet title, a nonsuit should not be granted for failure of the plaintiff, after having proved title in himself, to prove an adverse claim, title, or interest in the defendants, when the complaint alleges and the answer admits that the defendants claim and assert an interest in the property.⁹⁴

§ 1491. **The same—Relief against stipulation.**—It is within the discretion of the trial court to relieve a plaintiff from the effect of a stipulation submitting the case on a motion for a nonsuit, and to allow him to file an amended complaint, and its action will not be disturbed upon appeal in the absence of a showing of an abuse of discretion.⁹⁵ On entry of judgment of dismissal, the court retains jurisdiction so as to entitle it to

⁸⁶ Rader v. McElvane, 21 Or. 56, 27 Pac. 97.

⁸⁷ Fagundes v. Central Pacific R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824. See Morgan v. Carbon Hill Coal Co., 6 Wash. 577, 34 Pac. 152, 772; Fox v. Southern Pacific Co., 95 Cal. 234, 30 Pac. 384.

⁸⁸ Currie v. Southern Pacific Co., 23 Or. 400, 31 Pac. 963.

⁸⁹ Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146.

⁹⁰ Id.; Reynolds v. Brumagim, 54 Cal. 254; Harney v. McLeran, 66 Cal. 34, 4 Pac. 884.

⁹¹ Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445.

⁹² Garber v. Gianella, 98 Cal. 527, 33 Pac. 458.

⁹³ Murray v. Meade, 5 Wash. 693, 32 Pac. 780.

⁹⁴ Vaca Valley etc. R. R. Co. v. Mansfield, 84 Cal. 560, 24 Pac. 145.

⁹⁵ Robinson v. Exempt Fire Co., 103 Cal. 1, 42 Am. St. Rep. 93, 36 Pac. 955, 24 L. R. A. 715.

vacate the judgment on a showing of mistake, and that mistake need not be mutual.⁹⁶

§ 1492. The same—Payment of jury.—Where a nonsuit is granted in a civil case, and the jury discharged, the jury fees must be paid by the plaintiff, and no further proceedings should be allowed in the case until such payment.⁹⁷

§ 1493. The same—Review on appeal.—An error in granting a nonsuit is an error of law, and should be excepted to and specified as such upon an appeal from the judgment, and cannot be reviewed upon the ground that the evidence is insufficient to support the decision.⁹⁸ A motion for nonsuit is no part of the judgment-roll.⁹⁹ The only grounds upon which a motion for nonsuit can be reviewed upon appeal are those specifically stated when the motion was made.¹⁰⁰ If any one of the several grounds for the motion is sufficient, a judgment of nonsuit will not be reversed, although the court may have founded its ruling upon an inadequate reason.¹⁰¹ If it does not appear from the record on appeal that any grounds for a nonsuit were stated in the motion therefor, no error appears in overruling the motion.¹⁰² In considering the trial court's ruling in granting a nonsuit, it is the duty of the appellate court to take as proven every fact which the plaintiff's evidence tended to prove, and which was essential to his recovery, and give him the benefit of all legal presumptions arising therefrom.¹⁰³ Where after the denial *pro forma* of a motion for a nonsuit, the defendant declined to offer any evidence, and the cause was submitted upon briefs, the fact

⁹⁶ Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474; Sheehan v. Osborn (Cal.), 69 Pac. 842, 138 Cal. 516, 71 Pac. 622.

⁹⁷ Lukes v. Logan, 66 Cal. 33, 4 Pac. 883; Fairchild v. King, 102 Cal. 320, 36 Pac. 649.

⁹⁸ Warner v. Darrow, 91 Cal. 309, 27 Pac. 737. See, also, Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939; McKay v. Montana etc. Ry. Co. 13 Mont. 15, 31 Pac. 999; Herbert v. Dufur, 23 Or. 462, 32 Pac. 302. As to record on appeal see Rooney v. Tong, 4 Mont. 597, 2 Pac. 312; McKay v. Montana etc. Ry. Co.,

13 Mont. 15, 31 Pac. 999; Roberts v. Parrish, 17 Or. 583, 22 Pac. 136; Coffin v. Hutchinson, 22 Or. 554, 30 Pac. 424; Fisher v. Kelly, 26 Or. 249, 38 Pac. 67.

⁹⁹ Barber v. Briscoe, 8 Mont. 224, 19 Pac. 589.

¹⁰⁰ Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254.

¹⁰¹ Brennan v. Front Street Cable Ry. Co., 8 Wash. 363, 36 Pac. 272.

¹⁰² Loring v. Stuart, 79 Cal. 200, 21 Pac. 651.

¹⁰³ Brown v. Warren, 16 Nev. 231; Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347.

that the court, without the plaintiff's consent, and before the expiration of the time for presenting the reply brief, entered an order granting a nonsuit and dismissing the action, is a harmless error, and is not ground for a reversal of the judgment for nonsuit, if, upon the case made, the plaintiff was not entitled to recover.¹⁰⁴ A motion to vacate an order dismissing a cause for want of prosecution is granted in the discretion of the court, and facts not before the court when the nonsuit was granted, if there is good excuse for their not being produced at that time, may by the court be considered.¹⁰⁵ It is not error to refuse to reinstate a case, dismissed for the reason that the attorneys had left the courtroom shortly before the noon adjournment, thinking the court could not reach their case before noon, and the court did actually come to that case on the calendar and dismissed it for lack of prosecution.¹⁰⁶

¹⁰⁴ Vincent v. City of Pacific Grove, 102 Cal. 405, 36 Pac. 773.

Machine Co. v. Caldwell, 14 Okla. 472, 78 Pac. 319.

¹⁰⁵ Moore v. Thompson, 138 Cal. 23, 70 Pac. 930; Aultman-Taylor

¹⁰⁶ Kline v. Higday, 15 Okla. 137, 79 Pac. 774.

CHAPTER LV.

JUDGMENT FOR COSTS.

§ 1494. **In general.**—The clerk must within two days after the costs are ascertained insert the same in the blank left in the judgment for that purpose, and make similar insertions in copies and dockets of the judgment.¹ The prevailing party in a justice court is by law entitled to costs of suit and enforcement of execution upon the judgment.²

§ 1495. **Costs—Affidavit.**—The affidavit by the attorney of the party accompanying the bill of costs is good under the statute.³ Any one who has knowledge of the facts may verify the memorandum.⁴ And a verified bill of costs, properly filed is *prima facie* evidence that the items thereof have been necessarily incurred.⁵ If the affidavits relating to the taxation of costs are conflicting, and some of the items relate to facts of which the court has actual knowledge, its ruling will not be disturbed.⁶ If a party entitled to costs neglects to serve and file his memorandum thereof until more than five days have elapsed after he has knowledge of the decision of the court, though no written notice of it has been served upon him, the filing is too late, and the costs will be stricken from the judgment on motion.⁷ And a cost-bill filed before the filing of the findings and entry of judgment is filed before the time authorized by law, and should be stricken out on motion.⁸ The time for filing a cost-bill in the superior court, after

1 Cal. Code Civ. Proc., § 1035.

2 Cal. Code Civ. Proc., § 924.

3 See Cal. Code Civ. Proc., § 1033; *Morris v. Rodgers*, 26 Or. 577, 38 Pac. 931.

4 *Yorba v. Dobner*, 90 Cal. 337, 27 Pac. 185.

5 *San Francisco v. Collins*, 98 Cal. 259, 33 Pac. 56. See *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210; *Gould v. Duluth etc. Elevator Co.*, 3 N. Dak. 96, 54 N. W. 316.

6 *Fanning v. Leviston*, 93 Cal. 186,

28 Pac. 943. See *Hoyt v. Selby Smelting Co.*, 90 Cal. 339, 27 Pac. 288.

7 *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409; *Mullally v. Irish-American Benev. Soc.*, 69 Cal. 559, 11 Pac. 215.

8 *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795. As to filing and service of cost-bill, see *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67; *Thompson v. Brannan*, 76 Cal. 618, 18 Pac. 783. As to time for filing objections to cost-bill under Oregon code, see

affirmance of an appeal from the justice court, may be extended by stipulation of the parties, or by order of the judge.⁹

§ 1496. Attorneys' fees.—The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties. But parties to actions or proceedings are entitled to costs and disbursements, as provided by statute.¹⁰ Costs are taxable only by force of statute.¹¹ But the recovery of costs, both in actions at law and suits in equity, may be regulated by statute.¹² The statute as to costs in existence at the time of rendition of judgment will control the question.¹³ The statute is to be strictly construed.¹⁴ In foreclosure cases, counsel fees are allowed by the court where there is a stipulation in the mortgage for counsel fees.¹⁵ Attorney's fees not being specified by the code section as part of the costs to be allowed in partition, they cannot be taxed as part of the costs.¹⁶ An attorney has no lien upon a judgment recovered by him in favor of his client for a *quantum meruit* compensation for his services. Such lien extends only to costs given by statute.¹⁷

§ 1497. Retaxing costs.—If items are included in the bill of costs which are not properly taxable, it affords no just ground for refusing to issue an execution or recalling one, but the remedy is by motion to retax.¹⁸ The clerk of the court has no authority to enter a judgment for costs while a motion to retax is pending.¹⁹ Costs are not a part of the judgment rendered in a cause, and can-

Hislop v. Moldenhauer, 24 Or. 106, 32 Pac. 1026; Walker v. Goldsmith, 16 Or. 161, 17 Pac. 865.

⁹ Cal. Code Civ. Proc., § 1054; Beilby v. Superior Court, 138 Cal. 51, 70 Pac. 1024.

¹⁰ Cal. Code Civ. Proc., § 1021.

¹¹ Board of Commissioners v. Lee, 3 Colo. App. 177, 32 Pac. 841.

¹² Kinnear v. Flanders, 17 Colo. 11, 28 Pac. 327.

¹³ Hepworth v. Gardner, 4 Utah, 439, 11 Pac. 566.

¹⁴ Jackson v. Siglin, 10 Or. 93. As to erroneous judgment for attorney fees in dismissal of action of ejectment, see Mason v. McLean, 6 Wash. 31, 32 Pac. 1006.

¹⁵ See Stats. 1874, p. 707. See, also, Sichel v. De Carrillo, 42 Cal. 494; Patterson v. Donner, 48 Cal. 380; Cal Code Civ. Proc., § 1500.

¹⁶ Legg v. Legg, 34 Wash. 132, 75 Pac. 130.

¹⁷ Ex parte Kyle, 1 Cal. 331; Mansfield v. Dorland, 2 Cal. 517; Russell v. Conway, 11 Cal. 103; Hogan v. Black, 66 Cal. 41, 4 Pac. 943.

¹⁸ Meeker v. Harris, 23 Cal. 286. See Burnham v. Hays, 3 Cal. 115, 58 Am. Dec. 389; Petty v. San Joaquin County Court, 45 Cal. 245.

¹⁹ Santa Clara etc. Lumber Co. v. Supervisors, 71 Cal. 268, 12 Pac. 129.

not be retaxed in the supreme court, unless there was a motion for retaxation denied in the court below.²⁰ Where the parties agreed upon a stenographer, in absence of the official stenographer of the court, and the costs were not taxed in the trial court, and no appeal was taken, the supreme court will not allow such costs.²¹ If the court adds to the judgment the costs of the prevailing party after the time for filing the same has expired, and after an appeal has been perfected, the error can only be corrected by an appeal from the order.²² Where costs on appeal to the supreme court are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution.²³

§ 1498. Costs, when allowed—Allowance, when discretionary.

—The allowance of costs rests in discretion of the court of original jurisdiction. And where, on sustaining a demurrer to a complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, the court gave judgment for the defendant for full costs, including a jury fee, it was held no such abuse of discretion as to warrant interference by the supreme court.²⁴ A court may, in its discretion, grant a nonsuit without requiring payment of the costs.²⁵ The discretion to "order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require,"²⁶ cannot be exercised until a decision has been made in the contest upon which the discretion may be based.²⁷ The supreme court will only review the ruling of an inferior court in the matter of costs upon an appeal from the judgment in the case.²⁸ Where there is nothing in the record to show that the trial court did not properly exercise its discretion in refusing to strike out certain items objected to upon motion to retax the costs, its order will be affirmed.²⁹ By failing to present the question of costs for review on a bill of

²⁰ *Burrichter v. Cline*, 3 Wash. 135, 28 Pac. 367.

²¹ *Albert v. City of Salem*, 39 Or. 466, 65 Pac. 1068, 66 Pac. 233.

²² *Jones v. Frost*, 28 Cal. 245.

²³ *Chapin v. Broder*, 16 Cal. 403.

²⁴ *Harvey v. Chilton*, 11 Cal. 119.

²⁵ *Mitchell v. Downing*, 23 Or. 448 32 Pac. 394. As to discretion of court as to costs in divorce proceed-

ings, see *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355.

²⁶ Cal. Code Civ. Proc., § 1720.

²⁷ *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230.

²⁸ *Votan v. Reese*, 20 Cal. 90.

²⁹ *Barnhart v. Kron*, 88 Cal. 446, 26 Pac. 210. Compare *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536.

exceptions, any objection to the costs in the judgment is waived.³⁰ An erroneous order *after* final judgment, relating to costs, can only be considered upon an appeal from such order.³¹

§ 1499. In particular cases—Claim and delivery.—In an action to recover possession of personal property, if the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action, but his right has ceased and vested in the plaintiff before trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant.³²

§ 1500. Clerk's duty.—Within two days after the costs are taxed or ascertained, if not included in the judgment, the clerk must insert the same in a blank left in the judgment for that purpose, and must make a similar entry in the copies and docket of the judgment.³³

§ 1501. Costs are part of judgment.—Costs are included in and constitute a part of the judgment; and hence, though ascertained and adjudged by the court after an entry of the judgment by the clerk may have been made, yet the law considers such action of the court as having preceded the final judgment.³⁴

§ 1502. Ejectment.—If the plaintiff in ejectment recovers judgment he is entitled to the costs, although his recovery is for only a portion of the demanded premises, and the defendant recovers judgment for the residue.³⁵

§ 1503. In partition.—Judgment for costs against defendant cannot be included in an interlocutory decree in partition, as it

³⁰ *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080; *People v. Marin County*, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659.

³¹ *Crane v. Forth*, 95 Cal. 88, 30 Pac. 193. As to waiver of right to costs see *Cantwell v. McPherson*, 3 Idaho, 321, 29 Pac. 102. As to when costs are allowed of course, see Cal. Code Civ. Proc., §§ 1022-1026; *Purvis v. Kroner*, 18 Or. 414, 23 Pac. 260.

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³² *O'Conner v. Blake*, 29 Cal. 312; *Edgar v. Gray*, 5 Cal. 267. See *Meads v. Lasar*, 93 Cal. 530, 29 Pac. 125.

³³ Cal. Code Civ. Proc., § 1035. See *Orr v. Haskell*, 2 Mont. 350. For the former practice, see *Chapin v. Broder*, 16 Cal. 403.

³⁴ *Lasky v. Davis*, 33 Cal. 677.

³⁵ *Havens v. Dale*, 30 Cal. 547.

is only on final judgment that costs are allowed.³⁶ The code section authorizing taxation of certain specified costs in partition, and not mentioning attorney's fees, does not permit allowance of attorney's fees.³⁷ The statute of California^{37a} as amended in 1907^{37b} provides for an attorney, for his fee, and a lien therefor, upon the interest of parties in partition who die or become incompetent pending the action.

§ 1504. In equity.—Costs in equity are always in the discretion of the court, and whether granted or withheld, are but as incidents to, and no part of, the relief sought.³⁸ Without a statement or bill of exceptions, this discretion cannot be reviewed upon appeal.³⁹ In some equity cases counsel fees may be awarded in the discretion of the court.⁴⁰

§ 1505. Injunction.—In a suit for damages to a mining claim and for an injunction, plaintiffs had judgment for one hundred dollars, and costs taxed at . . . dollars, a perpetual injunction being granted also. After the judgment was entered, plaintiffs moved that costs for the trial be allowed. The motion was denied, except as to the costs accrued by reason of the injunction granted; and it was held that this is a case where allowance of costs is in the discretion of the court below.⁴¹

§ 1506. Money or damages.—Costs of a suit form no part of the matter in dispute, and an appeal does not lie to the supreme court where the amount involved is less than two hundred dollars, although the costs added thereto may increase it beyond that sum.⁴² Under the California statute⁴³ providing that "no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars,"

³⁶ *Harrington v. Goldsmith*, 136 Cal. 168, 68 Pac. 594.

³⁷ *Legg v. Legg*, 34 Wash. 132, 75 Pac. 130.

^{37a} Cal. Code Civ. Proc., § 763.

^{37b} Cal. Stats. 1907, p. 605.

³⁸ *Gray v. Dougherty*, 25 Cal. 282. See, also, *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44; *Cole v. Logan*, 24 Or. 304, 33 Pac. 568; *Lovejoy v. Chapman*, 23 Or. 571, 32 Pac. 687.

³⁹ *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021.

⁴⁰ *Salmina v. Juri*, 96 Cal. 418, 31 Pac. 365.

⁴¹ *Esmond v. Chew*, 17 Cal. 336. As to costs in injunction suits, see *Himes v. Johnson*, 61 Cal. 259; *Brown v. Delavau*, 63 Cal. 303; *Davidson v. Devine*, 70 Cal. 519, 11 Pac. 664; *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44.

⁴² *Dumphy v. Guindon*, 13 Cal. 30. See *Zabriskie v. Torrey*, 20 Cal. 174.

⁴³ Code Civ. Proc., § 1025.

neither party can recover costs in such case, and the defendant is not entitled to a judgment against the plaintiff for his costs.⁴⁴

§ 1507. **On appeal.**—The judgment of the supreme court on appeal, and costs consequent thereon, is final, and the superior court has no authority to prevent immediate execution of the judgment of this court so remitted.⁴⁵ The clerk of the supreme court, in entering up the judgment, adds the words “with costs,” and annexes to the *remittitur* a copy of the bill of costs filed; these words are a sufficient awarding of costs for the clerk below to issue an execution.⁴⁶ The costs on appeal, or, properly, the costs in this court, and the costs of making up the appeal in the court below, including the costs of making out the transcript and the costs of the former trial, abide the event of the suit.⁴⁷ The supreme court is not bound, in taxing costs on an appeal, to allow the amount actually paid for printing briefs, when such amount appears unreasonable.⁴⁸

§ 1508. **On judgment affirmed in part and reversed in part.**—Where a judgment was affirmed in part and reversed in part, the respondent may be allowed his costs in the court below, and be required to pay the costs of the appeal.⁴⁹ Judgment may be affirmed as to a *mandamus*, but reversed as to costs.⁵⁰ Thus, where a judgment of the court was incorrect in part, the appellate court ordered the court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal.⁵¹ Both parties having sought an injunction against the other, each, having failed to make a case, should pay his own costs.⁵² Where an appeal is joint as to two respondents, and appellant prevails as to one only,

⁴⁴ *Anthony v. Grand*, 101 Cal. 235, 35 Pac. 859.

⁴⁵ *City of Marysville v. Buchanan*, 3 Cal. 212.

⁴⁶ *Id.* See, as to costs on reversal, *Estate of Robinson*, 106 Cal. 493, 39 Pac. 862.

⁴⁷ *Gray v. Gray and Eaton v. Palmer*, 11 Cal. 341; *Ex parte Burrill*, 24 Cal. 350. Where each party was made to pay his own costs on appeal, see *Bradbury v. Barnes*, 19 Cal. 120. Where costs of motion in supreme court were not allowed, see *Swain*

v. Naglee, 19 Cal. 127. Where appellant paid costs in supreme court, see *Jungerman v. Bovee*, 19 Cal. 355.

⁴⁸ *State v. Friedrich*, 3 Wash. 418, 23 Pac. 747.

⁴⁹ *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288.

⁵⁰ *McDougal v. Roman*, 2 Cal. 80.

⁵¹ *Welch v. Sullivan*, 8 Cal. 512. See *Cassin v. Marshall*, 18 Cal. 693.

⁵² *Paterson v. Nurnberg*, 17 Colo. App. 223, 68 Pac. 134.

he can recover of the unsuccessful respondent only one half of the costs on appeal.⁵³

§ 1509. **On new trial awarded.**—When a judgment for plaintiff is refused by the appellate court, and a new trial is awarded, if plaintiff recovers judgment on the second trial, he is entitled to his costs in the court below incurred on the first trial.⁵⁴

§ 1510. **On judgment reversed.**—Where a judgment is reversed by the supreme court, and the case remanded for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the supreme court. The costs of the former trial abide the event of the suit.⁵⁵ Where the judgment below is reversed on appeal and a new trial had, the costs of the first trial are part of the final bill of costs.⁵⁶ Appellant may have to pay costs, though the judgment is reversed.⁵⁷ The expense of printing the record and the appellant's brief, and the stenographer's fee, are not, in the absence of a statute, properly items of costs awarded appellant on the reversal of the judgment.⁵⁸ Expenses incurred by a party to a suit in the employment of experts are not taxable as costs.⁵⁹ And the clerk is not authorized to tax fees for approving appeal and *supersedeas* bonds.⁶⁰ If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court at appellant's cost.⁶¹ If any one or more of the parties desire a modification of the judgment as to costs, the proper application should have been made within the ten days allowed for filing a petition for a rehearing.⁶² Defendants below and appellants here, on the main question, to wit, the injunction, re-

⁵³ McKenzie v. Royal Dairy, 35 Wash, 390, 77 Pac. 680.

⁵⁴ Stoddard v. Treadwell, 29 Cal. 281.

⁵⁵ Ex parte Burrill, 24 Cal. 350.

⁵⁶ Visher v. Webster, 13 Cal. 58.

⁵⁷ Reniff v. The Cynthia, 18 Cal. 669.

⁵⁸ Price v. Garland, 4 N. Mex. 365, 20 Pac. 182. As to taxation as costs of stenographer's fees, see McDonald v. Burke, 3 Idaho, 266, 28 Pac. 440; Barkly v. Copeland, 86 Cal. 493, 25 Pac. 3; Marks v. Culmer, 7 Utah, 163,

25 Pac. 743; First Nat. Bank v. North, 6 Dak. 136, 41 N. W. 736, 50 N. W. 621.

⁵⁹ McDonald v. Burke, 3 Idaho, 266, 28 Pac. 440. See Faulkner v. Hendy, 79 Cal. 265, 21 Pac. 754. As to attorney's fee not taxable as costs, see Marks v. Culmer, 7 Utah, 163, 25 Pac. 743.

⁶⁰ Soules v. McLean, 7 Wash. 451, 35 Pac. 364, 1082.

⁶¹ Tryon v. Sutton, 13 Cal. 491.

⁶² Gray v. Gray, 11 Cal. 341.

quired to pay costs in this court on both appeals.⁶³ Subject to a motion to strike out disputed items, the filing of the memorandum of costs has the same effect as a formal entry of judgment, and execution thereon may issue as on a final judgment of the court, but the successful party must, within thirty days after the *remittitur* is filed with the clerk below, file with such clerk a memorandum of his costs.⁶⁴

§ 1511. On remittitur.—The party responsible for erroneous proceedings after the *remittitur* has been sent down from the supreme court must pay the costs of those proceedings, and the costs consequent on a second appeal caused by them.⁶⁵ If the printed transcript in the supreme court is unnecessarily long, the party responsible for this will be adjudged to pay the costs of printing thus unnecessarily incurred.⁶⁶ The respondent will not be allowed costs for the printing in his brief of the findings of fact of the trial court, after the appellant has printed the same in his brief;⁶⁷ nor will the cost of printing unnecessary repetitions be allowed.⁶⁸ The clerk of the court below can issue an execution, if required by the prevailing party, for the costs included in the memorandum and the costs of the clerk of the supreme court, as certified by him in the *remittitur*.⁶⁹

§ 1512. Right of use of water.—In an action to try the right of the use of water, and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs.⁷⁰

§ 1513. Costs—In particular cases.—Section 997 of the California Code of Civil Procedure, providing that in case of an offer of judgment by the defendant, "if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer," is to be construed as applying only to costs accruing after the time of the offer.⁷¹ In

⁶³ *Jungerman v. Bovee*, 19 Cal. 355.

⁶⁴ *State v. District Court*, 27 Mont. 40, 69 Pac. 244.

⁶⁵ *Argenti v. City of San Francisco*, 30 Cal. 458.

⁶⁶ *People v. Holden*, 28 Cal. 124.

⁶⁷ *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561.

⁶⁸ *Ferguson v. Byers*, 40 Or. 468,

67 Pac. 1115, 69 Pac. 32.

⁶⁹ *Ex parte Burrill*, 24 Cal. 350.

⁷⁰ *Marius v. Bicknell*, 10 Cal. 217; *Votan v. Reese*, 20 Cal. 90.

⁷¹ *Douthitt v. Finch*, 84 Cal. 214, 24 Pac. 929. See *Scammon v. Denio*, 72 Cal. 393, 14 Pac. 98.

actions to foreclose liens of materialmen and subcontractors in the city and county of San Francisco, the plaintiff, as the prevailing party, is entitled to recover as costs the percentage on the amount recovered, fixed by the act of February 9, 1866.⁷² The provision of section 6 of this act does not include a judgment in the alternative in an action of replevin for the return of the property, or its value with interest.⁷³ But actions to enforce a street assessment are included therein.⁷⁴ Where specific performance is refused because of the fraudulent misrepresentations of the plaintiff, and the defendant is free from blame, costs should not be awarded to the plaintiff, but should be awarded to the defendant.⁷⁵

§ 1514. The same—Security for.—The cost-bond required of non-residents before commencing suit, if tendered after action brought, even though before the motion to dismiss is interposed, comes too late.⁷⁶ Whether or not a resident plaintiff shall be required to give security for costs under the Colorado act of 1885,⁷⁷ is a matter resting in the sound discretion of the court.⁷⁸ In an action against several defendants by a non-resident plaintiff, he cannot, under section 844 of the Washington Code of Procedure, be compelled to furnish a separate bond for costs to each defendant appearing and claiming such bond.⁷⁹ Where an attachment of property of an insolvent building and loan association is a valid lien, the costs of the action are secured by it, and should be paid in full from proceeds of the sale of the attached property, the same as the original debt sued on.⁸⁰ The court may order costs to be paid out of money deposited in court as and for a tender on part of defendant.⁸¹

⁷² *Golden Gate L. Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635. See *Packard v. Wilson*, 72 Cal. 124, 13 Pac. 220; *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943.

⁷³ *Wheatland Mill Co. v. Pirrie*, 89 Cal. 459, 26 Pac. 964.

⁷⁴ *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943.

⁷⁵ *Kelly v. Central Pacific R. R. Co.*, 74 Cal. 565, 16 Pac. 390. As to costs in action by executor or administrator, see *Stevens v. San Francisco etc. R. R. Co.*, 103 Cal. 252, 37 Pac. 146; *Reay v. Butler*, 99 Cal. 477, 33

Pac. 1134. As to liability for costs of guardian ad litem, see *Granholt v. Sweigle*, 3 N. Dak. 476, 57 N. W. 509.

⁷⁶ *Edgar etc. Min. Co. v. Taylor*, 10 Colo. 110, 14 Pac. 113.

⁷⁷ Sess. Laws, 156.

⁷⁸ *Ward v. Wilms*, 16 Colo. 86, 27 Pac. 247.

⁷⁹ *Robinson v. Haller*, 8 Wash. 309, 36 Pac. 134.

⁸⁰ *Bories v. Union Building etc. Assoc.*, 141 Cal. 79, 74 Pac. 554.

⁸¹ *Kruegel v. Kitchen*, 33 Wash. 214, 74 Pac. 373.

§ 1515. **The same—Vacating judgment for.**—A party may, under the Oregon statute,⁸² be relieved from a judgment for costs and disbursements entered against him if it shall appear that it was entered through mistake, inadvertence, surprise, or excusable neglect.⁸³

§ 1516. **Memorandum of costs and disbursements.**

Form No. 471.

[TITLE.]

DISBURSEMENTS.

Sheriff's fees	\$15 00
Clerk's fees	20 00
Witnesses' fees	46 00
[Names of witnesses must be given.]	
Referee's fees	50 00
Notary fees	10 00
	<hr/>
	\$141 00

STATE OF CALIFORNIA, }
CITY AND COUNTY OF . . . } ss.

E. F., being duly sworn, deposes and says:

I. That he is one of the attorneys for the plaintiff in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiff.

II. That the items in the above memorandum contained are correct to the best of said affiant's knowledge and belief, and that the said disbursements have been necessarily incurred in the said action.

[JURAT.]

[SIGNATURE.]

⁸² Or. B. & C. Codes, § 103.

⁸³ Weiss v. Meyer, 24 Or. 108, 32 Pac. 1025.

CHAPTER LVI.

CONCLUSIVENESS OF JUDGMENT.

§ 1517. **Conclusiveness of adjudication, in general.**—A decree of dismissal without prejudice to any action at law in a federal court is a bar to a subsequent suit in equity even in a state court. Judgment in a law action is conclusive upon the same issues raised in a subsequent equitable action;¹ but an ordinary dismissal without prejudice is not final on the issues joined.² A widow may make more than one application for allowance out of her husband's estate, or may dismiss an application and apply again.³ Judgment by the owner bars the lessee from an action for failure to supply water for irrigation.⁴ Judgment against the insured is competent evidence against the insurer, though he had no knowledge of the suit.⁵ A witness interested in the result of the case is estopped by the judgment as fully as if he had been a nominal party.⁶ A defendant dismissed before judgment need not intervene or be bound by the judgment therein.⁷ A mother suing as guardian *ad litem* for injury to her child is precluded from subsequent suit for the loss of his time and earnings.⁸ It is presumed that a judgment disposes of all matters in controversy.⁹ Where a city and a railroad company are both liable, and the company is responsible to the city, a judgment exonerating the company is conclusive in suit by the city against the company over a judgment secured by the party injured against the city.¹⁰ A corporation which was not a party to a suit between plaintiffs and the corporation's grantor for an accounting is not bound by the decree.¹¹ It will be presumed that all of defendant's claims to land were litigated in suit over the title, and he cannot afterwards claim title

1 Smith v. Cowell, 41 Colo. 178, 92 Pac. 20.

2 Budlong v. Budlong, 48 Wash. 645, 94 Pac. 478.

3 In re Bump Estate, 152 Cal. 274, 92 Pac. 643.

4 Farmer's High Line etc. Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 Pac. 290.

5 City of Seattle v. Saulez, 47 Wash. 365, 92 Pac. 140.

6 American Bonding Co. v. Loeb, 47 Wash. 447, 92 Pac. 282.

7 Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 Pac. 516.

8 Hammer v. Caine, 47 Wash. 672, 92 Pac. 441.

9 Towne v. Towne, 6 Cal. App. 697, 92 Pac. 1050.

10 City of Seattle v. Northern Pacific Ry., 47 Wash. 552, 92 Pac. 411.

11 Costello v. Scott (Nev.), 93 Pac. 1.

under a prior deed.¹² An immaterial finding not carried into the judgment is not binding in subsequent actions.¹³

A judgment is of no force except between the parties and privies,¹⁴ except in some cases for specific purposes.¹⁵ The judgment of a competent court, when properly pleaded, is conclusive in a subsequent action between the same parties for the same thing, although it be palpably erroneous.¹⁶ If a fact has been once litigated in a court of competent jurisdiction the judgment rendered therein forever estops the parties and their privies from again litigating the same fact.¹⁷ The doctrine has been broadly stated, however, that a judgment between parties is conclusive not only as to the matters which were in fact determined, but as to all other matters which might have been litigated as incidental or essentially connected with the subject-matter of the litigation, whether the same were or were not, as a matter of fact, considered.¹⁸ Where several judgments have been rendered in actions between the same parties in respect to the same subject-matter, the judgment last in point of time is conclusive.¹⁹ One in possession of land, who is neither a party nor a privy to a judgment for the recovery of possession of it, is neither affected by the judgment as an instrument of evidence, nor can he be dispossessed by virtue of a writ issued upon it.²⁰ On a trial by the court, it may and should decide the whole case.²¹ The same parties are not estopped in a

¹² *Nemo v. Farrington*, 7 Cal. App. 443, 94 Pac. 874, 877.

¹³ *Collins v. Gray*, 154 Cal. 131, 97 Pac. 142.

¹⁴ *Beckett v. Selover*, 7 Cal. 228, 68 Am. Dec. 237; *Shay v. McNamara*, 54 Cal. 170.

¹⁵ *Gregory v. Haynes*, 13 Cal. 591. See, also, *Davidson v. Dallis*, 8 Cal. 227; *Kittridge v. Stevens*, 16 Cal. 381.

¹⁶ *Wolverton v. Baker*, 86 Cal. 591, 25 Pac. 54.

¹⁷ *Hall v. Zeller*, 17 Or. 381, 21 Pac. 192; *Savage v. McCorkle*, 17 Or. 42, 21 Pac. 444. See, also, *Neil v. Tolman*, 12 Or. 289, 7 Pac. 103; *Barratt v. Failing*, 8 Or. 152; *Farquar v. Farquar*, 20 Or. 69, 23 Am. St. Rep. 93, 25 Pac. 146; *Finley v. Houser*, 22 Or. 562, 30 Pac. 494; *Crabill v. Crabill*, 22 Or. 588, 30 Pac. 320; *Harmon v. Auditor etc.*, 123 Ill.

133, 5 Am. St. Rep. 507, 13 N. E. 161; *McWhorter v. Andrews*, 53 Ark. 312, 13 S. W. 1099.

¹⁸ *Denver etc. Water Co. v. Mid-daugh*, 12 Colo. 434, 13 Am. St. Rep. 254, 21 Pac. 565; *Johnson v. Johnson*, 20 Colo. 143, 36 Pac. 898; *Neil v. Tolman*, 12 Or. 289, 7 Pac. 103; *Sayward v. Thayer*, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137. Compare *Union Pacific Ry. Co. v. Kelley*, 4 Colo. App. 325, 35 Pac. 923; *Gallup v. Lichter*, 4 Colo. App. 296, 35 Pac. 985; *Campbell v. Rankin*, 2 Mont. 363.

¹⁹ *Tyrrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867.

²⁰ *Le Roy v. Rogers*, 30 Cal. 229, 89 Am. Dec. 88.

²¹ *Griffin v. Cranston*, 1 Bosw. 281; *Van Valen v. Lapham*, 13 How. Pr. 246.

Utah court from setting up the claim that the Idaho courts had no jurisdiction of the case tried therein, in reference to the use of the waters of a certain stream, as jurisdiction cannot be conferred or taken away by consent.²² Final judgments in the probate court on matters upon which it is authorized to deal are absolute, unless appealed from.²³

§ 1518. *In equity*.—The court may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.²⁴ Where a decision is made in a suit in equity upon any particular subject-matter, the rights of all persons whose interests are immediately connected with that decision, and affected by it, should be provided for.²⁵ Equity has jurisdiction to vacate a judgment fraudulently altered, so as to include a defendant not served with process and not originally included in the judgment.²⁶ A perpetual injunction restraining the collection of a non-negotiable note is a complete defense to the same when suit is brought on it by a subsequent purchaser for value without notice.²⁷ The contention that the finding of the appellate court on the issue of fraud is not *res adjudicata*, if the determination of that question is not necessary to decide the case, is without merit, for the reason that defendant may interpose as many defenses as he has, and the court may determine all, though any one would be sufficient.²⁸ An infant defendant is as much bound by the decree in equity as a person of full age.²⁹ And it is questionable under our practice whether he is entitled to have a day given in the judgment to show cause against it.³⁰ But the probate of a will is not conclusive on an infant or person of unsound mind until one year after their respective disabilities are removed.³¹

§ 1519. *Res adjudicata*.—It is a well-recognized doctrine that a matter decided by a court of competent jurisdiction cannot be

²² Conant v. Deep Creek etc. Irr. Co., 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188.

²³ Greer v. McNeal, 11 Okla. 519, 69 Pac. 891.

²⁴ Cal. Code Civ. Proc., § 578.

²⁵ McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129.

²⁶ Chester v. Miller, 13 Cal. 558.

²⁷ Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946.

²⁸ Clark v. Knox, 32 Colo. 342, 76 Pac. 372.

²⁹ Joyce v. McAvoy, 31 Cal. 273, 89 Am. Dec. 172.

³⁰ Id. Cal. Code Civ. Proc., §§ 41, 42.

³¹ Cal. Code Civ. Proc., § 1333.

contested again between the same parties.³² Nor is there any difference in this respect between a verdict and judgment at common law and a decree of a court of equity.³³ And the fact that a judgment in a former action between the same parties, which determined the same points as those raised in the latter action, was erroneous under the law as subsequently declared by the appellate court in other cases between other parties, does not affect its force as an adjudication of the rights of the parties thereto, and those in privity with them,³⁴ if the judgment is valid.³⁵ But a judgment rendered in a prior action cannot be a bar to the prosecution of a subsequent action, so long as the time for appeal from the prior judgment has not expired, or it remains undetermined on appeal.³⁶ And where a judgment in a former action, relied on as a bar, is not set forth in the record on appeal, it cannot be held to have constituted such a bar.³⁷ A judgment against one trespasser which has not been satisfied is not a bar to a suit against another trespasser to recover for the same wrong.³⁸ A former adjudication is not available unless pleaded;³⁹ but the fact of a former suit and its disposition being fully set forth in the complaint, the issue of *res adjudicata* can then be raised by demurrer.⁴⁰ Otherwise, defendant should plead and prove a judgment decree or final order of a court of competent jurisdiction on the same issue.⁴¹

§ 1520. **Stare decisis—Law of case.**—*Stare decisis* is the policy of the courts, and the principal upon which rests the authority of judicial decisions as precedents in subsequent litigation. And this doctrine is not to be departed from, except when subsequent examination shows the case to have been decided contrary to principle.⁴² But a decision is not even authority, except upon the

32 See *Dunstan v. Higgins*, 138 N. Y. 70, 34 Am. St. Rep. 431, 33 N. E. 729, 20 L. R. A. 668, and cases cited.

33 *Robbins v. Collier*, 3 N. Mex. 231 (342), 5 Pac. 538. See *Farquar v. Farquar*, 20 Or. 69, 23 Am. St. Rep. 93, 25 Pac. 146; *Collins v. Gleason*, 47 Wash. 62, 125 Am. St. Rep. 891, 91 Pac. 566.

34 *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54.

35 *Page v. Garver*, 5 Cal. App. 383, 90 Pac. 481.

36 *Story v. Story*, 100 Cal. 41, 34 Pac. 675; *Brown v. Campbell*, 100

Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433; *Kerr v. Burns*, 42 Colo. 285, 93 Pac. 1120.

37 *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441.

38 *Hattersley v. Burrows*, 4 Colo. App. 538, 36 Pac. 889.

39 *McLean v. Baldwin*, 136 Cal. 565, 69 Pac. 259.

40 *Lockhart v. Leeds*, 12 N. Mex. 156, 76 Pac. 312.

41 *Ortiz v. First Nat. Bank*, 12 N. Mex. 519, 78 Pac. 529.

42 *State v. Clark*, 9 Or. 466. See *Paulson v. Portland*, 16 Or. 450, 19

point actually passed upon by the court and directly involved in the case.⁴³ And expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and cannot be safely applied in their largest and most universal sense to dissimilar cases.⁴⁴ When the law governing a case has been once declared by the opinion of an appellate court on a direct appeal or writ of error, such opinion, on the retrial of the same case upon the same state of facts is *res adjudicata*, and is declared to be higher authority than *stare decisis*, so far as the particular action is concerned.⁴⁵ The decision of the appellate court becomes the law of the case, and, upon a second appeal, is binding upon the court and the parties, and from which the court is not at liberty to depart;⁴⁶ and this though the same question comes up in a separate suit.⁴⁷

§ 1521. Pleading *res adjudicata*.—A plea of *res adjudicata*, showing the pleadings, findings of facts, conclusions of law, and judgment in the former action, shows thereby the issues and facts determined in such suit, and in whose favor, without further allegations.⁴⁸ Where the judgment in a suit on a judgment is vacated, the original judgment still stands, and is not merged into the void judgment.⁴⁹ The opinion of the court of appeals may be examined to determine the extent of the decree as *res adjudicata*.⁵⁰

§ 1522. Evidence of *res adjudicata*.—A judgment being a matter of record, it cannot be overcome as to its effect by evidence of any lower degree; but the recital in the decree as to certain service of defendant, though entitled to the same presumption of verity as any other, may be impeached by some extraneous mat-

Pac. 450, 1 L. R. A. 673; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Estate of Dorris*, 93 Cal. 611, 29 Pac. 244; *Emery v. Reed*, 65 Cal. 351, 4 Pac. 200; *Allen v. Allen*, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646.

⁴³ *Norris v. Moody*, 84 Cal. 143, 24 Pac. 37.

⁴⁴ *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2.

⁴⁵ *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436. See *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29

Pac. 54; *Palmer v. Railway Co.*, 2 Idaho, 382, 16 Pac. 553.

⁴⁶ *Applegate v. Dowell*, 17 Or. 299, 20 Pac. 429; *Porter v. Muller*, 112 Cal. 355, 44 Pac. 729.

⁴⁷ *Hilton v. Stewart*, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

⁴⁸ *Dixon v. Caster*, 65 Kan. 739, 70 Pac. 871.

⁴⁹ *Abbott v. Abbott*, 70 Kan. 423, 78 Pac. 827.

⁵⁰ *Gentry v. Pacific Live Stock Co.*, 45 Or. 233, 77 Pac. 115.

ter.⁵¹ A motion to vacate a judgment for want of jurisdiction being a direct attack, the want of jurisdiction may be shown by matters outside the record.⁵² Where the parties are not the same, and the relief demanded is not the same, it is a question for the court to determine whether the former case is *res adjudicata*.⁵³ Recitals in a judgment pleaded in bar are sufficient evidence of the matters therein recited.⁵⁴ Judgment of dismissal must be on the merits, with the facts set out in the declarations of the judgment, in order to make it *res adjudicata*.⁵⁵

A judgment on the pleadings is a judgment on the merits,⁵⁶ but a dismissal without prejudice is not.⁵⁷ A decision in election contest is *res adjudicata* in an action in *quo warranto* between the same parties,⁵⁸ or in an action for the fees of the office.⁵⁹ In unlawful detainer, records in action resulting in judgment, under which plaintiff claims, are admissible, though defendant was not a party to that action.⁶⁰

The burden is upon the one alleging former adjudication, and the record entry of a judgment in another court thus relied on is indispensable.⁶¹ The rule of *res adjudicata* is based upon public policy, and the judgment is generally made conclusive not only as to the points decided, but as to all points which might have been decided in the action.⁶² Parties in default are bound equally with those defending.⁶³ A nonsuit, from any cause, is not a bar to a subsequent suit on the same cause of action.⁶⁴ A decree against several defendants as to water-rights is not *res adjudicata* as to the rights of such defendants between themselves, unless the court expressly settle those rights under section 4852 of the Revised Civil Code of Montana.⁶⁵

51 *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

52 *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446.

53 *Weatherwax Lumber Co. v. Ray*, 38 Wash. 545, 80 Pac. 775.

54 *Page v. Garver*, 5 Cal. App. 383, 90 Pac. 481.

55 *Glass v. Basin etc.*, 35 Mont. 567, 90 Pac. 753.

56 *Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 740, 91 Pac. 416.

57 *Averill Machinery Co. v. Allbritton*, 51 Wash. 30, 97 Pac. 1082.

58 *People v. Wilson*, 6 Cal. App. 122, 91 Pac. 661.

59 *Sandoval v. Albright (N. Mex.)*, 93 Pac. 717.

60 *McMillan v. Walker*, 48 Wash. 342, 93 Pac. 520; *City of Olympia v. Knox*, 49 Wash. 537, 95 Pac. 1090.

61 *Ex parte Stevenson*, 20 Okla. 549, 94 Pac. 1071.

62 *Bell v. Thompson*, 153 Cal. 331, 95 Pac. 372.

63 *Hough v. Porter (Or.)*, 95 Pac. 732.

64 *City and County of San Francisco v. Brown*, 153 Cal. 644, 96 Pac. 281.

65 *Sloan v. Byers*, 37 Mont. 503, 97 Pac. 855.

§ 1523. **In partition.**—A judgment in an action for partition is binding and conclusive as to title upon all the parties who are served with summons or appear, and a bar to a new action.⁶⁶ It is conclusive upon the parties and privies that they were tenants in common and in possession of the land at the date of its rendition.⁶⁷ But such judgment and partition shall not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.⁶⁸ In the absence of fraud or collusion, minors properly represented in an action for partition are bound as fully as if they had been majors and personally cited.⁶⁹ The effect of a judgment in partition is to be determined by our statute, and not by the common law.⁷⁰ A court in rendering judgment in partition of joint property incumbered by conflicting and general liens may make any order as to the sale of the property which the necessity of the case demands shall be made for the protection of the lienholders and the joint owners.⁷¹ Denial of confirmation of a sale in partition, authorized by section 766 of the California Code of Civil Procedure, may only be with a just regard to the rights of all concerned.⁷² The order of a court for a partition of lands, or for a sale, in case a partition cannot properly be made, is not a final judgment in an action for partition. They are to be succeeded by a judgment confirming the partition sale.⁷³

§ 1524. **Replevin.**—In replevin, a judgment for the plaintiff, in order to hold the sureties on the undertaking, must be in the alternative,⁷⁴ and must determine the controversy as to the whole property in dispute.⁷⁵ The right of defendant to have a judg-

66 *Morenhout v. Higuera*, 32 Cal. 289.

67 *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 101, 25 Pac. 362, 11 L. R. A. 155.

68 Cal. Code Civ. Proc., § 767.

69 *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

70 *Morenhout v. Higuera*, 32 Cal. 289.

71 *Hagen v. Webb*, 65 Kan. 38, 93 Am. St. Rep. 276, 68 Pac. 1096.

72 *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847.

73 *Hastings v. Cunningham*, 35 Cal. 549; *Stewart v. Taylor*, 68 Cal. 5, 8

Pac. 605; *Cooke v. Aguirre*, 86 Cal. 479, 25 Pac. 5; *Etchepare v. Aguirre*, 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668; *Myers v. Moulton*, 71 Cal. 498, 12 Pac. 505; *Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48; *Phipps v. Taylor*, 15 Or. 484, 16 Pac. 171.

74 See Cal. Code Civ. Proc., §§ 514, 627, 667; *Nickerson v. Chatterton*, 7 Cal. 568; *O'Connor v. Blake*, 29 Cal. 312; *Hynes v. Barnes*, 30 Mont. 25, 75 Pac. 523; *McFadyen v. Masters*, 11 Okla. 16, 66 Pac. 284.

75 *Muller v. Jewett*, 66 Cal. 216, 5 Pac. 84.

ment in his favor in the alternative is not an exclusive remedy, and he may maintain a separate action thereon.⁷⁶

§ 1525. On the merits.—In California, in cases other than those mentioned in sections 581 and 581a of the Code of Civil Procedure, judgment is rendered on the merits.⁷⁷ Where an answer is filed, the court may grant any relief consistent with the case made by the complaint and embraced within the issue.⁷⁸ The provisions of these sections apply to *mandamus* and *quo warranto*.⁷⁹

§ 1526. On report of referee.—A *mandamus* lies to compel the judge of a district court to enter judgment on the report of a referee.⁸⁰ A judgment on the report of a referee must be construed by the report.⁸¹

§ 1527. Decree must contain what.—All that a decree in a suit to foreclose a mortgage should contain is a statement of the amount due to the plaintiffs, a designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of sale, the costs of the action, and the debt. Nothing further is required.⁸² The decree concludes the rights of all parties to the action.⁸³ The omission from the judgment foreclosing a mortgage of the name of a lienholder who is a party defendant is immaterial.⁸⁴

§ 1528. Personal judgment—Relief from erroneous decree.—In California, parties are at liberty to adopt, in the foreclosure of

⁷⁶ Johnson v. Boehme, 66 Kan. 72, 97 Am. St. Rep. 357, 71 Pac. 243.

⁷⁷ Cal. Code Civ. Proc., § 582.

⁷⁸ Cal. Code Civ. Proc., § 580.

⁷⁹ People v. Board of Supervisors San Francisco Co., 27 Cal. 655.

⁸⁰ Russell v. Elliott, 2 Cal. 245.

⁸¹ Mason v. Ring, 2 Abb. Pr. (N. S.) 322; Commercial Bank of Albany v. Ten Eyck, 50 Barb. 9.

⁸² Leviston v. Swan, 33 Cal. 480. See, also, Sichler v. Look, 93 Cal. 601, 29 Pac. 220; Raun v. Reynolds, 11 Cal. 14; Taggart v. San Antonio etc.

Co., 18 Cal. 460; Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 561; Pechaud v. Rinquet, 21 Cal. 76; San Francisco v. Lawton, 21 Cal. 589; the early cases of Moore v. Reynolds, 1 Cal. 351, and Harlan v. Smith, 6 Cal. 173.

⁸³ Montgomery v. Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187.

⁸⁴ Sichler v. Look, 93 Cal. 600, 29 Pac. 220. See Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises, and the application of the proceeds to its payment, and apply after sale for the ascertainment of any deficiency, and execution for the same; or they may take a formal judgment for the amount due in the first instance.⁸⁵ But a personal judgment is not a lien until after sale and deficiency.⁸⁶ Section 246 of the Practice Act limits the lien of a foreclosure judgment or decree, whatever its form, to the mortgaged property until it is exhausted, and there can be no judgment lien upon other property until a deficiency is duly ascertained and docketed.⁸⁷ Courts of equity are ever ready to grant relief from their decrees.⁸⁸ Where the enforcement of a judgment violates his rights, a stranger thereto may maintain suit to enjoin it.⁸⁹

§ 1529. Effect of decree.—If plaintiff prevail in an action to quiet title, a decree inserted in the judgment enjoining defendant from making any further contest on plaintiff's title, even if not strictly correct, does not injure defendant. Such decree does not preclude defendant from availing himself of an acquired title.⁹⁰

§ 1530. Judgment of divorce—When operative, etc.—A judgment of divorce is effective to dissolve the marriage tie when the order for judgment is rendered and entered upon the minutes, and the failure or neglect of the plaintiff to have the judgment entered will not affect its validity, it being the duty of the clerk to make the entry at any time after the rendition, and the entry being but the evidence of the judgment already in operation

⁸⁵ Cal. Code Civ. Proc., § 726, as amended 1895; Rowland v. Leiby, 14 Cal. 156; Englund v. Lewis, 25 Cal. 348; Chapin v. Broder, 16 Cal. 403. See Toby v. Oregon etc. R. R. Co., 98 Cal. 490, 33 Pac. 550.

⁸⁶ Cal. Code Civ. Proc., § 726; Culver v. Rogers, 28 Cal. 520.

⁸⁷ Weil v. Howard, 4 Nev. 384. As to deficiency judgment after foreclosure, see Black v. Gerichten, 58 Cal. 56; Blumberg v. Birch, 99 Cal. 416, 37 Am. St. Rep. 67, 34 Pac. 102; La Societe etc. v. Weidmann, 97 Cal. 507,

32 Pac. 583; Batchelder v. Brickell, 75 Cal. 373, 17 Pac. 441.

⁸⁸ Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540. As to how relief may be sought in such cases, consult Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 561; Raun v. Reynolds, 15 Cal. 468; Burton v. Lies, 21 Cal. 87; Leviston v. Swan, 33 Cal. 420.

⁸⁹ Crippen v. X. Y. Irrigation Ditch Co., 32 Colo. 447, 76 Pac. 794.

⁹⁰ Reed v. Calderwood, 32 Cal. 109. As to effect of decree, see Marshall v. Shafter, 32 Cal. 176.

and effect.⁹¹ A final judgment of divorce rendered without an interlocutory decree, or within one year from entry of an interlocutory decree, is absolutely void.⁹² The omission of the date of entry of a decree from the journal of the clerk does not render the decree void, even though the decree does not become absolute until six months after the date of such entry.⁹³ If it be made to appear that fraud has been practiced on the defendant and the court in procuring the decree of divorce, it will be promptly set aside.⁹⁴ Where plaintiff is regularly awarded a divorce after service by publication, the court, after judgment entered, has no jurisdiction to set the same aside and allow defendant to defend the suit.⁹⁵ The California statute gives such a defendant one year after judgment in which to open the case and make defense.^{95a} Actual notice one month before entry of decree will prevent opening of a decree of divorce, although plaintiff knowingly sent the notice to the wrong address.⁹⁶ Courts of general jurisdiction have this inherent power independent of any statutory provisions.⁹⁷

§ 1531. Judgment in ejectment—Effect.—A judgment in ejectment in no manner vacated, and from which no valid appellate proceeding is prosecuted, remains a conclusive and final judgment directly affecting the estate, and binding upon the parties and all claiming under them. The court should put the successful party into possession.⁹⁸

§ 1532. Judgment in action against an estate.—It is erroneous in an action against an estate to enter judgment against the administrator personally, or to award execution. A judgment against an administrator should be *de bonis testatoris*.⁹⁹

⁹¹ *In re Cook*, 83 Cal. 415, 23 Pac. 392; *In re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887.

⁹² *Grannis v. Superior Court*, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897.

⁹³ *Phillips v. Phillips*, 69 Kan. 324, 76 Pac. 842.

⁹⁴ *Morton v. Morton*, 16 Colo. 358, 27 Pac. 718.

⁹⁵ *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535.

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^{95a} Cal. Code Civ. Proc., § 473.

⁹⁶ *McDonald v. McDonald*, 34 Wash. 293, 75 Pac. 865.

⁹⁷ *Yorke v. Yorke*, 3 N. Dak. 343, 55 N. W. 1095.

⁹⁸ *Hurd v. McClellan*, 1 Colo. App. 327, 29 Pac. 181.

⁹⁹ *Mattison v. Childs*, 5 Colo. 78; *Jones v. Perot*, 19 Colo. 141, 34 Pac. 728. See *Cooper v. De Mainville*, 1 Colo. App. 16, 27 Pac. 86.

§ 1533. **Judgment in action on bond.**—At common law, it was the practice in actions on penal bonds to enter judgment for the full amount of the penalty, to be discharged upon payment of the damages. But under code procedure, a judgment for the amount of the damages is the proper form.¹⁰⁰

§ 1534. **Judgment—Proper on sustaining plea.**—Where a plea of the pendency of a former action is sustained, the proper judgment to be entered is one abating the subsequent action, and not a judgment that the plaintiff take nothing thereby.¹⁰¹

¹⁰⁰ *Allen v. King*, 4 Colo. App. 319, 35 Pac. 1061.

¹⁰¹ *Conbrough v. Adams*, 70 Cal. 374, 11 Pac. 634.

CHAPTER LVII.

VACATING AND AMENDING JUDGMENT.

§ 1535. **Judgments—Validity of, generally.**—Every presumption is in favor of the correctness of the judgment of a court of general jurisdiction until the contrary is made affirmatively to appear.¹ Jurisdiction having been once acquired over the parties and the subject-matter, every presumption is in favor of the legality of the judgment.² A judgment is void on its face only when that fact is made apparent by an inspection of the judgment-roll.³ As a rule, a judgment of a court of general jurisdiction is void in no case except when it appears from the record itself that the court in pronouncing it acted without jurisdiction.⁴ The mere absence of findings does not render a judgment void in any case.⁵ And in no case will a judgment be disturbed for immaterial error.⁶ But a judgment for the plaintiff obtained through a clear departure from the issues joined cannot be sustained.⁷ Nor can a judgment rendered against a garnishee without affirmative proof of indebtedness be sustained.⁸ On an application for a writ of *habeas corpus*, the judgment under which the prisoner is held is a unit, and if one portion of it is without the jurisdiction of the court which made it the whole is void.⁹ Judgment

1 *Kent v. Dakota etc. Ins. Co.*, 2 S. Dak. 300, 50 N. W. 85; *Renig v. Hecht*, 58 Wis. 212, 16 N. W. 548; *Credit Foncier v. Rogers*, 10 Neb. 184, 4 N. W. 1012.

2 *Blake v. Lyon etc. Mfg. Co.*, 77 N. Y. 626. To same effect, *Caruthers v. Hensley*, 90 Cal. 559, 27 Pac. 411; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Piper v. Packer*, 20 Minn. 274; *Jones v. Adams*, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442; *Thompson v. Reno Sav. Bank*, 19 Nev. 293, 9 Pac. 883; *Murphy v. King*, 6 Mont. 30, 9 Pac. 585; *McMillan v. Carter*, 6 Mont. 215, 9 Pac. 906; *Clark v. Baker*, 6 Mont. 153, 9 Pac. 911.

3 *People v. Thomas*, 101 Cal. 571,

36 Pac. 9; *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Churchill v. More*, 7 Cal. App. 767, 96 Pac. 108; *Stubbs v. McGillis (Colo.)*, 96 Pac. 1005.

4 *Great West Min. Co. v. Woodmas etc. Min. Co.*, 14 Colo. 90, 23 Pac. 908.

5 *In re Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567.

6 *Tulloch v. Skein Works*, 17 Colo. 579, 31 Pac. 229.

7 *Jackson v. Ackroyd*, 15 Colo. 583, 26 Pac. 132.

8 *Union Pacific Ry. Co. v. Gibson*, 15 Colo. 299, 25 Pac. 300.

9 *Ex parte Kelly*, 65 Cal. 154, 3 Pac. 673.

rendered against a party to an action after his death is not void on its face. Proceedings must be taken to set aside the judgment before an application for a *mandamus* can be made by the administrator of the decedent to compel the court to substitute him as a party to the action.¹⁰ A judgment in favor of a dead man is a nullity.¹¹ Where, in an action against a firm composed of two persons, the jury renders a general verdict only, in favor of plaintiff and against defendant, it is error for the court, while such verdict remains in the record, to render judgment against the plaintiff, dismissing the action as to one member of the firm, with costs.¹² A party accepting and retaining the fruits of a void judgment is estopped from assailing the judgment itself. As to him such a judgment has the same force and effect as a valid judgment.¹³

§ 1536. **Equitable relief.**—Equity will relieve a party from a judgment obtained by fraud.¹⁴ Where the judgment assailed cannot properly be set aside, the court may adjudge the guilty beneficiary, or his successor with notice, a trustee for the defrauded party.¹⁵ A court of equity may vacate a judgment at law obtained by fraud and perjury, but in doing so cannot review questions which have been tried and finally determined in a law action.¹⁶

§ 1537. **Judgments—Defense.**—In an action to restrain the enforcement of a voidable judgment, the complaint must show that the plaintiff had a good defense to the action in which the judgment was rendered. Such a defense is sufficiently shown, however, in the absence of a special demurrer, by an allegation that at the time of the entry of the judgment the defendant had no cause of action against the plaintiff.¹⁷ In an action by a junior creditor to set aside a prior judgment and execution sale

¹⁰ *Elliott v. Paterson*, 65 Cal. 109, 3 Pac. 493.

¹¹ *McCreery v. Everding*, 44 Cal. 284.

¹² *Kellogg v. Gilman*, 3 N. Dak. 538, 58 N. W. 339.

¹³ *Denver etc. Water Co. v. Mid-daugh*, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565; *Kile v. Town of Yellowhead*, 80 Ill. 208; *Hitchcock v. Danbury etc. R. R. Co.*, 25 Conn. 516.

¹⁴ *Flood v. Templeton*, 152 Cal. 148, 92 Pac. 78, 13 L. R. A. (N. S.) 579; Cal. Civ. Code, § 1572, subd. 4.

¹⁵ *Campbell v. Campbell*, 152 Cal. 201, 92 Pac. 184.

¹⁶ *Harden v. Card* (Wyo.), 97 Pac. 1075.

¹⁷ *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888.

of the property of the debtor on the ground of fraud, the complaint need not allege that an execution had been issued and returned unsatisfied, where it is averred that the judgment debtor has not and never had any property except that sold under the fraudulent judgment.¹⁸ The issues of the case cannot be tried a second time on motion to set aside sheriff's sale.¹⁹

§ 1538. Judgments—Impeachment—Relief against.—A judgment rendered without obtaining jurisdiction of the person may be impeached by a proceeding in equity, or by answer to an action, where equitable defenses are allowable.²⁰ A party is entitled to equitable relief against a judgment procured by fraud. But such relief will not be granted, unless the party seeking it has been free from negligence.²¹ And the assistance of equity cannot be invoked so long as the remedy by motion exists.²² A bill in equity to set aside a decree cannot be sustained where it is clear from the facts pleaded that plaintiff has an adequate remedy at law, by an application to the court rendering the judgment to vacate or modify the same.²³ And in order to obtain equitable relief against a judgment alleged to have been fraudulently obtained, it must be averred and shown that there is a valid defense on the merits.²⁴ So the frauds for which equity grants relief against judgments are those which are extrinsic, or collateral to the matter examined in the first suit.²⁵ The fact that the right of appeal was lost by the inadvertence of the clerk of the plaintiff's attorney in failing to file an undertaking on appeal in proper time is not a ground for relief in equity.²⁶ But it does not affect the question of the right of a party to equitable relief against

¹⁸ *Terney v. Doten*, 70 Cal. 399, 11 Pac. 743. As to insufficiency of complaint in action on money judgment, see *Hogan v. Kyle*, 7 Wash. 595, 38 Am. St. Rep. 910, 35 Pac. 399.

¹⁹ *Greenwell v. Moffett*, 77 Kan. 41, 93 Pac. 609.

²⁰ *Wilson v. Hawthorne*, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548.

²¹ *Champion v. Woods*, 79 Cal. 17, 12 Am. St. Rep. 126, 21 Pac. 534; *Amestoy Estate v. City of Los Angeles*, 5 Cal. App. 273, 90 Pac. 42.

²² *Ede v. Hazen*, 61 Cal. 360. Compare *Ex Mission Land etc. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600.

²³ *Racey v. Racey*, 12 Okla. 650, 73 Pac. 305; *Hoover v. Bartlett*, 42 Or. 145, 70 Pac. 378; *Baer v. Higson*, 26 Utah, 78, 72 Pac. 180; *Hull v. Calkins*, 137 Cal. 84, 69 Pac. 838.

²⁴ *Eldred v. White*, 102 Cal. 600, 36 Pac. 944; *White v. Crow*, 110 U. S. 183, 28 L. Ed. 113, 4 Sup. Ct. 71. As to sufficient statement of meritorious defense, see *Lang Syne Min. Co. v. Ross*, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358.

²⁵ *In re Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381.

²⁶ *Daly v. Pennie*, 86 Cal. 553, 21 Am. St. Rep. 61, 25 Pac. 67.

a void judgment that an attorney having no authority appeared for him in the action.²⁷

§ 1539. **Erroneous judgment—Remedy.**—Under the Washington practice, where a judgment, erroneous but not void, has been entered against a party, he should either appeal or apply to the court in the manner and within the time prescribed by law to have it set aside. After the expiration of the time prescribed, the district judge has no power to vacate or modify the judgment.²⁸

§ 1540. **Vacating or setting aside.**—A court of equity will never set aside a judgment for mere error, whether of law or fact, committed in the rendition of the judgment.²⁹ Where the enforcement of a judgment violates his rights, a stranger thereto may maintain a suit to enjoin it.³⁰ When an action is brought in a court of equity to set aside a judgment at law, the attack, although not collateral, is always indirect, and such an attack does not question or dispute the effect of the judgment as an adjudication, but seeks to be relieved from its operation upon equitable grounds.³¹ The Colorado statute³² authorizes the court under certain specified circumstances, at any time within six months after adjournment of the term, to relieve a party from a judgment, order, or proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect.³³ Similar statutory provisions likewise exist in other states.³⁴ An application to set aside a judg-

²⁷ *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232.

²⁸ *Hawks v. Votaw*, 1 Wash. 70, 23 Pac. 442. See, also, *Bowman v. McGregor*, 6 Wash. 118, 32 Pac. 1059; *Seattle etc. Ry. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567; *Putnam v. Webb*, 15 Or. 440, 15 Pac. 711.

²⁹ *Wickersham v. Comerford*, 104 Cal. 494, 38 Pac. 101. See *In re Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381. As to vacation for fraud or deceit, see *Yorke v. Yorke*, 3 N. Dak. 343, 55 N. W. 1095; *Bent v. Maxwell*, 3 N. Mex. 158 (227), 3 Pac. 721; *Lang Syne Min. Co. v. Ross*, 20 Nev. 128, 19 Am. St. Rep. 337, 18 Pac. 358; *Thompson v. Maxwell etc. Ry. Co.*, 3 N. Mex. 269 (448),

6 Pac. 193. See, also, as to equitable relief against judgment, *Merriman v. Walton*, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108, 30 L. R. A. 786; *Sears v. Hicklin*, 13 Colo. 143, 21 Pac. 1022.

³⁰ *Crippen v. X. Y. Irrigation Ditch Co.*, 32 Colo. 447, 76 Pac. 794.

³¹ *Eichhoff v. Eichhoff*, 107 Cal. 42, 48 Am. St. Rep. 110, 40 Pac. 24.

³² Code Civ. Proc., § 75.

³³ See *Clark v. Perry*, 17 Colo. 56, 28 Pac. 329; *City Block Directory Co. v. App.* 4 Colo. App. 350, 35 Pac. 985.

³⁴ See *Utah Comp. Laws* 1888, § 3256; *Cal. Code Civ. Proc.*, § 473; *Or. B. & C. Codes*, § 103; *Thomas v.*

ment in any such case is directed to the sound legal discretion of the trial court, and an order granting the application will not be reversed on appeal unless it clearly appears that the court abused its discretion.³⁵ A motion will not lie to vacate a judgment after the lapse of the time limited by statute, if the judgment is not void on its face, and in all cases, after the lapse of such time, when the attempt is made to vacate the judgment by a proceeding in court for that purpose, an action regularly brought is preferable, and should be required.³⁶ A judgment cannot be set aside on the ground of fraud, which was an issue tendered by the complaint in the action.³⁷ A judgment void on its face is one that appears to be void by inspection of the judgment-roll, and it is only such a judgment that can be attacked either directly or collaterally, without reference to the lapse of time.³⁸ An application to vacate a judgment for want of service of summons upon or appearance of a defendant, is not matter of discretion, but of pure legal right, and does not arise under section 473 of the California Code of Civil Procedure.³⁹ But such vacation does not abate the action when the defendant appears for certain purposes, and he should be permitted to answer or demur.⁴⁰ If parties stipulate or admit that there was in fact no service of summons, it is the duty of the court to declare the judgment void, as matter of law, upon the admitted facts.⁴¹

Morris, 8 Utah, 284, 31 Pac. 446; Yerkes v. Henry, 6 Dak. 5, 50 N. W. 485; Warder v. Patterson, 6 Dak. 83, 50 N. W. 484.

³⁵ Buell v. Emerich, 85 Cal. 116, 24 Pac. 644; O'Connor v. Ellmaker, 83 Cal. 452, 23 Pac. 531; Pearson v. Drobaz Fishing Co., 99 Cal. 425, 34 Pac. 76; Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798; Malone v. Big Flat etc. Min. Co., 93 Cal. 384, 28 Pac. 1063; Livesley v. O'Brien, 6 Wash. 553, 34 Pac. 134; Bozzio v. Vaglio, 10 Wash. 270, 38 Pac. 1042.

³⁶ People v. Harrison, 84 Cal. 607, 611, 24 Pac. 311.

³⁷ Amestoy Estate v. City of Los Angeles, 5 Cal. App. 273, 90 Pac. 42.

³⁸ Id.; Brown v. Wilson, 21 Colo. 309, 52 Am. St. Rep. 228, 40 Pac. 688. See Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; People v. Temple,

103 Cal. 447, 37 Pac. 414; Eldred v. White, 102 Cal. 600, 36 Pac. 944. Compare Hill v. City Cab Co., 79 Cal. 191, 21 Pac. 728; People v. Harrison, 107 Cal. 541, 40 Pac. 956; People v. Thomas, 101 Cal. 571, 36 Pac. 9.

³⁹ Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51; Norton v. Atehison etc. R. R. Co., 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 385, 32 Pac. 452.

⁴⁰ Stubbs v. McGillis (Colo.), 96 Pac. 1005.

⁴¹ People v. Harrison, 107 Cal. 541, 40 Pac. 956. As to setting aside judgment on ground of surprise, etc., see Donnelly v. Clark, 6 Mont. 135, 9 Pac. 887; Lowell v. Ames, 6 Mont. 187, 9 Pac. 826. As to vacation of void judgment, see Beach v. Beach, 6 Dak. 371, 43 N. W. 701; Hauswirth v. Sullivan, 6 Mont. 203, 9

§ 1541. **Judgment—Collateral attack.**—When a court has acquired jurisdiction, its subsequent proceedings, however irregular, are not void. The record of the court is conclusive as to all matters decided by it, and no evidence can be received to contradict it upon a collateral attack.⁴² Sufficiency of the evidence cannot be considered.⁴³ The main difference between collateral and direct attacks upon a judgment, in respect of the judgment and its recitals, is, that upon a collateral attack the record alone can be inspected, and it is conclusively presumed to be correct, while on a direct attack the true facts may be shown in contradiction of the record, and thus the judgment itself on appeal may be reversed or modified.⁴⁴ But the judgment and its recitals will be presumed to be correct upon appeal unless the contrary is made to appear.⁴⁵ A motion to vacate a judgment on the ground that it is void is a direct and not a collateral attack.⁴⁶ The judgment or decree of a court having jurisdiction to pronounce the same is in respect of the matter directly determined, or actually and necessarily included therein, conclusive upon the parties and those asserting subsequent claims under them, and cannot be collaterally attacked.⁴⁷ The courts of the United States being courts of superior jurisdiction, their decrees are not open to collateral attack, unless it is affirmatively shown by the record that they had no jurisdiction.⁴⁸

Pac. 798; McEachern v. Brackett, 8 Wash. 652, 40 Am. St. Rep. 922, 36 Pac. 690. As to procedure on vacating judgment, see Wheeler v. Moore, 10 Wash. 309, 38 Pac. 1053; Whidby Land etc. Co. v. Nye, 5 Wash. 301, 31 Pac. 752. That party must proceed with diligence, see Bozzio v. Vaglio, 10 Wash. 270, 38 Pac. 1042; Darke v. Ireland, 4 Utah, 192, 7 Pac. 714; Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503; Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344. As to modification of judgment, see State v. Superior Court, 8 Wash. 591, 36 Pac. 443; Tacoma Lumber etc. Co. v. Wolff, 7 Wash. 478, 35 Pac. 115, 755.

⁴² Ex parte Sternes, 77 Cal. 156, 11 Am. St. Rep. 251, 19 Pac. 275; Harnish v. Bramer, 71 Cal. 156, 11 Pac. 888. See Edgerton v. Edgerton, 12 Mont. 122, 33 Am. St. Rep. 557, 29 Pac. 966, 16 L. R. A. 94.

⁴³ Amestoy Estate v. City of Los Angeles, 5 Cal. App. 273, 90 Pac. 42.

⁴⁴ Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026. See Morrill v. Morrill, 20 Or. 96, 23 Am. St. Rep. 95, 25 Pac. 362, 11 L. R. A. 155.

⁴⁵ Id. See Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

⁴⁶ Reinhart v. Luzo, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089. See People v. Mullan, 65 Cal. 396, 4 Pac. 348.

⁴⁷ Finley v. Houser, 22 Or. 562, 30 Pac. 494. See, also, North Pacific Cycle Co. v. Thomas, 26 Or. 381, 46 Am. St. Rep. 636, 38 Pac. 307; Berry v. King, 15 Or. 165, 13 Pac. 772; Vantilburgh v. Black, 2 Mont. 371.

⁴⁸ Applegate v. Doell, 15 Or. 513, 16 Pac. 651, 17 Or. 300, 20 Pac. 429. See Dowell v. Applegate, 152 U. S. 334, 38 L. Ed. 463, 14 Sup. Ct. 611; reversing 24 Or. 440, 33 Pac. 937.

A judgment regular on its face is not subject to collateral attack on the grounds that it is void.⁴⁹ Probate courts being courts of record with original jurisdiction, their orders cannot be collaterally attacked, but only by proper motion or an appeal.⁵⁰ Defendant's sureties on a bond on appeal cannot attack a decree of the probate court distributing plaintiff's interest in the judgment against said defendant.⁵¹ A second judgment entered on record in place of a former one, marked void and vacated, is a final judgment, and cannot be impeached by matters outside the record.⁵² Collateral attack on a non-appealable judgment awarding costs cannot be had on the grounds that the party was not liable for costs.⁵³ As between the judgment debtor and the purchaser at an execution sale, the validity of the judgment cannot be collaterally attacked;⁵⁴ likewise between a stockholder and a judgment creditor of the corporation, attempting to realize upon judgment against the corporation out of stock subscriptions not yet paid.⁵⁵

§ 1542. Grounds for collateral attack.—Where it affirmatively appears on the face of the judgment record that the court did not have jurisdiction of the defendant, a judgment is at all times open to either direct or collateral attack.⁵⁶ If such defect does not appear on the face of the record, the attack cannot be made collateral.⁵⁷ If on a collateral attack on a judgment the jurisdiction can in any way be upheld, it will be done, though the facts showing jurisdiction are defectively stated, and inferences must be indulged in favor of the judgment.⁵⁸ Want of service of process will sustain the attack.⁵⁹ The presumptions in favor of the judgment are the same in case of a service by publication as in case of personal service.⁶⁰ It will be presumed, as against

⁴⁹ Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73.

⁵⁰ Clark v. Rossier, 10 Idaho, 348, 78 Pac. 358.

⁵¹ Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75.

⁵² Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572.

⁵³ Howe v. Southrey, 144 Cal. 767, 78 Pac. 259.

⁵⁴ Schlosser v. Beemer, 40 Or. 412, 67 Pac. 299.

⁵⁵ Robinson v. Blood, 151 Cal. 504, 91 Pac. 258.

⁵⁶ Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007; Ewing v. Mallison, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369. See, also, Haupt v. Simington, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672.

⁵⁷ Aldrich v. Barton, 153 Cal. 438, 95 Pac. 900.

⁵⁸ Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052.

⁵⁹ Bauer v. Widholm, 49 Wash. 310, 95 Pac. 277.

⁶⁰ McHatton v. Rhodes, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036.

a collateral attack on the judgment, when one is recited in the journal entry of the judgment to have made an appearance, that such person did make a voluntary appearance, even though the pleadings do not show that he was made a party.⁶¹ Where a judgment of a court of record contains a finding that personal service was made upon defendant, it cannot be attacked collaterally.⁶² A judgment as to whether property is a homestead, and a mortgage thereon was made with the joint consent of the husband and wife, is not open to collateral attack, but must be corrected in direct proceedings.⁶³ An erroneous decision of and on the issues cannot be collaterally attacked.⁶⁴

Where a court has jurisdiction of the subject-matter and of the parties, and the judgment is not in excess of the jurisdiction, irregularities in the proceedings will not render the judgment void, but, until vacated or set aside in a proper proceeding, it is binding on the parties.⁶⁵

A judgment may be attacked for fraud by answer and cross-complaint,⁶⁶ but the defense of collusion with defendant's attorney, being a collateral attack, cannot be made.⁶⁷ In a suit to set aside a conveyance as in fraud of creditors, the judgment cannot be impeached for fraud.⁶⁸ The defense that a note was paid before judgment was obtained upon the note is not available in suit on the judgment.⁶⁹

§ 1543. Examples of collateral attack.—A collateral attack is an indirect attack upon the judgment, such as where a suit is brought in equity to set aside a judgment rendered in a previous action at law;⁷⁰ an attempt to impeach a judgment by matters *dehors* the record;⁷¹ the claim by an intervening creditor that a mortgage given by the estate is invalid, because the probate

⁶¹ *National Bank of America v. Home Security Co.*, 65 Kan. 642, 70 Pac. 646.

⁶² *Crist v. Crosby*, 11 Okla. 635, 69 Pac. 885.

⁶³ *Clevenger v. Figley*, 68 Kan. 699, 75 Pac. 1001.

⁶⁴ *Koehler v. Holt Mfg. Co.*, 146 Cal. 335, 80 Pac. 73.

⁶⁵ *Smith v. Finger*, 15 Okla. 120, 79 Pac. 759; *Amestoy Estate v. Los Angeles*, 5 Cal. App. 273, 90 Pac. 42.

⁶⁶ *Relender v. Riggs*, 20 Colo. App. 423, 79 Pac. 328.

⁶⁷ *Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911.

⁶⁸ *Budlong v. Budlong*, 32 Wash. 672, 73 Pac. 783.

⁶⁹ *Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911.

⁷⁰ *Le Mesnager v. Variel* 144 Cal. 463, 103 Am. St. Rep. 91, 77 Pac. 988.

⁷¹ *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

court had no authority to direct the making of the mortgage, and will not affect the order unless it is absolutely void.⁷² A petition asking that a judgment sued on be set aside, without raising any question of proper service or jurisdiction, is a collateral attack upon a judgment entered by a court of general jurisdiction in another cause, and cannot be entertained.⁷³ An attack on a judgment as void, made by way of defense to a suit to revive it, is a collateral attack.⁷⁴

A direct attack on a judgment is some proceeding in the action in which it was rendered, either by a motion before the court which rendered it or on appeal,⁷⁵ or writ of error,⁷⁶ as an attack on a judgment on the grounds of its being procured by fraud, or a separate proceeding to vacate a judgment because rendered without securing jurisdiction of the person of defendant,⁷⁷ or in case of a cross-complaint filed in an action to quiet title, setting up that the summons was not served in the foreclosure proceedings on which plaintiff's title is based,⁷⁸ or an objection to the sale of a homestead on execution, on the ground that the property was not subject thereto, made in a suit to quiet title.⁷⁹

An action brought to set aside a decree fraudulently obtained, though asking for further relief in the matter of quieting title, is not a collateral attack.⁸⁰

FORMS FOR REVIEW AND AMENDMENTS.

§ 1544. Petition to amend judgment to accord with the findings or decision.

Form No. 472.

[TITLE.]

To the . . . Court for . . . County:

The petition of A. B. respectfully shows that he is the plaintiff in the above-entitled action; that in the judgment in this action,

⁷² *Stambach v. Emerson*, 139 Cal. 282, 72 Pac. 991.

⁷³ *People v. McKelvey*, 19 Colo. App. 131, 74 Pac. 533.

⁷⁴ *Haupt v. Simington*, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672.

⁷⁵ *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

⁷⁶ *O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20.

⁷⁷ *Symes v. Charpiot*, 17 Colo. App. 463, 69 Pac. 311.

⁷⁸ *Northwestern etc. Hypotheek Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139; *Donaldson v. Winningham*, 48 Wash. 374, 125 Am. St. Rep. 937, 93 Pac. 534.

⁷⁹ *Lewis v. Mauerman*, 35 Wash. 156, 76 Pac. 737.

⁸⁰ *Noble v. Aune*, 50 Wash. 73, 96 Pac. 688.

which was entered on the . . . day of . . . , 19.., an error was inadvertently made in this, to-wit: [Here state the error, and show in what respect the judgment differs from the findings or decision.]

That, in furtherance of justice, the said judgment ought to be amended by [state precisely the amendment necessary].

That, as your petitioner is informed and believes, no rights of third parties have intervened or will be prejudiced by such amendment.

Wherefore, your petitioner prays that said judgment may be amended in manner aforesaid. A. B.

[JURAT.]

[Add verification.]

[This petition should be brought to hearing by notice of motion or order to show cause.]

§ 1545. Outline of complaint to set aside judgment procured by perjury or fraud.

Form No. 473.

[TITLE.]

The plaintiff, complaining of the defendant, respectfully alleges:

I. That on the . . . day of . . . , 19.., judgment was rendered and entered by this court in an action then and there pending, wherein the above-named defendant was plaintiff, and this plaintiff was defendant, by which it was adjudged that the above-named defendant recover of this plaintiff the sum of . . . dollars. [Or, otherwise, state the nature of the judgment according to the fact.]

II. That said judgment was obtained by perjury [or, by subornation of perjury; or, by fraudulent practice] on the part of said A. B., [plaintiff in former action], in this: [Here state fully and particularly the perjury or fraud committed, and show that it was practiced by the prevailing party, and that the former judgment was based thereon.]

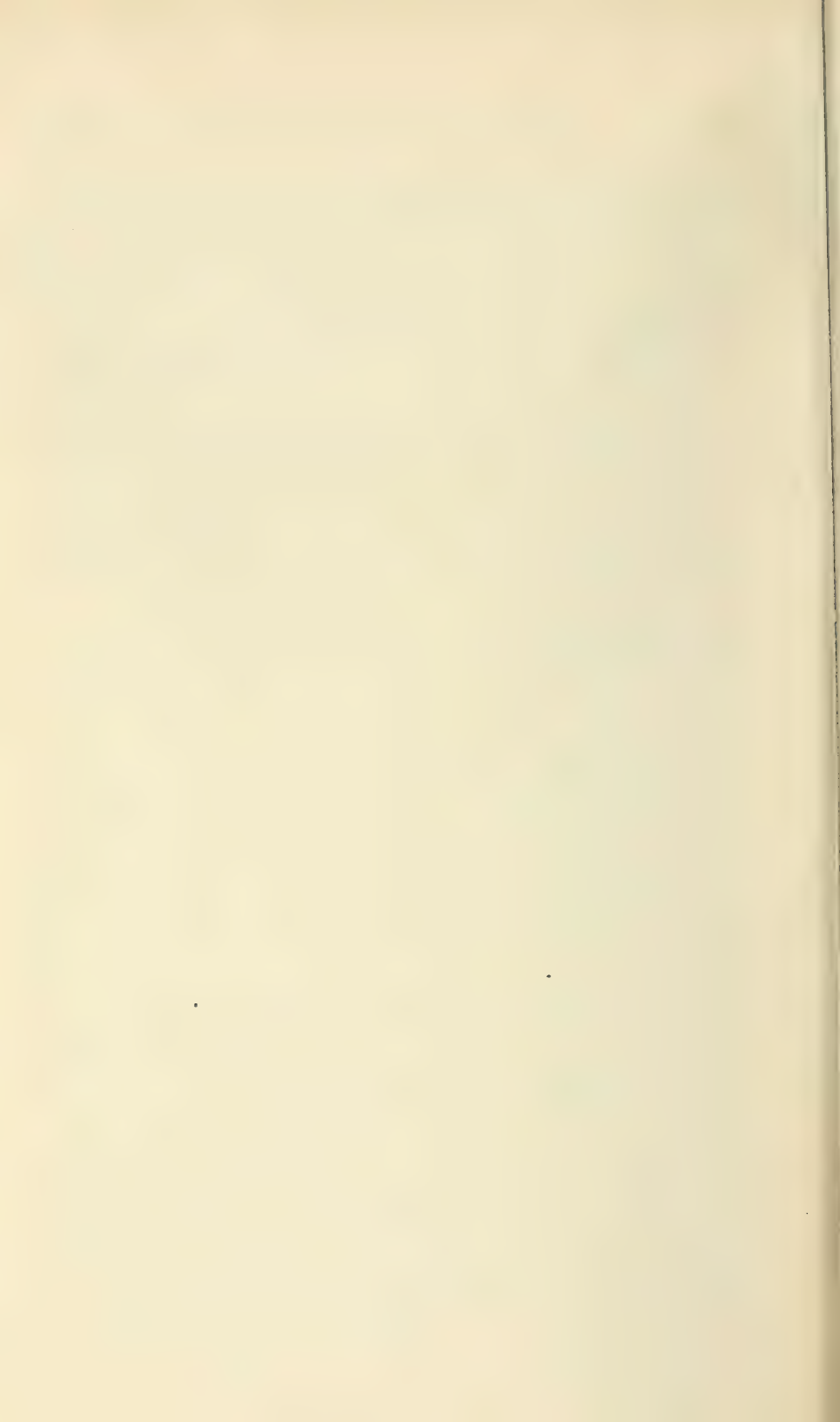
III. That this plaintiff did not discover or know of said perjury [or, fraud] until on or about the . . . day of . . . , 19.., and thereupon [state diligence used in commencing the present action], and that this action was commenced on the . . . day of . . . , 19.., and within [three] years after the discovery by this plaintiff of said fraud [or, perjury].

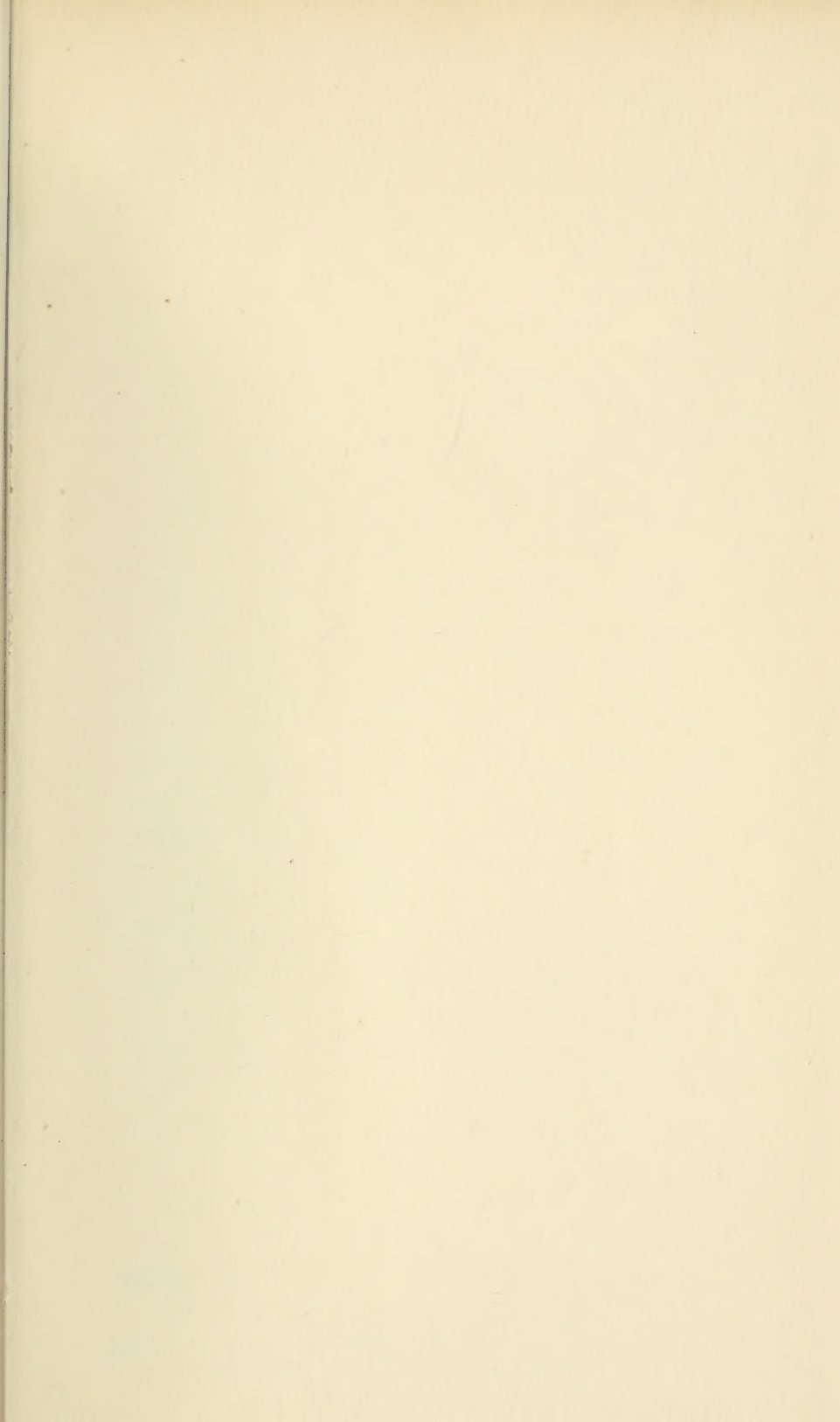
IV. That this plaintiff has suffered damages by the rendition of said former judgment, in this: [Here state damages suffered.]

Wherefore, the plaintiff prays that said judgment be set aside and held for naught, and that said defendant be enjoined from enforcing the same. [Or demand such other relief as the statute authorizes and as the case may require.]

[VERIFICATION.]

G. H., Plaintiff's Attorney.





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